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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted] EAC 01 070 50458

Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2004

IN/RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the Director, California Service Center, determined that the petition had been approved in error. The Director, California Service Center, properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of 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 petition was approved on August 10, 2001. Upon review, 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 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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 regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability in computer science. 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.¹

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

In addition to regional and company recognition, the petitioner submitted evidence that in 1995 he received a first class National Science and Technology Achievement Award for his work on the Galaxy II Simulation Computer and in 1998 he received a first class National Science and Technology Achievement Award for his work on the Galaxy Super-mini Simulation Computer System.

In response to the director's notice of intent to revoke, the petitioner asserts that, as a project director, he was one of 15 individuals who won the first class prize on the project which was ranked seventh of 25 first prizes. The petitioner submitted the State Council rules for the National Award for Scientific and Technological Progress. The rules discuss national and provincial awards, indicating that provincial or "ministry level" awards will be issued by provincial authorities or ministries. The petitioner's 1995 award is issued by the National Commission of Science and Technology while his 1998 award is issued by the "Minister of National Commission of Science and Technology." The director concluded that the petitioner had not established that the awards were national as opposed to provincial.

On appeal, counsel asserts that the awards were national awards. At the very least, the 1995 certificate suggests that it was awarded by a national entity. Of more concern, however, is the absence of the petitioner's project and name from the list of 1995 winners provided by the petitioner in response to the notice of intent to revoke. The petitioner asserts that his prize was not listed, but "released internally." Moreover, the 1995 article in the *People's Daily* provided by the petitioner indicates that 795 projects and 4,600 people received awards from the State Commission of Science and Technology in 1995. The plain language of the statute itself indicates that the classification applies to aliens who can demonstrate "sustained national or international acclaim." The regulations merely provide various categories of evidence that can be used to demonstrate that an alien meets that ultimate standard. We cannot conclude that receiving an unpublished award results in any acclaim to the

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

petitioner, certainly not as much acclaim as accrued to the other 4,599 individuals who won awards and whose names were released.

Finally, the petitioner has received no national recognition since 1998, more than two years prior to the filing of the petition. As stated above, the statute itself requires evidence of "sustained" acclaim. As will be discussed further below, the record contains little evidence of any acclaim between 1998 and the date of filing.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The petitioner submitted evidence of membership in the following associations: the Young Scientific Workers Association of Hunan Province, the Society for Computer Simulation International (SCS) and the Institute of Electrical and Electronics Engineers (IEEE). In response to the director's notice of intent to revoke, the petitioner asserted that there are 1,000 members of the Hunan Provincial Association of Young Scientific Researchers out of 400,000 young researchers in the field, and that he served as vice president. The petitioner failed to submit evidence of the membership requirements for these associations. The director concluded that the petitioner had not established that outstanding achievements are required for membership in any of the above associations.

On appeal, counsel asserts that the IEEE is "prestigious and venerable" and that membership is limited to those who have "demonstrated professional competence in IEEE-designated field." Counsel further asserts that SCS membership "represents a worldwide network of working professionals whose work requires them to be current with advancements in simulation technology." The petitioner submits no evidence to support these assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, professional competence and keeping current in one's field are not outstanding achievements. Thus, we concur with the director that the petitioner has not established that he meets this criterion.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner submitted a partial translation of an article that appears to be about the petitioner published in a 1997 issue of *Education and Defense*. The remaining articles are from 1993. The article in the *People's Daily* lists the petitioner, among others, as a scholarship recipient, and is not primarily about the petitioner. The remaining articles discuss the development of a simulation and modeling software system developed at the National University of Defense Technology and do not mention the petitioner by name. The director noted that the articles were not "about" the petitioner and concluded that they could not serve to meet this criterion. Counsel does not challenge this conclusion on appeal. We concur with the director. The record does not contain a complete translation or evidence of the circulation data for the 1997 article. Moreover, while the petitioner may have worked on the project discussed in the 1993 articles, the articles are not primarily about him and no one who did not know him would learn of him from the articles. Thus, the articles are not indicative of or even consistent with national or international acclaim. Finally, none of the articles are indicative of any recognized achievements after 1997.

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.

The petitioner submitted a letter from the Hunan Publishing House of Science and Technology dated March 15, 1995, requesting that he serve as "guest editor." In 1993, the same publishing company requested that the petitioner review a textbook. In response to the director's request for additional documentation, the petitioner asserted that he also reviewed at least 10 papers for the *Journal of NUDT*,² *Aerospace Control*, and *Transaction of System Simulation* since 1990.

The director concluded that the petitioner had not established that extraordinary ability was required to perform these reviews. On appeal, counsel notes that the court in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), held that 8 C.F.R. § 204.5(h)(3)(iv) does not require that participating as a judge was the result of having extraordinary ability. *Id.* at 1231.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Regardless, we do not find it violates the reasoning in *Buletini*, 860 F. Supp. at 1231, to examine the evidence submitted as to whether it is indicative of or inconsistent with national or international acclaim. The court in *Buletini* was concerned that an alien would need to first demonstrate "extraordinary ability" in order to meet this criterion. We are not following this "circular exercise" that troubled the court. Rather, we are looking at the type of review responsibilities inherent to the field and what review responsibilities might be indicative of or at least consistent with national acclaim. Specifically, we cannot ignore that engineering journals are peer reviewed and rely on many engineers 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 petitioner 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 or publishing company, we cannot conclude that the petitioner meets this criterion.

The record only supports the petitioner's claim to have served as a guest editor and to have reviewed a single book for the same publishing company. The record contains no evidence regarding the responsibilities of a guest editor. Thus, we cannot evaluate whether those responsibilities might be indicative of or consistent with national or international acclaim. Moreover, the petitioner submitted no evidence relating to this criterion that postdates March 1995.

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

The petitioner began his career with the National University of Defense Technology (NUDT). In 1998, the petitioner went to work at the High Performance Computing and Software Lab (HPCS) at the College of William and Mary where he collaborated with UTStarcom, Inc. Dr. [REDACTED] Professor and Vice Dean of the College of Computers at NUDT, asserts that the petitioner served as chief designer for two priority

² National University of Defense Technology, where the petitioner previously worked.

projects and project leader for another three projects, including the Galaxy II Simulation Computer and Galaxy Super-mini Simulation Computer that were recognized by the Chinese government with awards to the researchers who worked on them. Dr. [REDACTED] asserts that the simulation computers developed by the petitioner "have been deployed in hundreds of institutions, universities and training centers for various application areas, which has produced enormous economic benefit to China." According to Dr. [REDACTED] the Parallel Simulation Developing Environment and Modeling and Simulation Software (PARSIM), allegedly invented by the petitioner in 1990, is the first software able to automatically generate parallel simulation programs, a challenge to computer scientists since the 1970's.

Dr. [REDACTED] a research scientist at Rice University, indicates that he has known the petitioner since they were both Ph.D. candidates. Dr. [REDACTED] asserts that the petitioner invented a device driver on VAX/VMS that outperformed a similar product from Applied Dynamic International. Dr. [REDACTED] continues:

In the area of automatic parallelization, he developed a whole set of novel technologies for automatic task partitioning and code generation. The generated programs achieved ideal speedup on the system up to eight processors. Since 1994, he led a team with 12 hardware and software engineers and successfully developed a serial of simulation computers based on various popular general purpose microprocessors. The computer he built outperformed the most powerful special purpose simulation computer at that time with only 10% of the price. Among the projects he led, two received top national awards.

[REDACTED] director of the HPCS laboratory, asserts that at HPCS the petitioner was "responsible for the research and development of the protocols and algorithms related to WACOS (Wireless Access Central Office Switch) system, a large collaborative project in our lab funded by UTStarcom, Inc." Mr. [REDACTED] asserts that the petitioner designed a parallel and distributed location updating protocol (LUP) that allows citywide roaming of handsets and an intelligent network based on feature interaction management protocol (FIM). The latter protocol "has the capability of plugging new services into the existing installation of WACOS without interrupting its running which realized smooth incremental deployment of WACOS." Finally, Dr. Zhang asserts:

He designed the first prototype of IP based telephony system, which combines the functionalities of networking and telephony together to support data and voice services. He also pioneered in the research of Media Gateway Control Protocol, developed the major functions of media gateway as well as its controller. They provide a generic mechanism in multipurpose IP-based communication networks to handle many kinds of media streams seamlessly.

[REDACTED] President and Chief Executive Office of UTStarcom, Inc. confirms the above information in his initial letter. In a subsequent letter, he asserts that because of the contributions of the petitioner and his team to WACOS, UTStarcom was able to significantly accelerate deployment of their wireless equipment and greatly extend their market share, doubling their revenue and allowing them to add hundreds of new jobs. The petitioner submitted evidence that Hong Lu was number 42 in the Time Digital Cyber Elite Top 50 in 1998. BusinessWeek listed UTStarcom, Inc. as number 47 in its list of the top "Hot Growth Companies" in 2002.

Noting that the above letters are all from the petitioner's collaborators and immediate colleagues, the director concluded that they cannot by themselves establish the petitioner's national or international acclaim. The director concluded his discussion of this criterion with the following language:

It is not sufficient to simply show that the petitioner has achieved three of the ten criteria enumerated in the regulation. This alone would not be sufficient if the sustained acclaim either nationally or internationally has not been reached and the recognition of achievement in the field has not reached the level expected within this highly restrictive definition.

On appeal, counsel cites a 1992 memorandum from [REDACTED] Acting Assistant Commissioner of legacy INS (now Citizenship and Immigration Services (CIS)), asserting that meeting three criteria is sufficient to establish eligibility for this classification. Counsel also cites two non-precedent decisions from this office concluding that opinions from collaborators can, on a case-by-case basis, be sufficient.

While we may not agree with the exact wording of the above statements by the director, we do not read the director's decision as concluding that the petitioner was eligible under the regulations but that the petition was not approvable. A more rational interpretation of the director's decision is that the submission of documentation that relates to or addresses three criteria is insufficient unless that documentation demonstrates national or international acclaim. We concur that a petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or uniquely consistent with sustained national or international acclaim.

Counsel does not provide copies of the non-precedent decisions he cites. We maintain electronic records of those decisions, however, and have reviewed them despite the fact that they are not binding on us. Counsel's use of those decisions is disingenuous as they relate to a lesser classification that does not require national or international acclaim. Counsel's failure to disclose that the decisions do not relate to the classification at issue in this matter diminishes counsel's overall credibility. We affirm, as we consistently do in this exclusive classification, that letters from one's immediate circle of colleagues cannot demonstrate that an individual is known beyond those colleagues.

That said, we acknowledge that the record contains evidence of government recognition and media coverage of the projects on which the petitioner worked. The more independent and objective evidence relating to this criterion, however, diminishes after 1998, with only general information about UTStarcom, Inc. supporting the testimonials of the petitioner's contributions at HPCS in collaboration with UTStarcom, Inc. Patents listing the petitioner as an inventor and significant sales data for those inventions would bolster the petitioner's case. Even if we concluded that the petitioner meets this criterion, however, it is one criterion and, for the reasons discussed above and below, the evidence falls short of establishing that the petitioner meets any of the other criteria.

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 he has authored eight published articles in 1995 or earlier. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is

expected, to publish the results of his or her research or scholarship during the period of the appointment.” Thus, this national organization considers publication of one’s work to be “expected,” even among researchers who have not yet begun “a full-time academic and/or research career.” This report reinforces CIS’s position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community’s reaction to those articles.

The record contains no evidence that any independent experts have cited the petitioner’s work. The director concluded that the petitioner had not demonstrated the significance of his published articles. Counsel does not challenge this conclusion on appeal. We note that the petitioner has not published any articles since 1995. Thus, this evidence does not relate to the petitioner’s sustained acclaim as of the date of filing.

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

The petitioner claims to have played leading or critical roles for HPCS and NUDT. The petitioner submitted letter from [REDACTED] Director of HPCS, asserts that the petitioner was employed as a research associate at HPCS where he “played a key role in my HPCS lab” as a project leader. Dr. [REDACTED] a professor and Vice Dean of the College of Computers at NUDT, asserts that the petitioner was an associate professor and then a full professor at NUDT where he also was the chief designer and project leader for various Chinese priority projects.

The director concluded that the petitioner’s roles did not set him apart from others in his field. On appeal, counsel asserts that the director erred in not considering the contributions discussed by [REDACTED] a research scientist at Rice University who has known the petitioner since they were both doctoral students.

The petitioner’s contributions while working for the College of William and Mary and NUDT have been considered above. What is relevant for this criterion is the nature of the position the petitioner was hired to fill. While the College of William and Mary and NUDT may have distinguished reputations, we cannot conclude that every researcher or professor who plays an important role in a distinguished institution’s laboratory plays a leading or critical role for the institution as a whole.

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

In response to the director’s request for additional documentation, the petitioner submitted his 2001 Form W-2 Wage and Tax Statement and 2001 Form 1099-MISC, both issued by UTStarcom. These forms indicate that UTStarcom paid the petitioner wages of \$137,399.77 and nonemployee compensation of \$169,750 in 2001. The director noted the lack of comparison salaries in the field and concluded the evidence did not establish high remuneration “for a sustained period.”

On appeal, the petitioner submits evidence from the Department of Labor reflecting that the level 2 wage for computer software engineers in Alameda County is \$47.32 per hour, or \$98,426 annually. This data does not demonstrate that the petitioner’s remuneration in 2001 compared with the highest salaries in the occupation nationally. Regardless, the petitioner filed the petition on January 2, 2001. At that time, he had yet to receive the remuneration represented on his 2001 tax documents. Thus, this evidence does not relate to his eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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 computer scientist to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a computer scientist, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. 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.