

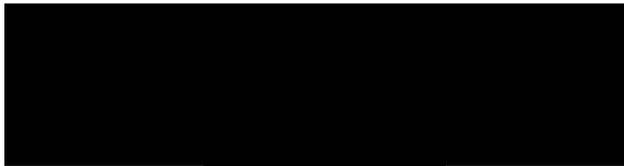
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 188 54097

Office: TEXAS SERVICE CENTER

Date:

OCT 01 2008

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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a pavement markings company, 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 earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner states:

[The beneficiary's] duties are extremely important to this organization as he is the inventor of a revolutionary product called DigiMark.

* * *

His invention of DigiMark is one of a kind as it makes possible the use of digital imaging on floor surfaces (especially outside surfaces) which [h]as immediate benefit not only in advertising but in safety, security, and other forms of graphic communications.

* * *

Other inventions of [the beneficiary] include the development of Preformed Thermoplastic which is used worldwide for marking highways and parking lots. The USA highway market has benefited greatly from his brilliant ideas as this technology is and will be used for many years to come.

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, 60898-99 (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 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, filed on June 6, 2007, seeks to classify the beneficiary as an alien with extraordinary ability as technical director and vice president of U.S. Striping, Inc. On appeal, ██████████ President, U.S. Striping, Inc., states that the beneficiary now holds the “title and position of Chief Operations Officer (COO).”

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, internationally 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. A petitioner, however, cannot establish the beneficiary’s eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the beneficiary 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. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “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 petitioner has submitted evidence pertaining to the following criteria

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

The petitioner submitted a July 18, 2003 article in the *Darlington & Stockton Times* stating that a company founded by the beneficiary and his spouse, Digital Markings Limited, received a North-East Regional Business Innovation Award. The article further states: “The company, whose patented system involves fixing highly durable, full-colour, digitalised images on to hard ground and floor surfaces, will now go through to the National Business Awards on November 11.” The beneficiary’s North-East Regional Business Innovation Award reflects regional recognition in the United Kingdom rather than national or international recognition. The petitioner also submitted an article posted on the National Business Awards’ internet site entitled “Finalists for 2003 UK ‘Business Oscars’ Are Announced.” The article states: “The 120 finalists competing for the 2003 UK ‘Business Oscars’ were announced today (September 9th) ahead of the prestigious National Business Awards ceremony, which takes place in London this November.” While the beneficiary’s company, Digital Markings Limited, was among the 120 finalists identified, there is no evidence showing that it received a “New Business of the Year Award” or a “Business Innovation of the Year Award” at the National Business Awards ceremony held in November 2003. While it is certainly an honor to be recognized

as a finalist, the plain language of this criterion requires the beneficiary's receipt of nationally or internationally recognized *prizes* or *awards*.

The petitioner submitted an October 5, 1994 article in the *South Wales Argus* entitled "Trailblazing company rolls 'em out to order." This article, which identifies the beneficiary as Managing Director of Preformed Rib Markings (PRM) Limited, states: "PRM has already earned a SMART Award for its achievements and is in the running for a Gwent TEC [Training and Enterprise Council] Investors in People Award." The Gwent TEC award reflects local recognition rather than national or international recognition. Further, there is no evidence showing that the beneficiary's company actually received a Gwent TEC award. With regard to PRM's receipt of a SMART Award, there is no evidence showing that this award is a nationally or internationally recognized prize or award for excellence in the field or that PRM's receipt of the award was primarily attributable to the beneficiary.

In light of the above, the petitioner has not established that the beneficiary 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.

In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

The petitioner submitted an article in the May 2007 issue of *Pavement Maintenance & Reconstruction* entitled "Value-added pavement marking," but the article does not mention the beneficiary. The plain language of this regulatory criterion requires that the published material be "about the alien." The petitioner also submitted an April 23, 1979 article in *New Products and Processes*, a March 12, 1979 article in *Neue Producte*, an article in the May/June 2002 issue of *Digital Display Printing*, and a December 2, 2002 article in the *Evening Herald*, but none of these articles were about the beneficiary.

Several articles submitted by the petitioner do discuss the beneficiary. These articles include an August 26, 1979 article in *The Observer*, a February 10, 1980 article in *The Sunday Times*, a December 17, 1991 article in *Western Mail*, an October 5, 1994 article in the *South Wales Argus*, an article in the March/April 2002 issue of *Sign Directions*, an October 10, 2002 article in the *Yorkshire Post*, and October 18, 2002 and July 18, 2003 articles in the *Darlington & Stockton Times*. The record does not include evidence (such as circulation statistics) showing that the preceding publications qualify as major trade publications or some other form of major media.

¹ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

In light of the above, the petitioner has not established that the beneficiary 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 an April 28, 2005 from [REDACTED], President, U.S. Striping, Inc., stating:

Our company, U.S. Striping Inc. specializes in applying markings on highways and in parking lots. As a result of various marketing and development efforts, we have the opportunity to acquire exclusive worldwide sales and manufacturing rights to several highly profitable highway safety and outdoor floor graphic products. The acquisition of these rights will enable us to initiate manufacturing in the United States, with the attendant creation of new jobs.

These products have been developed in England by [the beneficiary], who has an established record as the originator of many innovative highway safety marking systems.

[The beneficiary] is widely recognized as the founder of preformed thermoplastic markings, which he invented and patented worldwide in 1978. This is a system where manufactured lines, symbols and legends are placed on roads and bonded to the highway surface using a gas torch. This development revolutionized the marking industry by simplifying previous procedures and avoiding the use of heavy equipment. Today, USA sales of this product are estimated at \$15 million per year, with and worldwide sales estimated at \$35 million per year.

* * *

Utilizing his specialized knowledge of road marking products, in 1991 [the beneficiary] invented and patented a preformed visual and audible edge lining system. This system has been adopted in various countries, with significant savings in road accidents, deaths and injuries. Patents were granted covering Europe, South Africa, Canada and Australia. . . . In addition, [the beneficiary] has an undisclosed blueprint for a further invention for installing these preformed audible pads at great speed – this development that has major safety connotations throughout the highway industry worldwide. U.S. Striping has a right of first refusal on developing this technology.

During the past few years, [the beneficiary] has developed a new technology based on his original work patented in 1978. U.S. Striping has the opportunity to manufacture both these materials . . .

The petitioner submitted intellectual property documentation showing that the beneficiary holds several patents for his inventions. Published material and other supporting documentation in the record demonstrate the widespread national and international implementation of the beneficiary's inventions and their major significance in the pavement marking products industry. As such, the petitioner has established that the beneficiary meets this single 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 a May 25, 2007 letter from [REDACTED] stating:

[The beneficiary] has proved to be very influential in the development of the production and expansion of his invented products which we are manufacturing and marketing. We require and need his wealth of knowledge and experience full time and would like him to become a full partner in our company.

* * *

Through [the beneficiary's] reputation and international contacts has lead [sic] U.S. Striping to gain important export leads into Eastern Europe, mainland Europe and Australia. We have licensed the Digimark product to other contractors in Canada, Virginia, Florida, Tennessee, New Jersey, Illinois, Caribbean and soon to be licensing in Columbia. We currently have over 300 license enquiries and are now in negotiations with large orignations [sic] for funding the growth of our business opportunities. [The beneficiary] is very much a key player for us because of his previous experiences in negotiations of intellectual property rights to high finance corporations[,] because of his patents and as the inventor of these products and systems he is taken very seriously which is of considerable help to us.

[The beneficiary] is currently working on a new audible and visual road marking that is to be used on our highways to create a barrier between passing traffic and the workpeople in these work zones.

There is no evidence showing that U.S. Striping has a distinguished reputation.² Further, while Steven Johnson's statements indicate that the beneficiary has helped U.S. Striping to market his Digimark product line, the record lacks information demonstrating that his role was leading or critical to U.S. Striping's overall operations as of the petition's filing date.³ On appeal, [REDACTED] states that the beneficiary now holds the "title and position of Chief Operations Officer (COO)." The beneficiary's promotion to COO occurred subsequent to the petition's filing date. A petitioner, however, must establish the beneficiary's eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Subsequent developments in the beneficiary's career, such as earning a job promotion or attaining a full partnership, cannot retroactively establish that he was eligible as of the petition's filing date. Accordingly, the AAO will not consider the beneficiary's COO position in this proceeding.

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

² While [REDACTED] is quoted in the May 2007 issue of *Pavement Maintenance & Reconstruction*, this single article is not adequate to demonstrate that U.S. Striping has a distinguished reputation.

³ For example, [REDACTED] does not indicate the percentage of his U.S. Striping's annual revenue attributable to sales of the beneficiary's products. Nor is there evidence demonstrating that the beneficiary's specific duties involved substantial control over company operations or where the position of vice president and technical director fits into the company's organizational hierarchy.

In this case, the petitioner has established that the beneficiary meets only one of the regulatory criteria, three of which are required to establish eligibility. 8 C.F.R. § 204.5(h)(3). The petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability.

While CIS has approved three O-1 nonimmigrant visa petitions filed on behalf of the beneficiary, those prior approvals do not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, 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 director has approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Review of the record does not establish that the beneficiary has distinguished himself 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 is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. 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.

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.