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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
SRC 07 056 52186

Office: TEXAS SERVICE CENTER Date: **MAY 30 2008**

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 Jensen
2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) 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 asserts that the director did not raise all of the deficiencies noted in the final decision in the request for additional evidence. We note that the petitioner’s response to the director’s request for additional evidence addressed several of the evidentiary criteria, not just the one raised by the director in the request for additional evidence. Regardless, the most expedient remedy for any error in this regard would be to consider any new evidence on appeal. Counsel’s remaining assertions will be discussed below. For the reasons expressed in the body of this decision, while counsel correctly identifies an internal inconsistency in the director’s decision, we uphold the director’s ultimate conclusion that the petitioner has not demonstrated her eligibility for the classification sought.

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 into the United States will substantially benefit prospectively the United States.

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). 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 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 she has sustained national or international acclaim at the very top level.

The petitioner did not complete Part 6 of the petition regarding her proposed employment. As of the date of filing, she was working as a chief scientist for a technology firm performing research on solar cells and other renewable energy. 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 cites *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), for the proposition that meeting three criteria is sufficient to establish eligibility. 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 contest that principle. Significantly, however, the court in *Buletini* acknowledged that "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini*, 860 F. Supp. at 1234. Consistent with this reasoning, we will evaluate the quality of the evidence submitted below.

The petitioner has submitted evidence that, she 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.

Initially, counsel asserts that the petitioner's extraordinary abilities have garnered her recognition "by way of the honors and awards she has received." Specifically, counsel asserts that the petitioner was "selected for a postdoctoral scholarship" at the University of California, Los Angeles (UCLA). Counsel further asserts that the petitioner's research in China was funded by Chinese government agencies. [REDACTED], a professor at the Rensselaer Polytechnic Institute (RPI) where the petitioner received her Ph.D., reiterates this claim, also noting that the petitioner was selected for an instructor position at UCLA. [REDACTED], a distinguished professor and Dean at UCLA, confirms that the petitioner was a lecturer at UCLA in the 2005 Winter Quarter, teaching a single class. [REDACTED] makes no attempt to compare this employment with a nationally or internationally recognized prize or award for excellence in the field of endeavor.

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

Counsel's response to the director's request for additional evidence does not address this criterion. The director concluded that the petitioner had not demonstrated that she meets this criterion. Counsel does not challenge this conclusion on appeal.

A job offer, regardless of whether it is for a competitive position, is simply not an award or prize principally designed to recognize excellence in the field. Similarly, research grants simply fund a scientist's work. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement.

In light of the above, we concur with the director that the petitioner has not established that she 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.

Initially, counsel asserts that the petitioner is a member of the American Society of Mechanical Engineers (ASME), which "requires demonstrated professional achievement for membership." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner initially submitted no evidence that she is a member of ASME or evidence of ASME's membership requirements.

The director requested proof of the petitioner's membership and the membership requirements for the association. In response, counsel asserted that the petitioner's membership in ASME is qualifying but did not provide the requested evidence of her membership. On this basis alone, the petition may not be approved. 8 C.F.R. § 103.2(b)(14). The petitioner submitted evidence that full membership requires "attainments equal to eight years of active practice in the profession of engineering or teaching." Significantly, the materials further indicate that attainment of a degree in an approved engineering curriculum or a baccalaureate degree in an approved engineering technology curriculum "shall be accepted as equivalent to the eight year experience requirement." Thus, the sole membership requirement for ASME is an undergraduate degree or eight years of experience.

The director concluded that the petitioner had not established that ASME requires outstanding achievements for its members. Counsel does not explicitly challenge this conclusion on appeal other than to reiterate the evidence submitted in response to the request for additional evidence and assert that the director "barely touched on the subject."

First, the record remains absent documentary evidence that the petitioner is a member of ASME. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Regardless, we concur with the director that this membership, had it been established, cannot serve to meet this criterion. We note that even ten years of experience is only one criterion for aliens of exceptional ability, a lesser classification under section 203(b)(2) of the Act. Experience alone cannot be considered an outstanding achievement indicative of extraordinary ability. Moreover, an undergraduate degree by itself, which probably would not even qualify the petitioner to perform the work she is now performing, also cannot be considered an outstanding achievement.

In light of the above, we concur with the director that the petitioner has not established that she meets this criterion.

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

Initially, counsel asserted that the articles by other researchers that contain footnoted references to the petitioner's work in addition to numerous other cited references serve to meet this criterion. Counsel reiterated this assertion in response to the director's request for additional evidence. The director's final decision, as noted by counsel on appeal, contains internal inconsistencies regarding whether citation evidence was even submitted. Specifically, in the same paragraph, the director states that no citations were submitted and then states that the "articles that [the petitioner] submitted in reference to her publications address her work and do not specifically address the petitioner's abilities." In a subsequent paragraph, the director stated that the petitioner "has not established that there is published material about her."

On appeal, counsel asserts that "the articles that cite to and discuss [the petitioner's] publications and rely on her original work most certainly meets [sic] the standards of 8 CFR §204.5(h)(3)(iii)." Counsel notes that the propositions for which the petitioner's work was cited were highlighted in each citing article.

We do not contest that citations are relevant evidence in this proceeding. That said, they simply do not meet the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(iii). The articles submitted are primarily about the research conducted by the authors of those articles. The petitioner's articles are cited in concert with numerous other articles as background information. It simply cannot be credibly argued that these citing articles constitute published material "about the alien relating to her work" as required under the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Rather, the citing articles are more directly relevant to the impact of the petitioner's research and scholarly articles under the criteria set forth at 8 C.F.R. § 204.5(h)(3)(v) and (vi), which will be discussed in detail below.

For the reasons discussed above, the petitioner has not established that she 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 record reflects that the petitioner has refereed "technical publications" for ASME and International Mechanical Engineering Congress and Exposition (IMECE) conferences and manuscripts for the *International Journal of Hydrogen Energy* and the *International Journal of Heat and Mass Transfer*. The record reflects that the invitation to review the manuscript for the *International Journal of Mass Transfer* was originally issued to [REDACTED] one of the petitioner's coauthors at RPI, who forwarded the invitation to the petitioner based on her "background" in the area. The invitation to review the manuscript for the *International Journal of Hydrogen Energy* was originally issued to Dr. Hongtan Liu, who, professing that the manuscript was not in her area of research, forwarded the invitation to the petitioner based on the fact that the petitioner was "currently working in the area of hydrogen production." The requests to review a technical publication for the ASME conference came from someone at a UCLA address while the petitioner was employed at UCLA.

As noted by counsel on appeal, the director failed to address this evidence. Counsel further asserts that CIS "has repeatedly recognized in liaison minutes, such as from June 3, 2002, that '**participation by the alien as a reviewer for peer reviewed scholarly journals will usually be a solid piece of evidence for evaluating an alien's extraordinary ability.**'" (Emphasis in original.) The petitioner submits Approved Minutes from a liaison meeting between the service center and the American Immigrant Lawyers Association (AILA) from June 3, 2002 supporting counsel's assertion.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

The comments made by service center employees during outreach meetings are not binding on the AAO. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center had approved an identical immigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

First, the requests from the petitioner's colleagues at RPI and UCLA are not indicative of international recognition. Regardless, 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 her field, such as evidence that she 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 relies on reference letters and her publication record to meet this criterion. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. 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 (Commr. 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. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that 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 her reputation and who have applied her 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.

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. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must 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. 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.

The petitioner received her Master of Science in Thermal Engineering from Tsinghua University in China in 2000. In 2004, she received her Ph.D. from RPI. As stated above, she then worked as a postdoctoral fellow for UCLA before joining GreenBridge Technology.

██████████ a professor at RPI and one of the petitioner's coauthors, discusses the importance of developing alternative energy sources and asserts that the petitioner "is credited with making significant contributions towards this national priority of finding energy conversion technologies for alternative energy sources." More specifically, ██████████ discusses the importance of fuel cell technology and explains that one of the challenges to this technology is the reliable and efficient production of hydrogen. According to ██████████, the petitioner developed a "cutting edge method" to produce hydrogen using *Anabaena Variabilis* bacteria that "split" water into hydrogen and oxygen while absorbing carbon dioxide. Thus, this process both produces hydrogen and reduces green house gases. The petitioner presented this work just prior to the filing of the petition and her peer-reviewed journal article on the subject was not yet published at that time. Thus, the petitioner cannot demonstrate that this work had already had an impact in the field as of the date of filing, the date as of which the petitioner must establish eligibility. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Similarly, ██████████, who obtained his Ph.D. from RPI a year after the petitioner did so, discusses the petitioner's cooling system that was only being prepared for submission to the Department of Energy. Once again, this work could not have impacted the field in a major way as of the date of filing.

██████████ further explains that the two-phase flow utilized in the thermal components in fuel cells increases the likelihood of instabilities. According to ██████████ the petitioner developed models that can predict the performance of two phase flow systems, allowing her to counsel on avoiding or controlling instabilities. ██████████ concludes that this work is "critical to determine the appropriate means to stabilize the system."

Finally, ██████████ discusses the petitioner's work with absorption heat transformers (AHT), a device used to raise the temperature of waste heat (generally released into the environment as waste water or steam) so that it can be reused in industry. ██████████ explains that in order for AHT to produce energy from a costless source with a reduction of fossil fuel use, a suitable "working pair," a refrigerant with an absorbent liquid, must be found. ██████████ asserts that the petitioner "proposed several novel working pair candidates" and that in 2003, a company in China developed the first industrial-scale absorption heat transformer equipment using one of the petitioner's working pairs. ██████████,² a professor at the University of Miami, asserts that the Chinese equipment "is the

² ██████████ asserts that he became aware of the petitioner when the petitioner contacted him for information about his prior research but does not affirm having applied any of the petitioner's work.

first AHT of its kind to employ these working pairs, which has led to great leaps in efficiency for recycling waste heat.”

According to the petitioner’s curriculum vitae and publications, her AHT research was performed in China and funded by the National Natural Science Funding of China. Her U.S. references purport to affirm the adoption of this work in China without explaining the basis of their knowledge of this information. The record contains no letters from officials at Yanshan Petrochemical Corporation, the company that purportedly adopted the petitioner’s working pair, confirming that they adopted the petitioner’s working pair. The record also lacks media coverage (either in the general media or trade media) discussing the significance of this equipment. It can be expected that new equipment incorporating a “great leap in efficiency for recycling waste heat” would command some attention in the trade literature.

██████████, Dean of the School of Engineering at UCLA, asserts that the petitioner developed a dynamic model of the fuel processing steam generator, which was integrated with other parts of the fuel cell system to form the basis of a new design for fuel cell systems that was adopted for United Technologies Proton Exchange Membrane (PEM) fuel cells.” The petitioner’s report on this work was submitted to the United Technologies Research Center (UTRC), which funded the petitioner’s research at RPI according to her curriculum vitae. ██████████ a technical staff member at Los Alamos National Laboratory, provides similar information. The record does contain a letter from an official at UTRC or any other entity that is adopting the petitioner’s work for PEM fuel cells.

The record contains evidence that the petitioner has authored more than 25 published articles and has presented her work. Some of the petitioner’s references assert that the petitioner is well cited, noting the total number of articles that cite the petitioner’s work. Considering only the total number of citations, however, is not useful as even an average researcher, over time, can eventually show significant citations in the aggregate. Far more probative is the number of citations per article. The record contains evidence that no more than six independent experts have cited any one article by the petitioner. This number of citations is not evidence that the petitioner’s work is widely cited.

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 performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance to the field as a whole. The petitioner in this matter has not demonstrated that her work in the field has had a major impact on the field such that she can be said to have garnered national or international acclaim as of the filing date in this matter.

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 she has authored more than 25 published articles. 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." Moreover, for physicists and astronomers, the Department of Labor's *Occupational Outlook Handbook* (2008-2009 ed.), available online at <http://www.bls.gov/oco/ocos052.htm> and accessed May 29, 2008, provides that good written communication skills are important because many physicists write research papers. This information 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 director stated: "No one has cited [the petitioner's] public works," but later appeared to acknowledge that citation evidence had been submitted. We acknowledge that the record contains 15 articles that cite the petitioner's work. As discussed above, however, no single article by the petitioner has been cited more than six times. The petitioner has not established that her publication record is consistent with national or international acclaim in the field.

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

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected her. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

We are not persuaded that every postdoctoral fellow for a prestigious university can be said to play a leading or critical role for that institution. As discussed above, postdoctoral positions are primarily temporary training positions. The petitioner's references contend that the petitioner's position as a principal investigator at GreenBridge Technology serves to meet this criterion. The record contains no confirmation of this position with the company. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of employment "shall" consist of letters from the employer. Moreover, the record does not contain an organizational chart or other evidence regarding the significance of a principal investigator position beyond the obvious need for a research and development company to employ competent investigators.

Finally, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner relies on her professional membership, participation in the routine review of manuscripts, the praise of her peers, her record as a prolific author and her minimal citation record. While this may distinguish her from others at the same career stage, we will not narrow her field to others with her level of training and experience. The record contains letters from deans of engineering departments at major universities, members of editorial boards, advisory board members and elected members of the National Academy of Engineering. Thus, the record reflects that the top of the petitioner's field is far higher than the level she has attained.

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