U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-193-52209 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2004

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]

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. Wiemann, Director
Administrative Appeals Office

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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 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 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 as a mechanical engineer (R&D). The petitioner received his Ph.D. in Civil Engineering from the University of Boulder in May 2001.[1] While the law and regulations do not preclude a newly graduated engineer from qualifying, the petitioner bears a heavy burden as he must establish that he is one of the very few at the top of the field, including in comparison to the most experienced members of the field.

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,[2] meets the following criteria.

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[1] The petitioner completed his coursework in December 2000.

[2] On appeal, counsel asserts that the petitioner meets four of the criteria, accepting the director's

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 record reflects that the petitioner has refereed a single article for the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). In addition, the University of Colorado requested that the petitioner provide an evaluation of his advisor to assist in their consideration of this professor for reappointment. The letter specifically states: "As part of our review process for making major personnel decisions, we contact current and former students of Mechanical Engineering who have knowledge of the candidate's teaching for their comments." It is clear that this request was based on the petitioner's status as a former student, and not on the petitioner's acclaim in the field. In his request for additional documentation, the director requested evidence as to how ASHRAE selects its reviewers.

In response, the petitioner submitted a November 25, 2002 letter from an editorial assistant at the *International Journal of HVAC&R Research* requesting that the petitioner review an article. The letter states that one of their associate editors "has informed us that you are willing to review the above-referenced manuscript." The petitioner also submitted a January 22, 2003 e-mail request for a review from the *Journal of the IEST*. Both requests are dated after the petition's date of filing.

The director concluded that the petitioner meets this criterion. While we disfavor reversing favorable determinations by the director, we cannot concur.

The petitioner has not established whether ASHRAE requested that the petitioner's advisor review the article(s) who then assigned the duty to the petitioner. Being requested to review an article by one's own advisor is not evidence of national or international acclaim. The other requests to review articles are dated after the date of filing and cannot be considered evidence of the petitioner's eligibility as of that date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Regardless, the language quoted above in the letter from *International Journal of HVAC&R Research* does not suggest that the petitioner was solicited to perform reviews based on his reputation in the field. Rather, the invitation was based on the petitioner's own communication to an editor that he was willing to do reviews.

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 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, we cannot conclude that the petitioner meets this criterion.

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

The petitioner submitted a letter from [redacted] a research scientist at the Centers for Disease Control (CDC), National Institute for Occupational Safety and Health (NIOSH). [redacted] asserts that she had the opportunity to "interact" with the petitioner after NIOSH awarded a contract to the petitioner's Ph.D.

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determination that the petitioner does not meet the other six. As such, we will only discuss the four claimed on appeal, although we concur with the director's analysis on the other six.

advisor, [redacted] explains that the contract involved a project to evaluate the use of upper-air ultraviolet germicidal irradiation (UVGI) to control the spread of tuberculosis (TB) in health care settings. [redacted] explains the significant of this research and states:

> During his doctoral research and studies, [the petitioner] made tremendous contributions to this project. Due to his insights and hard work, many of the parameters for optimizing the use of upper air UVGI technology have been identified.

[redacted] explains that prior to the petitioner's research, health officials were relying on outdated studies and that the petitioner moved this area of research forward for the first time in 30 years. She concludes:

> [The petitioner's] outstanding work helped us to better design the UVGI system and make it more efficient. It provides a new perspective on how to prevent TB transmission in health-care facilities and may be a more effective engineering control than dilution ventilation. His work has been highly recognized by other researchers and engineers. His work is also the basis for the CDC/NIOSH to develop national guidelines on how to use this technology.

[redacted], an assistant professor at the University of Colorado and the petitioner's Ph.D. advisor, expands on the petitioner's work with controlling infectious disease transmission asserting that he made "groundbreaking contributions" in this area. She states:

> Notably, [the petitioner] pointed out that environmental factors have substantial influence on UVGI performance and documented such influences experimentally. . . . During the last year of his study at the University of Colorado, [the petitioner] initiated a computational fluid dynamics model that simulates the transmission of infectious particles and inactivation and control of these disease-transmitting agents using UVGI. This new CFD model provides a new tool to better understand infectious disease transmission and engineering controls for transmission prevention.

In reference to the petitioner's current research, he submitted a letter from [redacted] Senior Staff Scientist and Group Leader of the Environmental Energy Technologies Division (EETD) at the Lawrence Berkeley National Laboratory. [redacted] states that at EETD, the petitioner is currently working on a project to develop a "novel evaporatively-cooled air conditioning unit for buildings." [redacted] explains that the unit will reduce electrical energy consumption and improve indoor air quality. [redacted] concludes: "His critical work has the potential to greatly benefit U.S. health and economy."

[redacted] the petitioner's project manager, provides similar information, asserting that EETD's decision to hire the petitioner as a mechanical engineer instead of a post-doctoral research fellow reflects the high level of the petitioner's abilities. We simply note that the standard for the exclusive classification sought by the petitioner is not how he compares to recent graduates or those with similar qualifications, but how he compares with the most experienced renowned members of the field.

The above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's national or international acclaim. In addition, the letters do not indicate that the petitioner's contributions are of such significance that independent experts recognize these contributions as having changed the field. While the petitioner's research is no doubt of value, it can be argued that any

research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D., is published or is working with a government grant has made a contribution of major significance. The record does not establish that the petitioner's work represented a groundbreaking advance in the petitioner's 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 submitted his curriculum vitae listing four published articles and two accepted for publication. While counsel's index of exhibits indicates that the petitioner was submitting all six articles, none of the articles submitted appear to have been copied from issued publications. Specifically, the copies do not contain the name of the journal or page numbers consistent with publication.

The petitioner also provided evidence of citations of the petitioner's work. Specifically, the Colorado Engineer Magazine, published by the University of Colorado, issued an article on the petitioner's work on UVGI, noting UVGI has been used in jails, homeless shelters, and hospitals for 50 years, although the conditions for its success have not been studied. In addition, the petitioner submitted an unpublished version of an article by Dr. [redacted] that appears to cite the petitioner at footnote 40, although the page with the text citing footnote 40 was not provided. Further, the petitioner submitted two unpublished Ph.D. dissertations that cite the petitioner's work.

The director requested evidence of publication and the significance of these articles and the publications that published them. In response, counsel asserted that the ACEEE Conference Proceedings had published the petitioner's work after the date of filing. Counsel also noted the prestige of another recent publication and that the petitioner is listed as the first author. The petitioner submitted the first page of his article published in 2003 (after the date of filing) in *Atmospheric Environment*.

The director concluded that the petitioner had not demonstrated that the articles accepted for publication at the time of filing were subsequently published. Ultimately, the director concluded that the petitioner had not demonstrated a solid, sustained record of publishing significant scholarly articles in the field. On appeal, counsel asserts that the article accepted for publication at the time of filing was published with a different title. Counsel further notes that the petitioner is listed as first author on some of his publications.

Whether or not the article accepted for publication at the time of filing was actually published is irrelevant. The evidence submitted to meet a criterion must be indicative of or consistent with national acclaim. We cannot conclude that an article that has yet to be published and, thus, nationally distributed, can be considered evidence consistent with national acclaim. As stated above, the petitioner must demonstrate eligibility at the time of filing.

Regardless, 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 our 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 evidence that an unpublished article and two Ph.D. dissertations, one from a student at the petitioner's alma mater, have cited the petitioner's work. This number of citations is not evidence that the petitioner's work is widely cited nationally. Further, that the petitioner's own school published an article on his project in their own journal featuring projects at the school is of little probative value in evaluating the petitioner's national notoriety.

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

Initially, the petitioner submitted his job offer letter, dated December 4, 2000, stating the proffered salary as $6,100 per month, or $73,200 annually. The director requested evidence that this constitutes a comparably high salary. In response, the petitioner submitted evidence that mechanical engineers have a national median base salary of $58,199 per year, a median base salary of $63,786 per year in Berkeley, California, and that the petitioner earns $81,000 per year. The director questioned the evidence of the petitioner's salary, but ultimately accepted that the petitioner meets this criterion. Once again, we cannot concur. The standard is not whether the petitioner earns more than the median salary in his field, but whether the petitioner earns a salary that is comparable with the salaries of the most experienced experts in the field. The petitioner has not satisfied this standard.

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 indicates that the petitioner shows talent as a mechanical engineer, 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.