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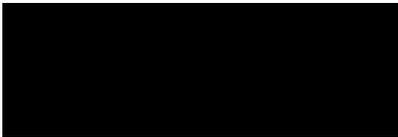
MAY 28 2004

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:

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

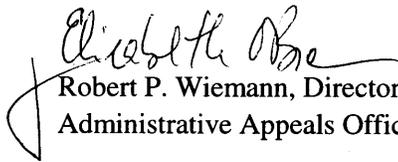
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an engineering consulting partnership. It 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 a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a project engineer. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II classification. The director found the petitioner had not established that the beneficiary has earned the widespread acclaim and international recognition necessary to qualify for Schedule A, Group II classification. The director also determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage.

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.

8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

(i) General. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

Prior to establishing eligibility for labor certification under Schedule A, Group II, the petitioner must establish that the beneficiary is eligible for the immigrant classification sought. Under section 203(b)(2) of the Act, a petitioner must establish that the beneficiary is a member of the professions holding an advanced degree or its equivalent or an individual of exceptional ability in the sciences, arts, or business. It appears from the record that the petitioner seeks to classify the beneficiary as an alien of exceptional ability. This issue is moot, however, because the record establishes that the beneficiary holds a Ph.D. in Mining and Earth Systems Engineering from the Colorado School of Mines. The beneficiary's occupation falls within the pertinent regulatory definition of a

profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree. The remaining issues to be determined are whether the beneficiary qualifies for Schedule A, Group II designation and whether the petitioner has the financial ability to pay the beneficiary's proffered wage.

In order to establish eligibility for Schedule A designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor*. This petition seeks to classify the beneficiary as an alien with exceptional ability in engineering. 20 C.F.R. § 656.22(d) provides:

An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines ten criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.22(d), the evidence submitted to meet these criteria should reflect "widespread acclaim and international recognition." The petitioner has submitted evidence that, counsel claims, meets the following criteria.

Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.

In order to demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. In addition, it is clear from the regulatory language that members must be selected at the international, rather than the local, level. Finally, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted a certificate verifying the beneficiary's regular membership in the Association of Engineering Geologists. According to the Association of Engineering Geologists website at www.aegweb.org, the following is the criteria for regular membership:

Applicants for this classification shall hold a degree in geology, engineering geology or geological engineering, or a degree in a related professional field with 30 semester-hours of credit in the geosciences. In addition, an applicant shall be practicing in the field of Engineering Geology, Environmental Geology or Hydrogeology.

Possessing the requisite educational degree and practicing in the field is all that is required for admission into this Association. Based on the evidence presented, it has not been shown that the beneficiary's membership required outstanding achievement or that he was evaluated by international experts in consideration of his membership.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

We withdraw the director's finding that the petitioner's evidence satisfies this criterion. The witness letters presented under this criterion are all from individuals who have direct ties to the beneficiary. In order to qualify for the classification sought, however, the petitioner must demonstrate that the beneficiary's research contributions are recognized not only by individuals with whom he has studied or worked, but throughout the greater international community of engineering professionals. The evidence presented here is not adequate to show that the beneficiary's work has earned him widespread acclaim at the international level.

James Friant, President, Excavation Engineering Associates, and former Research Professor at the Colorado School of Mines, states:

[The beneficiary] enrolled in the Master's program at the Colorado School of Mines (CSM) in 1993 and continued on, receiving his doctorate in 2000. During this time, [the beneficiary] also worked part time at the Earth Mechanics Institute Laboratory.

As a Research Professor at CSM during this same period, I was able to observe his competence.... In fact, [the beneficiary] participated in some of my research projects.

[The beneficiary] took a specific interest in the well known CSM computer model which sets tunneling equipment parameters and predicts performance in various rock conditions. His efforts included a detailed study of rock mass properties such as joints and foliation, and how to insert modifiers into the computer model to improve accuracy. In its current advanced state, this model is recognized industry wide as the most accurate model in existence. [The beneficiary's] work contributed to the CSM reputation, and in attracting commercial contracts for the laboratory.

We accept that the beneficiary assisted in providing incremental improvements to CSM's existing computer model, but the record does not show that the beneficiary's own contribution rises to the level of an engineering contribution of major international significance.

Professor of Mining Engineering, Colorado School of Mines, states that he and the beneficiary "have worked together for over two years." Dr further states:

[The beneficiary's] work represents a significant contribution to mining and civil construction. He has given users of tunnel boring machines a more accurate tool to predict their performance. The predictive tool gives construction and mining companies a more economical means to perform the task of constructing tunnels. Manufacturers of these machines have built machines that performed better using the tools. [The beneficiary] has proposed a significant and outstanding method for predicting the performance of tunnel boring machines.

Dr. [REDACTED] does not identify the manufacturers that have successfully utilized the beneficiary's predictive tool, nor does the record contain evidence showing that the beneficiary's work is widely acclaimed among various manufacturers of tunnel boring machinery.

[REDACTED] President, NSA Engineering, Golden, Colorado, states:

I have known [the beneficiary] since 1993 through our association with the Earth Mechanics Institute (EMI) at the Colorado School of Mines, where he was completing his graduate work in Mechanical Excavation under Professor [REDACTED] and I was conducting work as a Research Professor on the Yucca Mountain Nuclear Waste Disposal excavation methods research group at EMI.

[The beneficiary's] work in the area of dust control and performance prediction for Tunnel Boring Machines (TBM) and other mechanical excavators is of critical importance in the development of cutting technology. His development of a boreability index for a performance prediction model based on geo-technical factors for TBM's is unique in the industry. Both project owners and equipment manufacturers have used this mathematical model on projects to improve productivity and performance.

Once again, the various "project owners and equipment manufacturers" are not specifically identified. Nor does the record contain evidence indicating that the industry as a whole hails the beneficiary's boreability index as a major engineering contribution.

Dr. [REDACTED] Professor, Department of Mining and Earth Systems Engineering, Colorado School of Mines, states: "I have known [the beneficiary] since 1992 as he enrolled in the Masters program and I was his thesis advisor. Having advised many graduate students in my 25 year teaching career, I can say that [the beneficiary] has been one of the most outstanding students I have known." University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. Dr. [REDACTED] observations regarding the beneficiary's capability as a graduate student offer no meaningful comparison between the beneficiary and experienced professionals in the engineering field who have long since completed their educational training.

Dr. [REDACTED] further states:

During his Master studies, from September 1992 through December 1995, [the beneficiary] made significant research contributions in the field of underground construction and rock excavation. His thesis subject dealt with the construction of the Department of Energy Yucca Mountain Nuclear Waste Repository, a program of significant national importance and need. As Yucca Mountain represents the first geographic disposal site ever built for high-level nuclear waste storage, the project presented unique challenges to the entire engineering and scientific profession.

* * *

The Earth Mechanics Institute of the Colorado School of Mines has employed [the beneficiary] as a Research Associate. I have been his supervisor during the entire period. His duties as a Research

Associate included: research in the area of testing and physical modeling of rock properties, rock fragmentation and performance optimization, and prediction and cost estimation for mechanical excavators including tunnel boring machines and road headers through computer modeling.

[The beneficiary's] association and work with my institute, considered the world's foremost research establishment in the area of rock excavation and underground construction, definitely includes innovative technology. [The beneficiary's] work made a significant contribution to U.S. economic competitiveness of infrastructure development.

Dr. [REDACTED] letter offers a general description of the beneficiary's past research activities, but it does not identify a specific contribution of major international significance directly attributable to the beneficiary. The beneficiary's influence on the field has not been shown to extend beyond the scope of his immediate projects.

[REDACTED] Chairman, National Development Consultants, Lahore, Pakistan, states:

During the period from fall of 1999, through July 2000, [the beneficiary] worked under my supervision on the Pehur High Level Canal Project to investigate mechanical means to excavate hard rock at the site of the project. This project...involved construction of a pressure tunnel, proposed for power generation at its downstream end. [The beneficiary] played a very important role in this research effort. His contributions in the field of modeling were certainly on the leading edge of the technology. Without this ability to model the detailed characteristics of dynamic mechanical systems, the performance of the large cutting machine could not have been successful. [The beneficiary] is one of the very few experts who had done this modeling successfully.... His ability to use his simulation to accurately predict the cutting rate of the full-size cutting machine in hard rock shows his outstanding skill in the rock excavation industry.

The issue here is not the beneficiary's expertise or skill level in mechanical modeling, but, rather, whether his accomplishments would qualify as internationally acclaimed contributions in the engineering field. While the beneficiary may have benefited the Pehur High Level Canal Project, it has not been shown that his own methodologies have had a substantial international impact throughout the industry.

Professor [REDACTED] Professor and Head of the Mining Engineering Department, Colorado School of Mines, states:

[The beneficiary] has written several papers, which have been accepted for publication in the 67th and 68th Annual Conventions of the Pakistan Engineering Congress, and in the *Engineering News Journal*, the quarterly publication of the Pakistan Engineering Congress. In addition, the American Society of Civil Engineers has accepted another paper for publication in the 2002 Colorado Geotechnical Conference Proceedings.

The beneficiary's co-authorship of published materials and conference papers may demonstrate that his engineering efforts yielded some useful and valid results; however, it is apparent that any article, in order to be accepted for publication, must offer new and useful information to the pool of knowledge. It does not

follow that every individual whose work is accepted for publication has made a major contribution to his field. While the record establishes that the beneficiary has co-written published articles and conference presentations, the record contains no objective evidence (such as citations) to establish the extent to which his work has affected the work of other engineering scientists.

In this case, the petitioner must demonstrate not only that the beneficiary is a particularly well-qualified engineer, but that his work has had a major impact at the international level. After reviewing the evidence presented in this case, we find that the petitioner has not provided adequate evidence to show that the beneficiary's work, to date, has consistently attracted widespread acclaim and international recognition. Rather, the beneficiary's reputation appears limited to his educational and professional acquaintances. While letters from those close to the beneficiary certainly have value, such letters do not show, first-hand, that the beneficiary's work is attracting attention on its own merits, as we might expect of engineering methodologies that are of major international significance. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of the beneficiary's published findings, would be more persuasive than the subjective statements of witnesses selected by the petitioner. The beneficiary's graduate work may have added to the general pool of knowledge in the engineering field, but it has not been shown that the greater field views this work as a contribution of major significance.

In conclusion, we find that the evidence presented under this criterion is not adequate to demonstrate that the beneficiary has earned international recognition or widespread acclaim for his engineering contributions.

Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

The record contains evidence showing that the beneficiary "presented research papers at the 67th and 68th Annual Conventions of the Pakistan Engineering Congress." Also provided was evidence showing that the beneficiary published an article in *Engineering News*, "A Quarterly Journal of the Pakistan Engineering Congress." Ghulam Hussain, Secretary, Pakistan Engineering Congress, states that the "*Pakistan Engineering Congress Proceedings* is circulated to research and academic societies internationally." The record, however, contains no evidence to support this assertion. Without evidence of their significant international distribution outside of Pakistan, the petitioner has failed to show that the beneficiary's articles in these publications are adequate to satisfy this criterion.

In response to the director's request for evidence, the petitioner submitted an affidavit from James Gill, Co-Chairman of the Geotechnical Group Steering Committee of the Colorado Section of the American Society of Civil Engineers. He states:

I am on the committee that accepted his paper, "Influence of Rock Mass Parameters on the performance of TBM for Hard Rocks," which he co-authored with [REDACTED]. This paper was accepted for publication in our recent biennial Geotechnical Conference Proceedings entitled: "More Than Just Lines on a Map," Geotechnical Engineering in Transportation, Denver, Colorado, October 4, 2002."

This paper was published subsequent to the petition's filing date of January 25, 2002. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). New circumstances that did not exist as of the petition's filing date cannot retroactively establish eligibility as of that date.

We note here that the very existence of published work by the beneficiary is not automatic evidence of international recognition; we must also consider the engineering field's reaction to those articles. When judging the influence and impact that the beneficiary's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. 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 referenced numerous sources in his own articles. This is a universally accepted practice among engineering scholars and researchers. Numerous independent citations would provide firm evidence that others 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 record contains no evidence showing that the beneficiary's published work is heavily cited.

The documentation submitted in support of a claim of Schedule A exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The petitioner has shown that the beneficiary is a talented project engineer, who has won the respect of his collaborators, employers, and professors. The record, however, stops short of elevating the beneficiary to having widespread acclaim and international recognition. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

Beyond the beneficiary's failure to satisfy at least two of the regulatory criteria at 20 C.F.R. § 656.22(d), the director found the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is January 25, 2002. The beneficiary's annual salary as stated on Form ETA-750A is \$60,000 per annum.

On January 16, 2003, the director issued a Request for Evidence instructing the petitioner to submit evidence of its ability to pay the proffered wage in the form of complete federal tax returns, copies of annual reports, or audited financial statements dated from 2001 to the present. The petitioner was also requested to submit a copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2001.

In response, the petitioner submitted a complete copy of IRS Form 1065, U.S. Return of Partnership Income, for the tax year ending 2001, the beneficiary's Form W-2 for 2001 reflecting earnings of \$27,542, and a copy of the beneficiary's "Employee Earnings Record" for 2001.

In determining the petitioner's ability to pay the proffered wage, CIS (Citizenship and Immigration Services) will examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. According to Form ETA-750B, the beneficiary has been working for the petitioner since August 2001. This is consistent with the "Employee Earnings Record" for 2001 which shows that from August 4, 2001 through the end of the year the beneficiary received a biweekly salary of \$2,308 or \$60,008 per annum. After a review of the beneficiary's "Employee Earnings Record" and the Form W-2 for 2001, we find that the evidence presented is adequate to demonstrate the petitioner's ability to pay the beneficiary's wage.

Therefore, we withdraw the director's finding that the petitioner had not established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to the present. Regardless, it remains that the petitioner has not established that the beneficiary has earned the widespread acclaim and international recognition necessary to qualify under Schedule A, Group II designation.

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.