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**U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 20 2006
WAC 04 108 50428

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to
Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[REDACTED]

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

On appeal, counsel claims the director's denial of the petition without prior issuance of a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) was contrary to Citizenship and Immigration Services (CIS) policy. The policy memorandum cited by counsel states that a petition may be denied without a RFE or a NOID if the petition contains clear evidence of statutory or regulatory ineligibility, but that "[i]n all other instances, such as when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of a RFE or NOID is usually discretionary but strongly recommended." Memo. from William R. Yates, Assoc. Dir., Operations, CIS, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, 2-3, (Feb. 16, 2005). Issuance of a RFE or a NOID may have been warranted in this case. Yet even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel's remaining claims and the evidence submitted on appeal do not overcome the deficiencies of the petition and the appeal will be dismissed for the reasons discussed below.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

Supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international

acclaim through evidence of a “one-time achievement (that is, a major, international recognized award).” *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

On appeal, counsel takes issue with the director’s statement that “[e]ven if the alien fulfills three of the ten criteria, it does not necessarily mean that the alien has achieved sustained national or international acclaim and recognition and therefore, mandate a finding of eligibility.” Counsel cites a previous decision from this office that rejects this statement as erroneous. Pursuant to 8 C.F.R. § 103.4(c), designated and published decisions of the AAO are binding precedent on all Service employees in the administration of the Act. However, unpublished decisions, such as that cited by counsel, have no such precedential value. Nonetheless, we agree that the director misstated the regulatory standard for establishing sustained national or international acclaim pursuant to 8 C.F.R. § 204.5(h). An alien who meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3) establishes the requisite acclaim. However, the evidence submitted must not be simply relevant to the criteria, the evidence must qualitatively satisfy the criteria through extensive documentation consistent with sustained national or international acclaim. If the alien meets the other statutory criteria at sections 203(b)(1)(A)(ii) and (iii) of the Act, he or she will be found eligible for immigrant classification pursuant to section 203(b)(1)(A) of the Act.

In this case, the evidence submitted below and on appeal does not establish that the petitioner has achieved the requisite sustained acclaim. We discuss counsel’s claims and the evidence submitted under the following regulatory criteria relevant to the petitioner’s case. The petitioner does not claim eligibility under any criteria not discussed below.

(ii) 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.

Duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself, or in a substantial proportion of positions within that occupation. We cannot ignore the fact that research funding through competitive grants is inherent to many fields within the basic and applied sciences. Although prestigious grants may indicate the recognized value of the recipient’s research, they do not – in and of themselves – establish that the recipient has already accomplished outstanding achievements in his or her field.

In this case, counsel claims the petitioner meets this criterion because he is the principal investigator (PI) on an Innovative Molecular Analysis Technologies (IMAT) program grant from the National Cancer Institute of the National Institutes of Health (NCI/NIH). Although the record verifies that the petitioner is the PI on an IMAT grant received by his employer, Stanford Research Institute International (SRI), and that the IMAT program has annual meetings for PIs of grant recipients, the evidence does not establish that being a PI on an IMAT grant satisfies this criterion.

An electronic mail message concerning one of the IMAT PI meetings states that the IMAT program “supports technologies specifically of interest for cancer research, including technologies for analysis in vitro, in living cells and in the body.” The message states that as part of the NCI’s “strong commitment to support the development and application of new technologies in the nation’s continuing battle against cancer,” the annual meeting will bring together investigators funded through the IMAT program and the Applications of Innovative Technologies for the Molecular Analysis of Cancer initiative. The message continues, “This select group of investigators, while exploring diverse technologies, is focused on new approaches to the analysis of genes and gene products.” According to the message, the intent of the PI meeting is for participants to share their ideas; discuss their research, progress and potential collaborations; explain complementary NCI programs and research resources; and solicit feedback on how NCI can facilitate progress in this field.

The record contains no documentation of the eligibility requirements or selection process for IMAT grants. On appeal, the petitioner submitted additional printouts from the IMAT pages on the NCI website, but the text of the printouts is cut off on the right margin and partially illegible. Regardless, the printouts do not appear to contain any information regarding the IMAT grant selection process or criteria. On appeal, counsel stresses that the IMAT program supports the research and application of “novel technologies.” Yet novel approaches do not always arise from or result in outstanding achievements. The evidence submitted demonstrates NCI’s commitment to funding research on the development and application of novel technologies that can be used to fight cancer, but the record does not establish that all IMAT grant recipients have already made outstanding achievements in their field. In addition, the IMAT program is not a professional association in the petitioner’s field. It is a funding program administered by NCI/NIH and any “membership” in the program is limited to the duration of the recipient’s grant. Accordingly, the petitioner does not meet this criterion.

(iv) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

Counsel claims the petitioner satisfies this criterion because he reviewed grant applications for the IMAT program and refereed manuscripts for scientific journals in his field. Again, duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself, or in a substantial proportion of positions within that occupation. In many fields of the basic and applied sciences, peer review is inherent to the publication and research funding processes of scientific journals and grant-making institutions. Accordingly, an alien will not meet this criterion through peer review of journal submissions or grant applications without evidence that he or she served on the editorial board of journals, held a significant role in the grant-making process beyond that of a single reviewer, or reviewed a substantial number of manuscripts or applications for respected journals or grant-making entities.

In this case, the record shows that in 2002, the petitioner reviewed four applications for the IMAT program. He was the primary reviewer for two applications, a regular reviewer for one application and a discussant on another application. The submitted electronic mail message inviting the petitioner to help review these applications states, “NIH-funded scientists are expected to act as reviewers of grant applications.” The record contains no evidence that the petitioner reviewed any additional applications for the IMAT program or took a more significant role in the grant review process. The petitioner’s one-time service as a reviewer of four grant applications for a single program nearly two years before his petition was filed does not reflect the requisite sustained acclaim.

On appeal, the petitioner submits a letter from [REDACTED] Regional Editor of *Sensors and Actuators B*, who confirms that the petitioner reviewed manuscripts for the journal in the solid state gas sensor field from October 2003 to September 2004. [REDACTED] "I [REDACTED] a referee for the journal [REDACTED] Oh is an expert of the solid state gas sensors, especially because of his extraordinary achievement in the development of zirconia-based wide range oxygen and NOx sensors as well as deep understanding gained from his long term experience in the field." [REDACTED] does not state how many reviews the petitioner completed before his petition was filed on March 8, 2004. This omission is relevant because the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record also contains no evidence of the impact factor of *Sensors and Actuators B*, the cited half-life of articles published in the journal, the journal's circulation or other evidence of its standing in the field. Without evidence of the number of reviews the petitioner completed prior to filing and the standing of *Sensors and Actuators B* in the petitioner's field, we cannot determine whether the petitioner's work for the journal demonstrates the requisite sustained acclaim.

On appeal, the petitioner also submitted two electronic mail messages [REDACTED] requesting the petitioner's review of manuscripts for *Sensors and Actuators B*. Even if these messages were accompanied by documentation that the petitioner actually completed the requested reviews, we cannot consider this evidence because it arose after the petition was filed. Again, the petitioner must establish eligibility at the time of filing. *Id.*

The record shows that the petitioner reviewed four grant applications for one funding program in 2002 and reviewed an unspecified number of manuscripts for one scientific in 2003 and 2004. The evidence submitted does not establish that the petitioner's service as a peer reviewer reflects sustained national or international acclaim. Accordingly, he does not meet this criterion.

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Counsel claims the petitioner meets this criterion through his accomplishments in polymer actuator and power generation development, the development of chemical sensors for combustion emission reduction and increased fuel efficiency in automotive engines and furnaces, and Nonobiotechnology. The record documents the petitioner's achievements in the first two areas through three U.S. patents awarded to the petitioner as a co-inventor, one published journal article of which the petitioner is the sole author, and three papers of which the petitioner is a co-author that were presented at two conferences in his field. His IMAT grant materials evidence the petitioner's work on Nonobiotechnology, but the record contains no evidence that the petitioner's work in this area has been published or disseminated to his field outside of the IMAT program.

While the record thus documents the petitioner's work in these areas, it does not establish that his accomplishments have been recognized as major contributions to his field. The record shows that petitioner has published only three articles in scientific journals in his field, has co-authored just three papers presented at conferences in his field, and that only one of his published articles has been cited once. On appeal, the petitioner submitted five articles from various sources that discuss SRI's work in electroactive polymers (EAPs). Although several SRI employees are quoted extensively in these articles, the petitioner is not quoted, but simply listed as one author of an SRI conference presentation in the *World Wide Electroactive Polymers Newsletter* and as a collaborator on one project in an article about Dr. Madou from *Lab on a Chip*. These articles evidence the

recognition of SRI's EAP work, but do not show that the petitioner has received significant individual recognition for his contributions in a manner consistent with sustained national or international acclaim.

The petitioner submitted evidence that he is the co-author of eight U.S. patents. While they may document the originality of a scientist's work, patents alone do not satisfy this criterion. To establish eligibility under this category by virtue of patents, a petitioner must not only show that his work has been granted a patent, but that the patented invention constitutes a scientific contribution of major significance in his field. The significance of the patented invention must be determined on a case-by-case basis. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n.7 (Comm. 1998). The petitioner submitted no evidence that his patents have been extensively cited in other patents, patent applications or scholarly articles published in scientific journals; have resulted in successful industrial or commercial application; or have otherwise been recognized as making major contributions to his field.

On appeal, counsel contends that CIS failed to understand the significance of the petitioner's accomplishments. Counsel states:

It is apparent that the adjudicating officer did not understand the depth and breadth of what s/he was reading. It was the officer's duty to either conduct research into this area of scientific endeavor to increase his/her personal knowledge so as to make an educated and informed decision or send an RFE asking for more details as to what all the evidence meant. When attorneys and scientists file I-140 petitions with the Service, we trust that highly skilled CIS workers are assigned to such cases that are familiar with scientific and scholarly work in all fields of science or have the where-with-all to increase their knowledge to a comprehensive level in order to make a competent decision.

CIS officers do not presume to have personal or general knowledge of all areas of science comparable to that of petitioners with advanced degrees and extensive experience in their particular scientific fields. To the contrary, the burden is upon the petitioner to establish his or her eligibility for immigrant classification as an alien with extraordinary ability in the sciences. The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. A significant part of this burden may entail explaining the impact and significance of a scientist's work in layman's terms.

On appeal, counsel stresses the importance and significance of the petitioner's work to develop a vaccine against biological threats such as small pox and anthrax, his patent for EAP fabrication, and his work on chemical sensors for combustion emission reduction and increased fuel efficiency in automotive engines and furnaces. Counsel's emphasis on the importance of this work is misguided for two reasons. First, the evidence concerning the petitioner's work on developing a vaccine against biological threats arose after the petition was filed and consequently cannot be considered. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Second, we do not question the importance or value of the petitioner's work in these areas. The issue here is whether or not the petitioner's work has been recognized as making major contributions to his field in a manner consistent with sustained national or international acclaim. As discussed above, the record shows that the petitioner's individual work has received minimal recognition in his field in a manner inconsistent with sustained national or international acclaim. Accordingly, the petitioner does not meet this criterion.

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

Duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. As frequent publication of research findings is inherent to success as an established research scientist, publications alone do not necessarily indicate the sustained acclaim requisite to classification as an alien with extraordinary ability. Evidence of publications must be accompanied by documentation of consistent citation by independent research teams or other proof that the alien's publications have had a significant impact in his field.

In this case, the petitioner submitted no evidence that frequent publication is not a common practice among scientists in his field. The record shows that the petitioner is the co-inventor of eight U.S. patents, the sole author of an article published in *Sensors and Actuators B* in 1994, the lead author of another article published in the same journal in 1992, and a co-author of an article published in *Analytical Chemistry* in 2002. According to the evidence submitted, one of the petitioner's articles has been cited once. The petitioner is mentioned as a collaborator [REDACTED] on one project in an article that [REDACTED]. The petitioner has also co-authored three papers that were presented at two scientific conferences in his field in 2001 and 2002. This minimal recognition of only some of the petitioner's published work does not demonstrate the requisite sustained acclaim. Accordingly, the petitioner does not meet this criterion.

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The petitioner did not initially claim eligibility under this criterion. On appeal, counsel claims the petitioner meets this criterion because SRI is an organization with a distinguished reputation and that as a PI, the petitioner is a team leader and plays a critical role in technology development for SRI. However, to meet this criterion, a petitioner must establish the nature of the alien's role within the entire organization or establishment and the reputation of the organization or establishment. The articles submitted on appeal demonstrate that SRI has a distinguished reputation, but the record does not show that the petitioner performs a leading or critical role for SRI as a whole.

The record contains a letter [REDACTED] Applied Physical Sciences Laboratory at SRI, which is dated December 13, 2001 and is written in regards to the petitioner's naturalization application. [REDACTED] that the petitioner has been employed at SRI since 1993 where he has worked [REDACTED] the Applied Physical Sciences Laboratory. The petitioner submitted two "Personnel Action Reprints," one of which confirms his employment [REDACTED] laboratory and a second which shows that the petitioner later became a Senior Research Engineer in the "Microsystems Engr [sic] Center" of SRI. Although the petitioner was the PI on SRI's IMAT program grant, the record does not establish that every PI on grants received by SRI performs a leading or critical role for the company as a whole. The company brochure submitted on appeal states that "SRI's government-funded research totals \$1 billion over the past decade alone" and that the company employs "more than 300 Ph.D.'s." The record thus does not establish that the petitioner performs a leading or critical role for SRI as a whole. Accordingly, the petitioner does not meet this criterion.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in

this case indicates that the petitioner is a co-inventor of eight U.S. patents and works for a distinguished company in his field. The record does not establish, however, that the petitioner has achieved sustained national or international acclaim as a scientist placing him at the very top of his field. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his petition may not be approved.

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.