



b5

U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: Texas Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

JUN 21 2001

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



Identification 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 which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability. The petitioner, a non-profit research and consultation facility, seeks to employ the beneficiary as a software engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as an alien of exceptional ability, and therefore the director made no determination regarding the petitioner's claim that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note that the regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a

college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The beneficiary states that he has completed the coursework for an M.S. degree from the University of Missouri, Kansas City, but as of the petition's filing date, the university had not actually conferred any degree on the beneficiary. The record contains a letter from the beneficiary's graduate advisor, indicating that the beneficiary will receive a master's degree "[u]pon completion and defense of his thesis." The letter is dated April 26, 1995, nearly three years before the petition's March 1998 filing date. An individual who has completed his coursework but not his thesis has not fulfilled the degree requirements.

The only actual degree that the beneficiary held as of the petition's filing date is a baccalaureate in Electronics and Communications from the University of Mysore in India. Counsel notes that the beneficiary graduated "with distinction."

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

A license to practice the profession or certification for a particular profession or occupation.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

Evidence of membership in professional associations.

The petitioner does not claim that the beneficiary satisfies the above three criteria. The beneficiary claims no licenses or memberships, and only seven years of full-time employment as of the petition's March 1998 filing date. The record offers no means by which to compare the beneficiary's salary to the remuneration paid to others in the field.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Counsel asserts that the beneficiary "has received national awards for excellence in his field." Every one of these awards is a

university award, recognizing the beneficiary's achievements not as an engineer but as an undergraduate college student (the most recent award is dated August 1990, just before the beneficiary began his graduate studies).

8 C.F.R. 204.5(k)(3)(iii) states "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." Counsel cites a variety of evidence under this provision. Among the "comparable evidence," counsel cites "numerous national awards for excellence" which the petitioner has received. These awards, however, constitute recognition for achievements and significant contributions and thus already fall under one of the existing criteria.

Counsel also contends that published articles, and citations of those articles, further demonstrate the beneficiary's exceptional ability. The petitioner submits a copy of an article from Signal's January 1998 issue. The article's sole credited author is [REDACTED]. A letter from Mr. [REDACTED] thanks the beneficiary for contributing to the five-page article, which contains three paragraphs that mention the beneficiary. The petitioner also submits two scholarly articles that contain citations of the beneficiary's work. Both of these citations are from the military research group that commissioned the beneficiary's research in the first place. While heavy citation of one's work certainly demonstrates an unusual degree of influence on the field, the petitioner has not shown that two such citations is so unusual that the cited author stands out from his peers.

The petitioner submits several documents which counsel deems to be "published articles." The majority of these documents appear to be internal or private documents and reports; they bear inscriptions such as "Informal White Paper" and "Technical Report," with the legend "Prepared for:" at the bottom of the cover page, followed by short lists of names and organizations. There is no evidence that these reports have been published in any journal or book. Privately printed reports, prepared specifically for internal circulation or distribution to specified clients, are not publications. The preparation of technical or performance reports in this manner would appear to be a fairly routine duty in the beneficiary's profession, barring evidence that engineers who prepare such reports are not usually found in the field.

Apart from the above unpublished reports, the petitioner has submitted one published article, and a letter attesting that the beneficiary gave a presentation at a conference. The petitioner has not shown that this level of published output is exceptional, and, as noted above, the only documented citations of the beneficiary's work are from the individuals who commissioned the cited research.

In response to a request for further evidence, the petitioner submitted an essentially complete copy of the initial submission, along with a small number of new witness letters addressing the national interest waiver.

The director denied the petition, stating that the beneficiary had satisfied only two criteria of exceptional ability (evidence of recognition and evidence of a degree in the field). Even this evidence is doubtful, because according to the Department of Labor's Occupational Outlook Handbook, 1998-1999 edition, page 111, indicates that "a bachelor's degree is virtually a prerequisite for most employers" seeking a computer professional. If a baccalaureate degree is a near-universal requirement, then the fact that the beneficiary holds such a degree does not indicate a degree of expertise significantly above that ordinarily encountered in the field. The petitioner may note that the beneficiary earned that bachelor's degree with honors, but we could also note, with regard to the beneficiary's master's studies, that the beneficiary has so far taken at least eight years to complete a degree which most students complete in three years.

The director accepted that "the beneficiary has been recognized for achievements and significant contributions to the industry or field," but did not elaborate on the evidence which the director found to support that conclusion.

On appeal, counsel submits yet another copy of the initial submission. These documents, already considered above, add nothing to the record in their second and third iterations. Counsel maintains that the director failed to consider the petitioner's evidence under 8 C.F.R. 204.5(k)(3)(iii), which allows for the submission of comparable evidence if the six stated criteria "do not readily apply to the beneficiary's occupation." Counsel does not explain how these criteria do not readily apply to the occupation of a software engineer. Of the six stated criteria, the only one which does not clearly apply to the beneficiary's field is the criterion pertaining to licensure or certification, but even this criterion could be applicable if there exists a form of voluntary certification about which we are unaware.

The petitioner has not shown that the six criteria do not readily apply to the beneficiary's occupation. The beneficiary's own apparent inability to meet those criteria does not show that software engineers, in principle, cannot meet them.

For the above reasons, the petitioner has not established that the beneficiary qualifies as an alien of exceptional ability, as the pertinent regulations define that classification. At no point has the petitioner claimed that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, or provided the direct evidence of five years of post-

baccalaureate employment which would be necessary to establish such a claim in the absence of an actual advanced degree. The beneficiary's own resume, and statements from individuals not involved with the beneficiary's prior employment, serve as claims rather than evidence of that employment.

Because neither the director's decision nor the petitioner's appeal contain a substantive discussion of the national interest waiver, there is no need to explore that issue in this appellate decision.

On the basis of the evidence submitted, the petitioner has not established that the beneficiary has demonstrated a degree of expertise significantly above that ordinarily encountered among software engineers. The petitioner has neither met at least three of the regulatory criteria, nor established that those criteria do not readily apply to the beneficiary's occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.