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APR 14 2004

FILE: EAC 03 244 55394 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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)

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunications company, seeking O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in science, in order to employ him in the United States for a period of three years as a member of its technical engineering staff.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is an alien of extraordinary ability.

On appeal, counsel for the petitioner submitted a brief arguing that the beneficiary qualifies for O-1 classification.

Section 101(a)(15)(O)(i) of 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.

The sole issue to be addressed in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien with extraordinary ability in science as defined by the statute and the regulations.

The regulation at 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.

The regulation at 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.

The beneficiary is a 33-year old native and citizen of the People's Republic of China (PRC). He received a bachelor's degree in electrical engineering from the Harbin Institute of Technology, Harbin, PRC in 1992. He completed a Master of Science in Engineering at the University of Pennsylvania, Philadelphia, Pennsylvania in 1996. He has been working for the petitioner since 1998. The petitioner states that the beneficiary has developed an international reputation in the field of wireless communications and international standardization over the past seven years.

After reviewing the evidence submitted in support of the petition, and in reply to the director's request for additional evidence, the director found that the petitioner had failed to establish that the beneficiary had demonstrated the type of sustained national or international recognition of his accomplishments necessary for O-1 classification.

On appeal, counsel for the petitioner asserts that the beneficiary meets all eight of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

There is no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A). Neither is the record persuasive in demonstrating that the beneficiary has met at least three of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

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

For criterion number one, counsel for the petitioner asserts that the beneficiary has filed eight patent applications. Counsel further states that the petitioner has awarded two prizes to the beneficiary for his performance.

In review, patent applications are not prizes or awards for excellence. The petitioner failed to establish that the two prizes granted to the beneficiary are internationally or nationally recognized awards for excellence in the field. The prizes are institutional awards. The beneficiary did not compete with the greater field of engineers for the prizes. While the petitioner is a large corporation, its awards are limited to its employees in recognition of superior accomplishment on the job. The beneficiary does not satisfy this criterion.

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.

For criterion number two, the petitioner asserts that the beneficiary satisfies this criterion by virtue of his “senior membership” in the Institute of Electrical and Electronic Engineers (IEEE). The petitioner asserts that the IEEE requires outstanding achievements of its senior members. According to the IEEE’s website, candidates for senior membership:

shall have been in professional practice for at least ten years and shall have shown significant performance over a period of at least five of those years, such performance including one or more of the following:

- Substantial engineering responsibility or achievement
- Publication of engineering or scientific papers, books, or inventions
- Technical direction or management of important scientific or engineering work with evidence of accomplishment
- Recognized contributions to the welfare of the scientific or engineering profession
- Development or furtherance of important scientific or engineering courses in a program on the “reference list of educational programs”
- Contributions equivalent to those [listed above] in areas such as technical editing, patent prosecution, or patent law, provided these contributions serve to advance progress substantially in IEEE-designated fields.

According to the evidence on the record, 7% (or 26,740) of the IEEE’s 382,000 members hold the grade of Senior Member. The evidence does not show that the IEEE requires outstanding achievements of its senior members, as judged by recognized national or international experts in the field. The beneficiary does not satisfy this criterion.

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.

For criterion number three, the petitioner asserts that the beneficiary’s work has been cited on eighteen occasions. Citations are not published material about the beneficiary; rather, they are references to the beneficiary’s work generally appearing in an article or articles that are about that researcher’s work, and listed as a reference to support such research. The beneficiary does not satisfy this criterion.

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.

For criterion number four, counsel for the petitioner asserts that the beneficiary satisfies this criterion because he gave presentations at 32 conferences, refereed papers and internal documents; and mentored new employees. There is no independent corroboration for the assertion that the beneficiary refereed papers. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner failed to establish how giving presentations at conferences is equivalent to judging the work of others. The conference presentations will be considered under a separate criterion. The beneficiary’s work mentoring new employees, and reviewing internal documents does not fit into the category of judging others’ work in the field. As a member of the petitioner’s technical engineering staff, the beneficiary was not judging the work of others in the field. Further, in order to fulfill the regulatory criterion, the petitioner should establish that the beneficiary’s selection to judge the work of others is indicative or unique to the beneficiary’s national or international acclaim. While acting as a referee of internal papers of the petitioner, the beneficiary was merely performing his job. The beneficiary does not satisfy this criterion.

Evidence of the alien's original scientific, scholarly, or business related contributions of major significance in the field

For criterion number five, counsel for the petitioner asserts that the beneficiary made a significant original contribution of major significance by filing eight patent applications. The granting of a patent may document that an invention or innovation is original, but not every patented invention or innovation constitutes a significant contribution in one's field. The petitioner failed to demonstrate that the beneficiary's patent applications have been adopted or applied in the field or that the technology has otherwise made a significant contribution to the field.

While the beneficiary has published the results of his research, the record does not show that his research is considered of "major significance" in the field. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed.

The petitioner provided CIS with numerous testimonials about the value of the beneficiary's work and the nature of his contributions. Dr. Satyashila Heeralall, a telecommunications expert, wrote that the beneficiary's "most valuable work in ITU-R¹ was on the technical research on IMT-2000 project. He was the key contributor to standardize the cdma2000 radio technology in the ITU-R Recommendation for IMT-2000 radio technology in the ITU-R." Dr. Hanli Liu, Associate Professor of Biomedical Engineering, wrote that the beneficiary's "pioneering development of a new frequency-domain photon migration spectroscopy technique has had a major impact on the field of near-infrared spectroscopy, breast tumor imaging, and optical tomography." Others asserted that the beneficiary made contributions in the areas of control structure, modes of operation and early decoding. Another noted that he made a contribution with his research on the STEALTH (Scheduled Transmission Elimination Ahead of Legacy Transmission) Mode Interference Cancellation project. Yet another cited the beneficiary's research project on Forward Link Enhancement (i.e. base station to mobile).

Dr. Heeralall failed to explain the basis for his opinion that the beneficiary was a key contributor to standardize the cdma200 radio technology. The record does not state how many individuals contributed to that standards project. It is unclear whether the beneficiary made an individual contribution or whether his work was part of a team effort. The petitioner failed to establish the significance of the standards in the petitioner's industry and of the beneficiary's contributions to the development of standards.

Dr. Kiu failed to specify how the beneficiary's techniques have had a major impact on spectroscopy, breast imaging and optimal tomography. It is unclear whether the beneficiary's techniques are original and have been utilized. Dr. George Zysman stated that the beneficiary's invention in the field of interference cancellation has "made a profound impact on the cellular industry." It is unclear how this invention has made a significant impact especially since it is the subject of a *pending* patent application.

The record contains no objective corroborating documentation in the form of media attention or contemporaneous documentation showing that the beneficiary has made a major contribution to his field of endeavor. In review, the evidence fails to show that the beneficiary has sustained national or international acclaim and recognition for major achievements in the field of engineering.

The eight regulatory criteria at 8 C.F.R. § 214.2(0)(3)(iii) reflect the statutory demand for "extensive documentation" in section 101(a)(15)(O)(i) of the Act. Opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition. By definition, national acclaim requires that the beneficiary is known beyond his employers and

¹ ITU-R is the acronym for the International Telecommunications Union Radiocommunication Sector. ITU is the internationally recognized standards body.

collaborators. The record contains little objective evidence demonstrating that the beneficiary has any notoriety in the field based on his contributions to the field.

Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.

For criterion number six, the petitioner asserts that the beneficiary satisfies the criterion by virtue of authoring two articles that were published in peer-reviewed journals and by writing 100 standards contributions papers. Scholarly publication in the beneficiary's field is common, and from those in academia, is expected. It does not follow that every scientist who publishes scholarly articles is an alien of extraordinary ability. The scientific community's reaction to published articles is a good indicator of distinction. Publication of two articles does not distinguish the beneficiary from others in his field. The petitioner provided evidence that the beneficiary's articles have been cited on 18 occasions. The citation history is not indicative of the beneficiary's distinction or his sustained national or international acclaim.

The petitioner asserts that the standards contributions papers were incorporated into the final published international telecommunications standards. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Even if the beneficiary's work were incorporated into the final edition of industry standards, it would not meet this criterion, which requires evidence of authorship of scholarly articles in the field. The record does not establish that the standards contributions papers or the beneficiary's 32 conference presentations were published in major media. The beneficiary does not satisfy this criterion.

Evidence that the alien has been employed in a critical or essential capacity for organizations and establishment that have a distinguished reputation.

The petitioner asserted that the beneficiary has been employed in a critical and essential capacity for the petitioner over the last six years. The petitioner's technology director writes:

[The beneficiary] has been employed in a critical and essential capacity, conducting leading extraordinary research, for Bell Laboratories, Lucent Technologies Inc., an organization that has a distinguished reputation, since 1996. . . . [The beneficiary's] contributions to Bell Laboratory, Lucent Technologies (patent applications, publications, conference participation, etc.) clearly evidences that he is employed there in a critical capacity.

The beneficiary has been employed as a member of a technical team for the petitioner. The evidence on the record does not indicate that the beneficiary has held a critical position within the petitioner's company. While it is evident that the petitioner values the beneficiary, he petitioner failed to establish that the beneficiary has been employed in a critical or essential capacity for the petitioner. *Ibid.*

Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services

The petitioner states that the beneficiary's annual salary of \$98,100 is high. The petitioner stated that it has had other top scientists approved for the I-140 outstanding researcher classification with salaries of \$94,900. The petitioner failed to establish the significance of I-140 outstanding researchers to cases involving aliens of extraordinary ability. The petitioner submitted documentation from the Economic Research Institute showing that the beneficiary's salary is more than 25% higher than the average salary of *scientific researchers* with seven years of experience. The petitioner should have provided more than just the average (mean) wage. Further, the survey should not be limited to those with comparable experience in the relatively early stages of their

career. To evaluate whether the salary is high, CIS needed to compare it to the median and highest wages offered nationwide to *engineers*. The beneficiary does not satisfy this criterion.

It is further noted that the evidence on the record is somewhat inconsistent. The petitioner asserted that the beneficiary is a senior member of the IEEE. The evidence submitted indicates that senior members of IEEE must have at least ten years of experience; yet, the petitioner suggests that the beneficiary's salary should be compared with those with seven years of experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel asserts that the director improperly considered that the beneficiary does not have a Ph.D., and was unfavorably inclined to grant him the visa classification based on the lack of the doctoral degree. Counsel further argues that the director improperly assumed that the beneficiary was applying for the O-1 visa because his H-1B visa period had expired. Counsel is correct that these would be improper bases upon which to base a denial. Nevertheless, as discussed above, the director based his decision on the petitioner's failure to prove that the beneficiary qualifies under the eligibility criteria for O-1 visa classification. We concur with the director's decision.

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, the statute requires evidence of "sustained national or international acclaim" and evidence 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.

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.