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U.S. Citizenship
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Services

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FILE: WAC 03 017 54409 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:



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.

Robert P. Wichmann, 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 business. The director determined the petitioner had not established that the beneficiary has the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel notes that the beneficiary in this matter is also the beneficiary of an approved nonimmigrant visa in a similar classification. Earlier in the proceedings, counsel asserted that such approval is “prima facie” evidence of eligibility in this matter. We do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis on the evidence of record. The nonimmigrant visa could have issued based on different evidence or in error. Citizenship and Immigration Services (CIS) 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 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 telecommunications executive. 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, it claims, meets the following criteria.¹

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 newspaper article in the *San Jose Mercury News* reporting on Nortel Networks' offer of employment to an entire group of engineering students at Santa Clara University. The idea of making the group offer is credited to Amandip Sehbey, Director of Internet Protocol Services Development. The article names the beneficiary, then the Vice President of Technology for Internet Protocol Services at Nortel Networks, as the individual who announced the group job offer at a recruitment affair. Counsel asserted that the *San Jose Mercury News* is "widely regarded as the premier business newspaper in Northern California."

In his request for additional documentation, the director requested evidence of the circulation of any publication submitted to meet this criterion. In response, the petitioner submitted evidence that the circulation of the *San Jose Mercury News* is "concentrated in Santa Clara County." The petitioner also submitted evidence that the paper is the 43rd largest paper in the United States, between the *Cincinnati Enquirer/Post* (42nd) and *The Buffalo News* (44th), two local papers.

The petitioner also submitted an article in *The Business Journal*, another San Jose paper, also discussing the group hiring of 34 graduates from Santa Clara University. As with the initial article, this article also credits the idea to Mr. [REDACTED] indicating that the beneficiary only agreed to it after expressing some reservations.

The petitioner also submitted the company newsletter for "Northern Telecom" workers, *Nortel World*, a newsletter for "BNR" employees and a Chinese language article on the demand for computer majors that devotes a single paragraph to hiring by Nortel Networks but does not mention the beneficiary by name.

The director concluded that the petitioner had not established that above articles were about the beneficiary and that they had been published in the major media. On appeal, counsel continues to assert that the beneficiary meets this criterion but does not discuss the director's concerns.

We concur with the director that the articles did not appear in major media, an essential component of this criterion according to its plain language. Moreover, the beneficiary is mentioned either in passing or not at all in the internal company newsletters and the Chinese article. An article that does not mention the beneficiary by name or is not distributed nationally beyond a single company is not indicative of or consistent with national acclaim.

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.

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

The beneficiary asserts that he judged the work of others in his managerial positions. He claims to have directly judged 100 employees, making the final judgments for another 900. He claims to have hired 500 individuals and fired another 400.

In his request for additional documentation, the director advised the petitioner that supervisory responsibilities inherent to one's occupation cannot serve to meet this criterion. In response, counsel asserts that the beneficiary's responsibilities were not limited "to a supervisory capacity." Counsel concludes that in the beneficiary's field, this criterion can be met "through a record of successful past performance of meeting and exceeding business goals and objectives through the obviously effective use of a qualified, productive support staff." Counsel provides no legal support for that conclusion.

The director concluded that successful fulfillment of one's duties does not amount to judging the work of others in the field. On appeal, counsel no longer asserts that the beneficiary meets this criterion and we concur with the director. In analyzing the evidence submitted to meet any criterion, CIS must determine whether that evidence is indicative of or consistent with national or international acclaim. Duties that are inherent to the occupation are not persuasive evidence of national or international acclaim. Supervising one's subordinates is inherent to all managers and is not evidence indicative of national or international acclaim any more than grading one's own students.

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

The petitioner submitted an "unsigned electronic copy" of a February 12, 2001 letter from [REDACTED]. In addition to being unsigned, the letter is not on company letterhead. The letter is addressed to [REDACTED], Executive Search Consultant with Spencer Stuart, and is characterized by the author as an "unsolicited testimonial letter." The author discloses that he was previously supervised by the beneficiary and is now the beneficiary's "partner in a start-up application and services business." The author praises the beneficiary's managerial skills as chief architect of the Nortel-Dasa Joint Venture technology center near Lake Constance in Germany.

[REDACTED] Vice President and General Counsel for Nortel-Dasa, asserts that he knew the beneficiary during his "assignment to the Executive Cabinet of Nortel Dasa" where he "established and managed a smoothly functioning Research and Development and Technology Centre." [REDACTED] focuses on the beneficiary's ability to manage a multicultural team of North Americans and Germans. In an e-mail message addressed to the beneficiary, [REDACTED] Director of Technology Operations for Nortel-Dasa, provides similar information, noting that the beneficiary initiated offsite meetings that "created in the management team a level of trust which I never have seen before." [REDACTED] concludes that the beneficiary is a "very competent manager."

The petitioner also submitted a January 22, 2002 letter from [REDACTED] asserting that he offered the beneficiary a position in 1999, which the beneficiary turned down. [REDACTED] further asserts that he identified the beneficiary to the petitioner's parent company in "the Fall of 2002." [REDACTED] concludes that the beneficiary "possess (1) a very broad range of both technical and business-related knowledge and skills; (2) a unique ability to lead people; (3) a well-known reputation for having successfully served in a critical capacity in reputation; and (4) outstanding intuitiveness in the business arena."

The petitioner also submitted letters from members of the field who rank the beneficiary at the top of his field based on their review of various documents that are already part of the record of proceedings in this matter. None of these references claim to have known of the beneficiary prior to being contacted for a reference or claim to have been influenced by any specific contribution the beneficiary has made to the field. Moreover, the letters appear to rely on the beneficiary's characterization of the evidence rather than a careful examination of the evidence itself. For example, three of the references assert that the *San Jose Mercury News* article credits the beneficiary as the originator of the group-hiring practice. As stated above, however, the article actually credits a subordinate manager with the idea, indicating that this manager eventually overcame the beneficiary initial concerns. Regardless, none of the references assert that this group-hiring concept has been influential in the field, resulting in a shift of recruiting tactics.

In response to the director's request for additional documentation, the petitioner did submit a letter providing more than general praise. [REDACTED] of the Computer Engineering Program at Seattle Pacific University, asserts that the beneficiary "has made original contributions to the field of Telecommunications Engineering Management in every organization that he has worked for." Dr. Prins continues:

[The beneficiary] conceived, developed, and delivered the world's largest non-blocking voice switching matrix while working for Bell Northern Research. His work for Nortel included several pioneering efforts. [The beneficiary] was able to create the Bodense Technology Center in Germany because of his expertise in both technology and management. This center was the first of its kind in Germany and took 3 years to create.

Dr. Prins also notes the group-hiring concept discussed in the Santa Clara newspapers submitted. Dr. Prins, however, does not explain how the beneficiary's work for Bell Northern Research or Nortel influenced the field as a whole or cite examples of that influence.

The director concluded the letters from the beneficiary's immediate circle of colleagues attesting to his role on a specific project and letters from experts who base their opinion solely on a review of the beneficiary's resume could not establish that the beneficiary has made contributions of major significance to the field as a whole.

Counsel's brief focuses mostly on this criterion, asserting that the director applied a standard not found in the regulations. Counsel asserts that this office has overturned Service Center decisions for failing to consider the testimonial letters. While counsel asserts that the overturned cases relate to this classification as well as those seeking a lesser classification, the case cited by counsel involves a lesser classification (an advanced degree professional seeking a waiver of the job offer in the national interest). We note that eligibility in national interest waiver cases does rest on national or international acclaim. The classification sought in this case, however, does require national or international acclaim.

While letters from one's colleagues are important in establishing one's role for various projects, they are insufficient by themselves as evidence of the beneficiary's notoriety beyond that circle of colleagues. Moreover, letters from experts who base their opinions on materials provided with the request for the reference and who have never heard of the beneficiary prior to the request cannot establish that the beneficiary is well known in the field. Finally, 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.

On appeal, the petitioner submits more detailed letters regarding his accomplishments in the field. The letter from Dominic Lester, Managing Director of UBS Investment Bank, discusses the beneficiary's accomplishments after the date of filing. Such accomplishments cannot be considered evidence relating to the beneficiary's eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

██████████ former Chief Financial Officer (CFO) of Nortel Networks, asserts that he was Vice President of Finance in Great Britain while the beneficiary was working for Nortel. ██████████ asserts that the beneficiary was "instrumental" in the success of Nortel-Dasa, the first ever joint venture designed to redesign products for the German market within 12 months. According to Mr. ██████████ the beneficiary hired and trained "an outstanding, world-class R&D team of over 400 designers and engineers." ██████████ concludes that the beneficiary's team "captured an unprecedented customer bid win worth \$200M in direct competition with the largest German vendor (Siemens) in the birth place of Siemens – Munich, Germany." Manfred Opificius, former Sales Executive for Nortel-Dasa during the beneficiary's time there, provides similar information. Neither of these individuals supervised the beneficiary, ██████████ who previously ran the Technology Center at Nortel Networks that is responsible for industrial research and advanced technology in five countries, asserts that the beneficiary ran a product division that was the recipient of the technology Dr. ██████████ developed. ██████████ further asserts that he and the beneficiary "conceived of new products and made [them] possible by these technologies we developed." The telecommunications industry is constantly evolving and we cannot conclude that every new technology constitutes a contribution of major significance.

Finally, the petitioner submits a more independent letter from ██████████ Vice President and Chief Technical Officer of the Enterprise Platforms Group of Intel Corporation. ██████████ discusses attempts in the United States to develop Voice Over IP (VoIP), a technology already developed by the petitioner's parent company in Italy, and the beneficiary's work towards bringing that technology to the United States. While the beneficiary had barely begun working for the petitioner as of the date of filing, ██████████ asserts that the beneficiary has been leading the field in VoIP since 1998 when he worked for Nortel. Mr. ██████████ notes that the beneficiary spearheaded a joint initiative between Nortel Networks and the beneficiary's parent company on which Mr. ██████████ worked.

The record establishes that the beneficiary worked on an important collaboration that helped Nortel-Dasa get access to German markets and that he was part of the initial management team, which included other managers, of this collaboration. The record, however, lacks sufficient corroboration of the significance of the beneficiary's role in this project. It can be expected that had the beneficiary's role on this project truly constituted a contribution of major significance to the field, the petitioner would be able to produce recognition of that fact from the people responsible for the project, such as Robert Pfeffer, identified as Chief Executive Officer for Nortel-Dasa, as well as unsolicited materials such as a discussion of the beneficiary's work on this project in independent trade journals or major business periodicals. Even the articles in *Nortel World* do not single out the beneficiary's contributions to this project as significant to the field; one article fails to mention him at all and the other one quotes the beneficiary but credits several other individuals with leading the effort.

Finally, the petitioner submitted an e-mail from the beneficiary in response to the request for additional evidence noting his invitation to what he claims is an exclusive conference. The invitation is dated October 30, 2002, seven days after the petition was filed and is not evidence of eligibility as of that date. Moreover, the materials about the conference reveal that executives from 70 companies were represented at the

conference, including companies with small capital and “highly promising” private companies. This information does not suggest that the invitation resulted from any recognition of the beneficiary’s contributions of major significance to the field as a whole.

In light of the above, the petitioner has not established 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 submitted its Unanimous Written Consent of the Sole Director dated January 17, 2002. According to this document, the beneficiary, as the sole director, elected himself president of the corporation. On December 21, 2001, the beneficiary was offered the position of Senior Vice President of the petitioner’s Italian parent company. The petitioner also submitted a July 4, 2000 press release announcing an alliance between Telecom Italia and Cisco Systems whereby Cisco Systems purchased 80 percent of the petitioner’s parent company from Telecom Italia. While the release asserts that Telecom Italia is “a leading international telecommunications company” and that the deal “will help accelerate development of [the petitioner’s parent company] into [a] leading independent voice/data communications company,” it does not indicate that the parent company already enjoyed a distinguished reputation nationally separate and independently from Telecom Italia.

In response to the director’s request for additional documentation, the petitioner submitted the 2002 annual report of the petitioner’s parent company asserting that it “is the leading Italian technology and network services supplier to the telecommunications industry” and that Cisco Systems designated the company as a “Gold Partner.” The report makes no mention of the petitioning subsidiary or any parent company operations in the United States other than a listing for the petitioner as one of the parent company’s foreign subsidiaries in an appendix. It appears from this appendix that the parent company only invested \$100 capital in the petitioner.

The petitioner also submitted a December 14, 1998 letter from a resourcing associate of Northern Telecom offering the beneficiary the position of Vice President for Meridian Technology² with a base salary of \$145,000, a 1999 press release from Nortel Networks’ website announcing the beneficiary’s appointment in that position, his employee profile report reflecting that he served as Vice President of M&A for “JCI” as of February 1999 and a 1993 job offer letter for the position of Director, Product Management, from Northern Telecom.

In a letter submitted in response to the director’s request for additional documentation, [REDACTED] Managing Director for Baker, Thomsen Associates, analyzes the beneficiary’s various positions. [REDACTED] asserts that the beneficiary served as Director of Research and Development for Bell Northern Research for 11 years, during which time he oversaw the development of optical networks, attendant software and voice switching matrices. [REDACTED] asserts that this work allowed Bell Northern Research to emerge as a leader in the field.

[REDACTED] further asserts that the beneficiary “led the technology, marketing and product development” for the Nortel-Dasa joint venture. In addition, according to [REDACTED] the beneficiary directed the technology development functions at Nortel Networks in Santa Clara where he managed a staff of 500.

The director concluded that merely holding an upper management position is insufficient to meet this criterion. On appeal, counsel challenges that assertion, characterizing the director’s conclusion as “incomprehensible.”

² Nortel Networks’ annual report indicates that Meridian is a trademark of Nortel Networks.

While we concur with the director, additional discussion is warranted.

The evidence is more persuasive regarding the reputation of the Italian parent company than of its U.S. subsidiary, the petitioner. We acknowledge that the beneficiary has a position, Senior Vice President, with the parent company itself. The record, however, is not persuasive that this position is significant within the parent company. The record does not establish how many senior vice presidents work for the parent company. More significantly, the beneficiary's job duties are not indicative of a leading or critical role for the parent company. The December 21, 2001 job offer describes the beneficiary's duties as follows:

[C]onsultant activities with regard to marketing matters related to strategic products in the TLC.³

Any power of attorney, purchasing or selling or spending power, or any power to operate in any other way in the name and on behalf of [the parent company] is expressly excluded.

You will usually operate in the USA territory.

We cannot conclude that a position that precludes the employee from acting on behalf of the employer is a leading or critical role.

Similarly, the December 14, 1998 job offer from Northern Telecom lists a Santa Clara address, not Nortel Networks' corporate headquarters in Canada. The record lacks evidence that the beneficiary was employed directly by Nortel Networks. Rather, the beneficiary appears to have served as a vice president for a subsidiary.⁴ The record lacks sufficient evidence of the subsidiary's national reputation independent of Nortel Networks' reputation.

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

The beneficiary's December 21, 2001 recruitment letter from the Italian parent company lists a base salary of \$245,000 with a fluctuating incentive pay of \$98,000. The petitioner also submitted a letter from Hartung and Associates confirming that they have reviewed "a description of the compensation package" given to the beneficiary and that the average prevailing wage for experienced chief executives in San Jose, California, is \$144,227.20 according to the Department of Labor Occupational Employment Statistics.

In response to the director's request for additional documentation, the petitioner submitted an April 15, 2003 letter from the Italian parent company asserting that the beneficiary's pre-tax incentive for 2002 came to \$100,550. The petitioner also submitted data from the Department of Labor's website reflecting that the level two wage for chief executives was \$145,226 in 2003.

³ The job offer letter does not define "TLC."

⁴ California's business website, <http://kepler.ss.ca.gov>, lists four corporations with "Northern Telecom" in their names and nine corporations with "Nortel Networks" in their names, although many are no longer active.

In addition, the petitioner submitted an executive compensation assessor for chief executive officers in the Santa Clara region prepared by the Economic Research Institute. This assessor reflects that the 90th percentile for mean base salaries in this occupation range from \$390,090 (for companies with revenues of \$1,000,000) to \$714,169 (for companies with revenues of \$100,000,000), while the 90th percentile for incentives range from \$44,241 to \$403,488. The Italian parent company's revenues in 2000 were 1,897.7 billion Lira, or \$923,333,610.⁵ On appeal, the petitioner submitted a corrected Form W-2 (W-2c) reflecting that the beneficiary earned \$98,825 from the petitioner in 2002.

The beneficiary began working for the petitioner in late 2001 or early 2002. The beneficiary has not established that his wages from the petitioner as of the date of filing, October 23, 2002, had been significantly high. Thus, these wages are not evidence of his eligibility as of the date of filing.

The petitioner also submitted compensation data for vice presidents of planning and development, reflecting 90th percentile mean base salaries ranging from \$187,324 (for companies with revenues of \$1,000,000) to \$253,185 (for companies with revenues of \$100,000,000) and 90th percentile incentives ranging from \$19,913 to \$39,522. The beneficiary served as Vice President of Technology and Internet Protocol for Northern Telecom. On appeal, the petitioner submits evidence that the beneficiary earned no more than \$245,926⁶ from Northern Telecom in 2001.

It is presumed that, in general, the companies with the largest revenues employ the top executives in the field.⁷ Thus, we must look at the top tier of wages for the largest revenue companies as a comparison. The beneficiary's wages from Northern Telecom in 2001 were below, albeit slightly, the 90th percentile mean salary for vice presidents of companies with revenues of \$100,000,000. Moreover, it is well known that the top executives in the country frequently earn seven digit salaries or above.⁸

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 telecommunications executive 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 a telecommunications executive, 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.

⁵ According to the exchange rate on December 31, 2000 as provided by www.oanda.com.

⁶ The petitioner did not submit the beneficiary's Form W-2 for 2000, however the total wages on line 7 of the beneficiary's tax return minus his wife's wages as demonstrated by her Forms W-2 leaves \$245,926.

⁷ While acclaimed executives may work for smaller companies for personal reasons, it is presumed that, with few exceptions, companies with comparatively large revenues employ only executives who have demonstrated their talent in the field.

⁸ CNN/MONEY, http://money.cnn.com/2003/03/25/news/ceos/executive_compensation, reports that median CEO pay for S&P 500 companies, including cash and bonuses, was \$1,500,000 in 2001 and \$1,560,000 in 2002.

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.