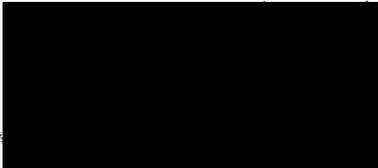


B3

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536



IC COPY

AUG 18 2003

File: WAC 02 134 51500 Office: California Service Center

Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, a privately held company that develops advanced image-guided radiosurgery technology, seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The petitioner seeks to employ the beneficiary as a "Software Manager/Senior Imaging Software Engineer." The director found that the petitioner has not established that the beneficiary is recognized internationally as outstanding in his academic field.

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):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if-

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(iii) An offer of employment from a prospective United States employer. A labor

certification is not required for this classification. The offer of employment shall be in the form of a letter from:

- (A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;
- (B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or
- (C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by “[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition.” The regulation lists six criteria, of which the beneficiary must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. The petitioner submits evidence pertaining to the following criteria.

Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.

The petitioner submitted three letters from [REDACTED] the beneficiary's former employer, indicating that work teams on which the beneficiary was a member received company PEER Awards in 1996 and 1997. This evidence is reflective of institutional, rather than international, recognition. Each of the three letters states that “[a] copy of the nomination detailing the award and your achievement is attached.” The petitioner, however, has not submitted this information. Thus, it is not apparent that these awards represent “outstanding achievement in the academic field.” Furthermore, there is no evidence indicating how many other [REDACTED] employees were similarly recognized through the company's PEER Award program. It has not been shown that the beneficiary's receipt of a team PEER Award, an award that appears recognizable only to the employees [REDACTED] constitutes international recognition. In sum, the petitioner has failed to provide evidence to establish that the beneficiary, as an individual, has received any special accolade at the international level. Evidence indicating that the beneficiary received recognition from his employer or that he was a member of a work team that earned collective recognition would not satisfy the restrictive nature of this criterion.

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members.

The petitioner submitted evidence of the beneficiary's membership in the Institute of Electrical and

Electronics Engineers (“IEEE”) and information regarding its membership requirements. The record, however, contains no evidence showing that this association requires outstanding achievement as an essential condition for admission to membership. An internet printout provided by the petitioner states that “professional competence” (rather than outstanding achievement) is all that is required for admission to membership. For example, an individual who has “received a baccalaureate degree or its equivalent... from a program on the reference list” is eligible to become a member in the IEEE, which claims that it has over 375,000 individual members.

Also submitted were a certificate reflecting the beneficiary’s membership in the Society for Optical Engineering (“SPIE”) and a copy of the Society’s application form. None of this documentation establishes that SPIE requires outstanding achievements of its members.

In response to the director’s request for evidence, the petitioner submitted an e-mail from Denise Howard, IEEE Admission and Advancement, reflecting that the beneficiary had upgraded his membership status to that of Senior Member on November 16, 2002. This evidence, however, came into existence subsequent to the petition’s filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. Aside from the issue of the date that this evidence came into existence, we note that, according to information provided by the petitioner, the IEEE has “nearly 26,000 Senior Members” and it requires “experience reflecting professional maturity” to achieve the grade of Senior Member.¹ Professional experience, however, would not qualify as outstanding achievement in an academic field.

Published material in professional publications written by others about the alien’s work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.

Throughout this proceeding, counsel has argued that documentation reflecting twenty or so brief citations of the beneficiary’s work would satisfy this criterion.

The director’s decision addressed this issue, stating:

The petitioner has submitted evidence showing that the beneficiary’s work has been referenced by others. However, review of the record shows this evidence to consist solely of published research papers which list the beneficiary’s authored and co-authored papers as one of a number of cited references. It is the nature of research work to build upon work which has gone before. In some instances, prior work is expanded upon or supported. In other instances, prior work is superseded by the findings in current research work. In either case, the current researcher normally cites the work of the prior researchers. Clearly this is not the same thing as published

¹ An internet printout provided by the petitioner states: “For admission or transfer to the grade of Senior Member, a candidate shall be an engineer, scientist, educator, technical executive or originator in IEEE-designated fields. The candidate shall have been in professional practice for ten years and shall have shown significant performance over a period of at least five of those years...”

material written about an individual's work in the field. This type of material does not discuss the merits of an individual's work, the individual's standing in the field, or any significant impact that his or her work has had on work in the field.

On appeal, counsel argues that at least three of the articles presented, none of which devotes more than three sentences to the beneficiary or his work, would satisfy this criterion because, contrary to the director's assertion, they do "discuss the merit of his work and its impact in the field." While this may be true to limited degree, a closer examination of the three articles cited by counsel indicates that they similarly reference the work of numerous other researchers. The petitioner, however, must demonstrate that the beneficiary's work was the main subject of the published material. Citations, which generally reference an individual's work, would not qualify as "published materials about the alien's work." Citations of the beneficiary's work will be addressed under a separate criterion.

Counsel also disputes the director's statement that the evidence presented "consist[s] solely of published research papers." Counsel states: "[The beneficiary's] work is also cited on the internationally available internet database of the Center for Biotechnology Information... and the Telemedicine Information Exchange." We note here that the plain wording of this criterion requires "published material in professional publications." Nevertheless, a review of the documentation presented indicates that these databases provide access to a wealth of published research papers and citations. Furthermore, according to its website at www.tie.telemed.org, the Telemedicine Information Exchange ("TIE") contains "13,429 article telemedicine and telehealth citations." The website also includes a disclaimer, stating: "Inclusion of items in the TIE does not necessarily infer endorsement by the Telemedicine Research Center or the National Library of Medicine." The database of the Center for Biotechnology Information contains "11,000,000 biomedical journal citations."² As evidence that his work was cited on the internet database of the Center for Biotechnology Information, the petitioner presented an internet printout from the PubMed database, an archive of life science journals that boasts "80,000 articles from over 100 journals," among which an abstract of the beneficiary's article entitled, "High-resolution Digital Teleradiology," is available. No documentary evidence has been submitted to elevate the petitioner's work above the numerous other cited database articles or to show that the Center for Biotechnology Information or the Telemedicine Research Center have authored original material about beneficiary's work (rather than simply including his abstracts in their vast databases). Mere availability of one's abstracts on large internet databases such as these would not elevate the beneficiary to a level of international recognition.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

In an occupation where "judging" the work of others is an inherent duty of the occupation, such as an instructor, teacher (including graduate student teaching assistants), professor or editor, simply performing one's job related duties demonstrates competency, and is not evidence of international recognition. The petitioner should demonstrate that the alien's international reputation resulted in his selection to serve as a judge of the work of others. Similarly, the judging should involve other

² Accessed at www.ncbi.nlm.nih.gov.

accomplished professionals in the alien's field at an international level. For example, evaluating tenured research professors for an international award would be far more indicative of an outstanding international reputation than would evaluating one's own graduate students on a dissertation committee.

In a letter accompanying the petition, [REDACTED] Human Resources Manager [REDACTED] states that the beneficiary reviewed the work of others while serving as a teaching assistant at the [REDACTED] a team leader at [REDACTED] and a manager at [REDACTED]. Reviewing students and subordinates, however, would be an inherent duty of the beneficiary's positions and therefore would not satisfy this criterion.

In response to the director's request for evidence, the petitioner submitted correspondence (dated October and November 2002) from the IEEE Press, *Computing Reviews*, and SPIE thanking the beneficiary for "volunteering" or "offering his assistance" as a manuscript reviewer. This evidence all came into existence subsequent to the petition's filing date. *See Matter of Katigbak, supra*. No evidence has been submitted to establish that the beneficiary had completed any manuscript reviews prior to the petition's filing date. The record includes an e-mail from the beneficiary to Catherine Faduska of the IEEE Press dated October 16, 2002. It states: "[T]his is an attempt to volunteer my services for reviewing books and proposals for books. Attached is my resume to assist you in assessing my credentials for these reviews."

Given that the petitioner has submitted documentation showing that the beneficiary initiated contact with all of the above publishers/editors, any subsequent claim that the beneficiary's outstanding international reputation resulted in his selection to serve as reviewer would carry little weight in this matter. We note, for example, that the petitioner has presented documentation from *Computing Reviews* that describes its requirements for participation as a reviewer. The documentation states: "In most cases, the Association for Computing Machinery requires at least a Bachelor's degree in Computer Science or a closely related field, and some professional work experience in a recognized subdiscipline of computing." Therefore, we dismiss the assertion that serving as a reviewer for *Computing Reviews* would automatically demonstrate international recognition as an outstanding researcher.

The director's decision stated:

The petitioner claims this criterion has been met because the beneficiary is a "Reviewer" for several prominent, internationally circulated journals and publications. However, the beneficiary's role as a reviewer consists primarily of peer review of research papers and articles authored by others in the field. This type of review is not the same as serving as a judge of the work of others.

On appeal, counsel disputes the director's finding, stating: "This statement is contrary to the Service's decisions in other outstanding researcher immigrant visa petitions as well as contrary to stated Service policy..." Counsel submits a copy of the liaison minutes (printed from the [REDACTED] website) from the October 7, 2002 meeting of the

[REDACTED] and representatives of the Texas Service Center. We note here that the Service Center's responses to AILA are not binding on the AAO. Although the Service Center's responses may be useful for clarification of its adjudication policies and practices, the information contained in the responses to AILA's questions are not binding on any Bureau officer as they merely indicate the respondent's analysis of a particular issue.

In response to AILA's question as to whether serving as a reviewer for a ranked peer journal would satisfy the judge of the works of others criterion for an alien of seeking classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of Act, the Service Center responded: "Serving as a reviewer or referee for a scientific or academic journal would normally satisfy the judge of the works of others criterion. However, examiners have the discretion to consider all of the evidence submitted with respect to each qualifying criteria." The Service Center also stated that it "continues to follow the guidance issued by previous INS memoranda and AAO decisions."

We concur with counsel that the director erred in his initial statement that peer review is not the same thing as serving as a judge of the work of others. Therefore, that portion of the director's decision is withdrawn. That being said, the remaining analysis offered by the director is found to be sound and correct. The director's decision goes on to state:

Scientific and technical papers and articles submitted for publication in various journals and publications are routinely subjected to peer review. Normally the journal's editorial staff will enlist the assistance of numerous professionals in the field who agree to review submitted papers. In this instance, the evidence indicates the beneficiary may have been the initiating party as it appears the various journals utilized the beneficiary as a reviewer as a result of the beneficiary offering his services as a reviewer. There is no evidence that the beneficiary was sought out because of his international recognition as an expert in the field. Indeed, it is common for a publication to ask several reviewers to review each paper and to offer comments. The publication may accept or reject any reviewer's comments in determining whether to publish or reject submitted papers.

On appeal, counsel asserts that the beneficiary "has an impressive record of peer review, and has served as a peer reviewer" for *Computing Reviews* and various other journals published by the IEEE Press and SPIE. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As previously noted, the record contains no first-hand documentary evidence showing that the beneficiary had completed manuscript reviews as of the petition's filing date. The beneficiary's subsequent decision to offer his services as a peer reviewer of manuscripts reflects his involvement in a routine process by which articles are selected for publication in scholarly journals. Occasional participation in peer review of this kind does not demonstrate that the beneficiary has achieved international recognition as outstanding in his academic field. Aside from the issues raised related to the commonality of peer review (as applicable to the beneficiary's documentation) and the date that the evidence presented under this criterion came into existence, the petitioner's documentation still lacks evidence to offer support

for counsel's assertion that the beneficiary "has an impressive record of peer review." The petitioner's response to the director's request for evidence included correspondence asking the beneficiary to review an article entitled "Block Matching Displacement Estimation: A Sliding Window Approach," but no documentary evidence confirming that he had actually *completed* the review. Nor did the response include any documentary evidence of completed manuscript reviews for the IEEE Press or SPIE.

It has not been shown that the numerous other individuals who volunteer their services and are selected as reviewers of manuscripts for *Computing Reviews*, IEEE Press, and SPIE are all internationally renowned, or that the beneficiary is among a select group. Without evidence that sets the beneficiary 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 beneficiary meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

The petitioner submitted witness letters from individuals who all have direct ties to the beneficiary. In order to qualify for the classification sought, however, the petitioner must demonstrate that the beneficiary is recognized not only by those institutions where he has studied or worked, but throughout the international research community as a whole.

In addressing the beneficiary's scientific and academic contributions, [REDACTED] Vice [REDACTED] states:

A major goal of the current research at [REDACTED] an organization with documented achievements in the field, is image-guidance systems for stereotactic radiosurgery. [The beneficiary] has played a central role in this effort, and will undoubtedly continue to advance Accuray's research goals. [The beneficiary's] numerous significant original research contributions while at Accuray have included directing research into six-degrees-of-freedom tracking algorithm for the head, and algorithms for identifying and tracking fiducials implanted in the human body. In addition, [the beneficiary] led the effort to incorporate these algorithms into an industrial version of Accuray's CyberKnife product, extending the product capabilities to treatment of cancerous tumors anywhere in the human body. The continuation of this research is critical not only to Accuray but also to similar scientific and academic institutions and their researchers worldwide.

Prior to his research at [REDACTED] [the beneficiary] conducted research in satellite imaging and synthetic aperture radar (SAR) image processing as a Project Engineer at [REDACTED] Richmond, British Columbia, Canada from 1992 to 2000. In his research at these institutions, [the beneficiary] played a key role in the development of Block Adaptive Quantization for the compression of SAR data, efficient

algorithms for computing SAR images, and new methods of computing [REDACTED] frequency shift in SAR images.

The fact that the beneficiary is credited with developing tracking algorithms and incorporating them into an industrial version of [REDACTED] system carries little weight. Of far greater importance in this proceeding is the importance to the greater field of the beneficiary's work. In this case, we must consider the significance, not just the originality, of the beneficiary's engineering research. There is no independent evidence to support the conclusion that the beneficiary's individual work for [REDACTED] has had a substantial impact on the overall field. Counsel contends that the beneficiary has made such a showing but offers no support except for the statements from individuals having direct ties to the beneficiary. These statements do not establish that academic scholars outside of the beneficiary's professional contacts share similar opinions regarding the significance of his work.

The individuals offering letters of support include [REDACTED] Chief Executive Officer and founder of [REDACTED] Human Resource Manager, two individuals who worked with the beneficiary at [REDACTED], his Ph.D. supervisor from the [REDACTED] who states that he has "personally known and worked with [the beneficiary] for the last 2.5 years on the CyberKnife System" and who has collaborated with [REDACTED] throughout the last decade), and [REDACTED] Director of Radiological Physics at the Newport Diagnostic Center (a customer site that utilizes Accuray's CyberKnife technology).

In addressing the witness letters, the director's decision stated:

This range of witnesses does not demonstrate that the beneficiary is well known outside of the organizations where he worked. Clearly, these individuals do not offer a wholly unbiased opinion regarding the contributions to the field which have been made by this beneficiary.... Despite claims to the contrary, the evidence does not show that the work of the beneficiary has been recognized as outstanding except by others who collaborated with or employed the beneficiary.

On appeal, counsel states:

[T]he Service's assertion that all support letter writers are affiliated with or have collaborated with the beneficiary is incorrect. For example, there is no indication that [REDACTED] Ph.D., Director of Radiological Physics at [REDACTED] California, is or was affiliated with [the beneficiary's] current or past employers, or collaborated with him on various projects.

Counsel seems to have overlooked information appearing on the second page of two different versions of the beneficiary's resume. Under the heading of "Key Project Experience," both of the beneficiary's resumes state: "Project Manger for the field validation of new image guidance techniques at two customer sites [REDACTED] and [REDACTED]. Additional documentation contained in the record shows that the [REDACTED] is one of

a few institutions in the United States that utilize [REDACTED] technology. Given that [REDACTED] has been the [REDACTED] since 1994 and that the beneficiary's resume indicates that he has been the Project Manager at that "customer site" since 2000, we find counsel's assertion that there is no "affiliation or collaboration" between the beneficiary and [REDACTED] to be completely unsubstantiated.

The petitioner has not provided evidence that the beneficiary's research, to date, has consistently attracted significant attention from independent engineering researchers from throughout the world. In fact, all of the petitioner's witnesses are from localities where the beneficiary has studied or worked and therefore they fail to demonstrate that the beneficiary's work is "internationally recognized" as outstanding. An individual who is recognized internationally as outstanding should be able to produce ample unsolicited materials reflecting such a reputation. In this case, the beneficiary has not demonstrated any specific scientific or scholarly contributions that have been unusually influential or renowned within his field. While the witnesses have asserted in general terms that the beneficiary is an outstanding researcher, he appears to have earned a reputation only among individuals with whom he is professionally acquainted. The absence of substantial independent evidence raises doubt as to the extent of the beneficiary's recognition.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

We withdraw the director's finding that the petitioner's evidence satisfies this criterion. The beneficiary's publication of scholarly articles is not automatic evidence of international recognition; we must also consider the academic field's reaction to those articles. Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the beneficiary's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the beneficiary himself has cited sources in his own articles. This is a universally accepted practice among academic scholars and researchers. Numerous independent citations would provide firm evidence that other researchers have been influenced by the beneficiary's work. Their citation of his published articles would demonstrate their familiarity with his work. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the international research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact - and international recognition - a researcher's work would have, if that research does not influence the direction of future research. In this case, the limited number of independent citations provided (less than twenty over a research career spanning well over a decade) would not elevate the beneficiary to a level of international recognition, particularly since the beneficiary has authored several papers.

Furthermore, evidence showing the extent of the circulation of his published material (in terms of copies distributed beyond the country of publication) has not been provided.

Beyond the beneficiary's failure to satisfy at least two of the regulatory criteria 8 C.F.R. § 204.5(i)(3)(i), we note that the record contains no formal job offer letter, i.e., a letter from the petitioner addressed to the beneficiary that sets forth a binding offer of employment, including specific terms thereof. The initial submission includes a letter from [REDACTED] dated January 31, 2002 and addressed to the "Immigration and Naturalization Service" which, over the course of thirteen pages, discusses [REDACTED] research achievements, the beneficiary's duties and responsibilities, his research background, and the beneficiary's eligibility under the regulatory criteria. This letter indicates that the beneficiary is employed by [REDACTED] but the letter is not an offer of employment addressed to the beneficiary; it is a letter to the "Immigration and Naturalization Service" which discusses (among other things) the petitioner's intention to continue employing the beneficiary in a research position. The letter does not constitute a formal offer of employment; indeed, it implies that the beneficiary has already accepted an offer made earlier. The record does not contain any documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a job offer from the petitioner to the beneficiary.

In this case, the petitioner has shown that the beneficiary is a talented engineering researcher/software engineer, who has won the respect of individuals from the institutions where he has studied and worked, while possibly securing some minimal degree of international exposure for his work. The record, however, stops short of elevating the beneficiary to an international reputation as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

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.