

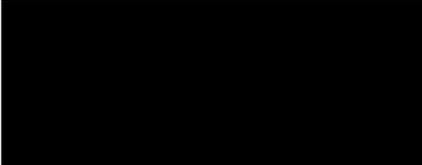


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U.S. Department of Justice
Immigration and Naturalization Service

to...
prevent...
invasion of...
TRACY

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



File: WAC-01-215-50116 Office: California Service Center Date: JUL 18 2002

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

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 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]

Public Copy

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 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 that 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
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner in this matter is a computer software development company. The beneficiary is a software engineer. The petitioner seeks O-1 classification of the beneficiary, as an alien with extraordinary ability in science under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), in order to employ him in the United States for a temporary period of three years as a "user interface designer" at a salary of \$100,000 per year.

The director denied the petition finding that the petitioner failed to establish that the beneficiary met the regulatory standard for classification as an alien with extraordinary ability in science.

On appeal, counsel for the petitioner argued that the director failed to consider the significance of the evidence submitted and argued that the beneficiary does satisfy the appropriate standards.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "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.

It must first be noted that the director considered the petition, in part, under the regulatory criteria for an alien with extraordinary ability in the arts. A software engineer is usually considered to be engaged in computer science and the pertinent regulations for extraordinary ability in science should be applied. There is no indication in the record that the petition should be considered under the criteria for the arts, rather than the criteria for science.

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.

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 Germany who last entered the United States on March 2, 2000, as a B-1 visitor. The record reflects that he was previously employed in the United States. However, the petitioner did not provide a comprehensive description of his education and employment history.

In the decision, the center director extensively reviewed the petitioner's claims regarding the beneficiary's accomplishments as a software engineer. The director found the beneficiary ineligible for O-1 classification based on finding insufficient documentation to show that he is "at the very top" of his field pursuant to 8 C.F.R. 214.2(o)(3)(ii) or that he has had the requisite "sustained acclaim" in the field of software engineering required by the statute.

On appeal, counsel disputed the director's analysis and argued that the evidence is sufficient to establish eligibility. Counsel argued that the beneficiary had his own software company in Germany and that he developed several innovative and successful software products. Counsel asserted that the beneficiary has received awards, including an award as "software engineer of the year" from an organization in Germany, and has received press coverage of his achievements in the field.

After careful review of the record, it must be concluded that the petitioner has failed to overcome the director's objections. The basic facts in this matter are not in dispute. The alien is a successful software engineer and has achieved a degree of national acclaim in Germany. The regulatory criteria at 8 C.F.R. 214.2(o)(3)(iii)(B) are guidelines for acceptable evidence to establish extraordinary ability that is defined as one of the few at the "very top" of the field of endeavor.

In order to establish eligibility for classification as an alien with extraordinary ability, a petitioner must submit documentation most relevant to the particular field of endeavor. That documentation must not only recognize an individual in the field, but must recognize the individual as one of the few at the very top of the field.

For example, there are numerous prestigious industry publications that cover the field of computer and software engineering. The Service also considers salary history, significant awards, and professional publications. The petitioner failed to submit any article from a significant industry publication recognizing the beneficiary as being at the very top of the field. There is no indication that the beneficiary has any professional publications in a significant scientific peer reviewed journal. Regarding the "software engineer of the year" award, the petitioner failed to demonstrate the status of the organization granting the award or the status of the award in the field. While the petitioner did not provide information regarding the beneficiary's salary history, the proposed salary of \$100,000 is not regarded as "high" in relation to the very highest salaries paid to software engineers in the field.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. See 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for extraordinary ability 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 record does not show that the beneficiary's achievements have been recognized as rising to this level.

The denial of this petition is without prejudice to the filing of a new petition under alternate provisions of the Act.

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.