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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

[redacted]

Public Copy

File: EAC-01-002-52586 Office: Vermont Service Center Date: MAY 22 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(O)(i)

IN BEHALF OF PETITIONER:

[redacted]

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 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

Mark L. Rosenberg

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner in this matter is an information systems firm. The beneficiary is a computer software engineer. The petitioner seeks O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), as an alien with extraordinary ability in science, in order to continue to employ him in the United States as a staff software engineer for a period of three years.

The director denied the petition finding that the petitioner failed to establish that the beneficiary met the regulatory standard for an alien with extraordinary ability in science which requires recognition as being at the very top of the field of endeavor.

On appeal, counsel for the petitioner asserted that the beneficiary meets the requisite three regulatory criteria for demonstrating extraordinary ability and that he is among the top 20% of IBM software engineers. Counsel requested reconsideration of the decision.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The issue raised by the director in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien of extraordinary ability in the sciences.

8 C.F.R. 214.2(o)(3)(ii) defines, in pertinent part:

> *Extraordinary ability in the field of science, education, business, or athletics* means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

8 C.F.R. 214.2(o)(3)(iii) states, in pertinent part, that:

> *Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

8 C.F.R. 214.2(o)(5)(i)(A) requires, in pertinent part:

> Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The beneficiary is a native and citizen of India who was last admitted to the United States as an H-1B temporary worker authorized to be employed by the petitioner. The director thoroughly reviewed the beneficiary's qualifications and experience in his decision. The director concluded that the beneficiary was a qualified software engineer, but that it had not been established that he had achieved recognition as being at the very top of the field of endeavor pursuant to 8 C.F.R. 214.2(o)(3)(ii).

Counsel argued on appeal that the beneficiary serves in a critical capacity for an organization with a distinguished reputation, that he has made significant contributions to the field, and that he is a member of a professional association and thereby satisfies three of the criteria at 8 C.F.R. 214.2(o)(3)(iii)(B). Counsel further asserted that [redacted] employs only the best software engineers and that the beneficiary is among the top 20% of its engineers as reflected in the proffered salary of $100,000. Counsel argued that this is sufficient to establish that the beneficiary is at the top of the field.

After a review of the record, it cannot be concluded that the grounds for denial of the petition have been overcome. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. In order to establish eligibility for this classification, the statute requires proof of "sustained" national or international acclaim and a demonstration that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

While it may be arguable that the beneficiary's achievements address at least three of the regulatory criteria, those criteria are initial evidentiary requirements and are not sufficient to establish eligibility for the benefit sought. The petitioner submitted evidence of the beneficiary's recognition within the IBM software division. However, the petitioner did not submit evidence of national or international acclaim such as awards in the field, professional publications, membership in associations in the field which require outstanding achievements of its members, original contributions to the field of major significance, or that he has commanded a high salary relative to the filed of endeavor.

Furthermore, it is concluded that the petitioner's claim that the beneficiary is among the "top 20%" of its software engineers does not constitute recognition of being at the "very top" of the field

of endeavor. The regulation specifically states that this is reserved for "one of the small percentage who have arisen to the very top." 8 C.F.R. 214.2(o)(3)(ii). While the term "very top" is not explicitly or quantitatively defined, it must be concluded that the top 20% of a single company, however large, does not satisfy the requirement of a "small percentage" at the very top of the entire field of endeavor on its face. For these reasons, it must be concluded that the petitioner has failed to overcome the grounds for denial of the petition.

The denial of this petition is without prejudice to the petitioner pursuing any other immigration benefit for which the beneficiary may be eligible.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.