

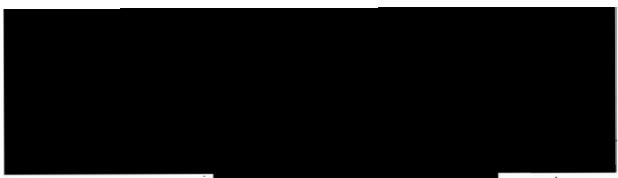


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FILE:

EAC 04-171 53786

Office: VERMONT SERVICE CENTER

Date:

SEP 22 2006

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:



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.

Σ Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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.

On appeal, counsel submits a brief and exhibits. For the reasons discussed below, counsel has not overcome the director's bases of denial. Ultimately, the petitioner was, at the time of filing, an assistant professor earning \$38,523, a position and salary that do not set him apart from university faculty nationwide,<sup>1</sup> who has not provided letters from experts outside his immediate circle of colleagues or evidence that his published articles have been influential in the field. The petitioner's eligibility claim primarily hinges on his unique training among the faculty where he teaches and the fact that he works on a Department of Defense project, which had produced few results as of the date of filing. The evidence is simply not indicative of or uniquely consistent with national or international acclaim, the statutory standard for the classification sought. Ultimately, the record contains no evidence that the petitioner has any recognition outside the institutions where he has studied and taught as of the date of filing. The evidence will be considered as it relates to the regulatory criteria below. Pursuant to that discussion, we find that the petitioner has failed to establish that he met any of those criteria as of the date of filing.<sup>2</sup>

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

<sup>1</sup> Even the petitioner's current position as an associate professor and wages do not set him apart from university faculty nationwide.

<sup>2</sup> As will be discussed below, while the director concluded that the petitioner met the criterion set forth in the regulation at 8 C.F.R. § 204.5(h)(4), he erroneously relied on evidence of reviews conducted after the date of filing.

(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 an 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. On appeal, counsel asserts that fulfilling three criteria meets the standard and that the director erred in using a "subjective determination of what was indeed enough to qualify for national or international acclaim." The petitioner, however, 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 consistent with sustained national or international acclaim if that statutory standard is to have any meaning.

The petitioner has submitted evidence that, he claims, meets the following criteria.<sup>3</sup>

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

While counsel initially asserted that the petitioner's local and academic honors served to meet this criterion, counsel abandoned this claim in response to the director's request for additional evidence and does not raise this criterion on appeal. We concur with the director that the petitioner has not established that he meets this criterion.

*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.*

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<sup>3</sup> The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

On his curriculum vitae, the petitioner claimed to be a member of the American Society of Mechanical Engineers (ASME), the Institute of Electrical and Electronics Engineers (IEEE), the American Design Drafting Association (ADDA) and the American Society for Engineering Education (ASEE). The petitioner submitted evidence that IEEE is "the world's largest technical professional association, connecting more than 360,000 members in approximately 175 countries." The materials submitted for ASEE reflect that it has more than 12,000 members, including deans, professors, instructors, students and industry representatives. The materials submitted for ADDA reflect that membership "is available to any individual, school, institution, company or corporation which is involved in the design drafting fields." The petitioner submitted no information regarding ASME.

In the request for additional evidence, the director noted that the petitioner had not submitted any evidence that membership is limited to those with outstanding achievements. In response, the petitioner resubmitted the same materials regarding IEEE, ASEE and ADDA. The director concluded that memberships cannot satisfy this criterion "if members are not selected at the national or international level, based upon outstanding achievement."

On appeal, counsel asserts that engineers can only join IEEE "upon satisfying IEEE-specified educational requirements and demonstrating professional competence in IEEE-designated fields of interest." Counsel notes that membership "is not simply open to the public." Finally, counsel asserts that ASEE and ASME have similar requirements. The petitioner submits the bylaws for IEEE which provide that members must either have (a) received a baccalaureate (or equivalent) or higher degree in an IEEE-designated field, (b) received a baccalaureate (or equivalent) or higher degree and at least three years experience in IEEE-designated fields, (c) demonstrated competence in an IEEE-designated field through at least six years of experience or (d) been an executive for six years directing work in an IEEE-designated field. A member need meet only one of these requirements. The petitioner does not submit the bylaws of ASEE or ASME.

The fact that IEEE is not open to the public is not decisive. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) provides that the association must require *outstanding achievements* of its members. A professional association that limits membership to professionals working in the field does not necessarily require outstanding achievements. Neither earning an undergraduate degree in engineering nor working in the field for a specific number of years is an outstanding achievement in engineering. We note that IEEE elects fellows, conferred by invitation only in recognition of unusual distinction. The petitioner does not claim to be a fellow of IEEE.

The director's conclusion regarding this criterion is not subjective, but based on the plain language of the regulation. We concur with the director that the petitioner has not established that IEEE, or any other association of which he claims to be a member, requires outstanding achievements of its members. Thus these memberships cannot serve to meet the plain language of the regulation. Moreover, while not raised by the director, the record lacks the petitioner's membership cards or other primary evidence of membership. The petitioner has not established that such evidence is unavailable

Page 5  
or does not exist. As such, we need not rely on his self-serving curriculum vitae. 8 C.F.R. § 103.2(b)(2).

In light of the above, the petitioner has not established that he meets this criterion.

*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 initially submitted evidence that he served on four Master theses examining committees at West Virginia University (WVU), where he teaches. In response to the director's request for additional evidence, the petitioner submitted requests to review seven manuscripts for the International Association of Science and Technology for Development, all of which postdate the filing of the petition. The petitioner also reviewed papers for an IEEE conference and ASEE after the date of filing. Also after the date of filing, [REDACTED] a division director and professor at WVU, nominated the petitioner as an ASME Mechanical Engineering Technology Evaluator. The record contains no evidence that the petitioner was actually selected as an evaluator by ASME. Finally, the petitioner submitted evidence that he chaired a Master thesis examining committee after the date of filing.

The director concluded that while review of academic work is an inherent responsibility of faculty at an academic institution, the petitioner "appears to be prolific in terms of performing reviews of scholarly works submitted to the professional organizations to which he belongs." Thus, the director appears to have concluded that the petitioner meets this criterion based on reviews conducted *after* the date of filing. On appeal, counsel reiterates that the petitioner has reviewed manuscripts for journals and conferences.

Counsel does not question the director's conclusion that serving on a thesis evaluating committee at the university where on works is an inherent duty of faculty. We concur with this conclusion. As stated above, the evidence submitted to meet a given criterion must be indicative of or consistent with national or international acclaim. Duties that are inherent to one's occupation cannot serve to meet this criterion. The record contains no evidence that the petitioner served as an external advisor at universities other than WVU.

The petitioner must establish 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). Thus, the director erred in considering the petitioner's journal and conference manuscript reviews undertaken by the petitioner after the date of filing. In light of the above, the petitioner has not established that he met this criterion *as of the date of filing*.

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

The petitioner submitted reference letters and published articles to meet this criterion. The director concluded that the petitioner had not demonstrated the impact of his work. The director noted that witness letters alone cannot "form the cornerstone of a successful claim" for the classification sought.

On appeal, counsel asserts that the regulations do not require evidence of the field's reaction to the petitioner's work, but assert that the petitioner's "prolific" work and reference letters adequately demonstrate that the petitioner meets this criterion.

While the regulation at 8 C.F.R. § 204.5(h)(3)(v) may not expressly state that the petitioner must demonstrate a "reaction" to his work, the regulation does require that the contributions be not only original but "of major significance." We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work. Thus, it is difficult to imagine how the petitioner's work could be considered a contribution of major significance without generating any "reaction" in the community.

We will consider the reference letters below. In evaluating the letters, we consider the following. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review. Ultimately, 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.

All of the faculty at WVU affirm that the petitioner is the only faculty member with his education and experience in robotics, expert systems and software development. They further discuss the importance of his projects. Having unique expertise among the faculty at a single university is not evidence of the petitioner's national or international acclaim or standing in the field overall. Moreover, the petitioner cannot establish his eligibility for the classification sought simply by demonstrating his qualifications to work on significant projects. The classification sought requires national or international acclaim in the field. [REDACTED] the petitioner's department head, asserts that the petitioner was the only qualified candidate after a national search. Determinations of shortages, however, fall under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm. 1998). The availability of other qualified workers is simply not a consideration for the classification sought.

[REDACTED] Professor and Dean of Engineering at WVU, summarizes the petitioner's contributions as follows:

- He is currently involved in Intelligent Vision System Development for Unmanned Aerial Vehicles (UAV) research supported by Department of Defense (DOD) under a project entitled, "Smart War Fighting Array of Reconfigurable Modules (SWARM)" for the US NAVY. He is a member of a research team consisting of faculty members, experts from industries, and graduate and undergraduate students at WVU Tech.
- Development of manufacturing process models for District Event Dynamic System Optimization of manufacturing process sequences.
- Determination of Significance of the execution speed of various thermal analysis techniques using Design of Experiments (DOE) techniques.
- Development of an Expert System approach to improve the quality of finite element mesh generation.
- Developing mixed numerical & analytical methods to solve the heat transfer problem in an axis-symmetric disk to be used with Discrete Event Dynamic System Optimization Program in US Air Force.
- Developing a new Hybrid technology to solve the heat transfer problem of complex geometric objects as a new Computer Aided Engineering (CAE) tool.

[REDACTED] does not, however, explain how any of these contributions have impacted the field. For example, he does not identify any industry that has adopted or is even considering adopting the petitioner's models. He also does not identify a paper or presentation that is demonstrably influential, such as through wide and frequent citation.

[REDACTED], a professor at WVU, indicates that the petitioner submitted three research proposals during his first two years at WVU, one of which was a joint proposal with [REDACTED]. While [REDACTED] asserts that the petitioner published his results from the first proposal, he does not explain the significance of this work other than it was funded by the Research Committee of WVU Tech. The joint proposal related to a smart vision system for the Department of Defense's Smart War-fighting Array of Reconfigurable Modules (SWARM). [REDACTED] does not discuss any results from this joint project. Finally, [REDACTED] asserts that the petitioner's third proposal is "still under evaluation." While [REDACTED] predicts a "very bright future for this young researcher" he does not claim that the petitioner has any acclaim in the field.

[REDACTED] another professor at WVU, provides similar information, asserting that the petitioner "has already assembled the research team" and begun work on the smart vision system for SWARM. [REDACTED] does not assert that the petitioner's work on this project has already produced a contribution of major significance. [REDACTED] asserts that the petitioner's teaching and research activities are "making an outstanding contribution to this institution, and, *potentially*, to the state and nation as well." (Emphasis added.) This language does not suggest that the petitioner has already made contributions of major significance to the field as a whole or that he enjoys national or international acclaim, the statutory standard for the classification sought.

[REDACTED] the petitioner's dissertation advisor at Ohio University, asserts that the petitioner conducted research on a number of manufacturing process models, applying finite element methods to develop thermal forging models. The petitioner also implemented a hybrid version of numerical method to analyze the forging process. Finally, he was successful in developing a numerical code that would interface with a commercial code, such as Hypermesh. [REDACTED] concludes that this work is "extremely critical technology for the manufacture of machine components." While [REDACTED] asserts that the petitioner presented this work at a conference, he does not allege that this work is widely implemented or cited. The record lacks evidence that the petitioner's published work has been cited and the record contains no letters from independent experts in the forging industry who have applied the petitioner's work.

[REDACTED] plant engineer for [REDACTED] North America in Ohio, asserts that he and the petitioner shared results. While he praises the petitioner's "ability to find critical information, analyze it and act appropriately," he does not identify a specific contribution of major significance to 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.

The petitioner submitted three published articles and his unpublished doctoral dissertation and Masters Thesis. The petitioner also submitted his SWARM research proposal. In response to the director's



request for additional evidence, the petitioner submitted evidence that he had authored two additional published articles, both after the date of filing. A third article appeared in the proceedings for a 2005 conference. The petitioner also submitted seven chapters of a book he had yet to complete or publish. Finally, the petitioner submitted e-mail messages accepting manuscripts for future publication. The record contains no evidence that the petitioner's articles have been widely and frequently cited or otherwise influential.

While the evidence demonstrates that the petitioner is a talented researcher with potential, it falls short of establishing that the petitioner had already made contributions of major significance. Thus, the petitioner has not established that he meets this criterion.

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

As stated above, the petitioner initially submitted three published articles and his unpublished doctoral dissertation and Masters Thesis. The petitioner also submitted his SWARM research proposal. In response to the director's request for additional evidence, the petitioner submitted evidence that he had authored two additional published articles, both after the date of filing. A third article appeared in the proceedings for a 2005 conference, also after the date of filing. The petitioner also submitted seven chapters of a book he had yet to complete or publish. Finally, the petitioner submitted e-mail messages accepting manuscripts for future publication. As also stated above, the petitioner submitted no evidence that his work has been cited or otherwise influential.

The director concluded that the petitioner had not established the reception of the overall engineering community. On appeal, counsel asserts that the petitioner had nine articles published or presented prior to the date of filing. Counsel concludes that the mere publication of articles serves to meet this criterion.

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.

Without evidence that the petitioner has been even moderately cited or comparable evidence of the significance of his work, we cannot conclude that his publication record is indicative of or consistent with national or international acclaim. Thus, the petitioner has not established that he meets this

criterion. Even if we accepted counsel's assertion that publication in and of itself is sufficient to meet this criterion, and we do not in the field of scientific research, the petitioner does not meet the plain language requirements of at least two other regulatory criteria, of which he must meet at least three to establish eligibility.

*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 a leading or critical role for WVU. As of the date of filing, the petitioner was employed there as an assistant professor. As discussed above, several of the faculty at WVU assert that the petitioner has unique education and experience among the faculty. The director concluded that the petitioner's position was not indicative of being at the top of his field. On appeal, counsel asserts that the director's finding that the petitioner is highly regarded at WVU demonstrates that the petitioner is employed "in a critical capacity for an organization with a distinguished reputation."

We have already considered the petitioner's claimed contributions above. Moreover, the petitioner's qualifications for his job and his competence in fulfilling his job duties are insufficient to meet this criterion. Rather, at issue for this criterion are the nature of the role the petitioner was hired to fill and the reputation of the entity that hired him. The director did not question WVU's national reputation. Assuming WVU does have a distinguished reputation nationally, we cannot conclude that every assistant professor with unique experience and education among the faculty at a university plays a leading or critical role for the university as a whole. Specifically, the position of "assistant professor" does not set the petitioner apart from the majority of the faculty at WVU, let alone nationwide. Thus, we concur with the director that the petitioner does not meet the plain language of this criterion.

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

Counsel did not initially assert that the petitioner meets this criterion. The petitioner submitted a notice of appointment for the position of assistant professor listing his salary as \$38,523 for the period of August 16, 2003 through May 14, 2004. In response to the director's request for additional evidence, counsel asserted that the petitioner was "recently" promoted to associate professor, earning \$53,672 for the academic year and \$5,200 per month over the summer. Counsel further asserts that the petitioner earns \$100 per hour as a consultant. The petitioner submitted:

1. A Notice of Intent to Renew Appointment, renewing his position as an *assistant* professor for the 2004-2005 academic year,
2. A May 12, 2005 letter promoting the petitioner to Associate Professor effective August 16, 2005 with an unspecified salary,

3. A May 13, 2005 letter from [REDACTED] at Columbia Alloys, Inc. requesting the petitioner's consulting services at a rate of \$100 per hour,
4. A May 2, 2005 letter from [REDACTED] Founding Director of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing at WVU advising that the petitioner earned \$5,200 per month working for the center from May 16, 2004 to July 15, 2004,
5. The petitioner's 2003 Form W-2 Wage and Tax Statement reflecting wages of \$35,717.46,
6. An earnings statement reflecting year to date earnings of \$8,835.18 as of February 27, 2004,
7. U.S. Department of Labor Employment and Training Administration statistics reflecting that the level one and four wages for engineering teachers, postsecondary in *Central West Virginia* are \$45,070 per year and \$93,310 per year respectively and
8. A bank statement for January 1, 2004 through March 31, 2004 reflecting payroll deposits of \$1,763.11 on March 16, 2004 and again on March 31, 2004.

We note that the petition was filed on May 6, 2004.

The director concluded that the petitioner had not established comparable wages in consulting work. On appeal, counsel asserts that the petitioner provided evidence that the petitioner's salary "as a summer researcher places him in one of the highest levels of wages for other postsecondary, engineering researchers." Counsel further asserts that the petitioner's wages as a consultant places him "well above the Department of Labor's Level Four wage." The petitioner submitted evidence that level one wage for electrical engineers in Central West Virginia is \$19.66 per hour or \$40,893 per year and the level four wage for these electrical engineers is \$30 per hour, or \$63,544 per year.

As of the date of filing, the petitioner was earning \$38,523, below the level one wage for both electrical engineers and postsecondary engineering teachers. Even the petitioner's alleged salary increase in 2005 as an associate professor, \$53,672 plus the possibility of an additional \$10,400 during the summer as occurred in 2004, is well below the level four wage for postsecondary engineering teachers, his occupation resulting in those wages. The record contains no evidence regarding how many hours he worked as a consultant or even whether he accepted the consulting work. As such, we cannot determine his actual remuneration for that work. Moreover, the statutory standard for the classification

sought is *national or international* acclaim. Thus, in order to meet this criterion, the petitioner's wages must compare with the highest wages in the field nationwide.<sup>4</sup>

In light of the above, the petitioner has not established that he meets this criterion.

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 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 petitioner shows talent as an 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.

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<sup>4</sup> The highest ten percent of electrical engineers nationwide earn \$108,070 annually and the highest ten percent of aeronautics engineers nationwide earn \$113,520 annually. U.S. Department of Labor, Occupational Outlook Handbook 140 (2006-07 ed.).