U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B2

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 05 2009

LIN 08 070 50303

IN RE: Petitioner:
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of the beneficiary 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. The director determined that the petitioner had not established that the beneficiary had the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner argues that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that the director applied incorrect standards in denying the petition.

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

> (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.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means 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). The specific requirements for supporting** documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on December 31, 2007, seeks to classify the beneficiary as an alien with extraordinary ability in high-tech sales and/or the software engineering field.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish the beneficiary's eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the beneficiary meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. 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).

Each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply. Thus, the beneficiary's eligibility will be evaluated under the regulatory criteria relating to the immigrant classification as claimed by the petitioner. The petitioner does not assert that the beneficiary meets any criteria at 8 C.F.R. **§ 204.5(h)(3) not discussed below.**

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

In the petitioner's initial brief, counsel argued that the beneficiary meets this criterion. The petitioner's brief stated that,

> In 2006, the international enterprise software company, BMC Software, recognized the company's efforts through the beneficiary's [redacted] proprietary methods as the 2006 Solution Partner of the Year. This is a coveted award in the enterprise software business as BMC is clearly the world's leader in this field with offices worldwide and revenues of more than $1.46 billion in the last fiscal year. Companies from around the globe compete to win these awards, but the beneficiary's [redacted] methods have given his company the competitive advantage.

The brief went on to state that the beneficiary's company has also been named 2005 BMC Solution Partner of the Year, BMC Remedy Partner of the Year for the past three years, winner of the BMC Remedy President's Award in 2000 and 2002, and was placed on Inc. Magazine's 500 fastest-growing privately owned businesses in 2006. The petitioner also submitted an internet article from www.columnit.com, which provided information regarding its company, Column Technologies, Inc. The article confirmed that the petitioner was given the above-referenced awards, as counsel asserted in his brief. In addition, the petitioner provided internet pages from its website, its financial statements and accountants' compilation report and its own corporate literature. None of this evidence mentions the beneficiary. Moreover, the corporate materials were not clear copies and were not fully legible. The only evidence submitted that specifically related to the beneficiary

included the beneficiary's college diploma, his transcripts and certificates of attendance and completion of various courses mainly in the late 1990's and in early 2000.

The director issued a Request For Evidence ("RFE") on March 31, 2008. In his RFE, the director requested evidence of awards the beneficiary received, the significance of the award and the criteria used to select the recipient. The petitioner failed to submit any new evidence in response to the RFE. Instead, the petitioner requested additional time to obtain evidence. Likewise, on appeal, no new evidence was submitted.

On July 23, 2008, the director in his decision found that the record does not demonstrate that the beneficiary meets this criterion. In his decision, the director stated that the petitioner claims it has received several awards from a business partner. However, the director found the record "lacks objective evidence of these awards, lacks evidence that these awards were for the beneficiary or directly related to his contributions to the company, and lacks evidence that such awards were nationally or internationally recognized in the field." We agree with the director's assessment.

The petitioner failed to prove the beneficiary's receipt of any awards. The petitioner submitted an internet article regarding awards which recognized its company, and did not even mention the beneficiary. Although counsel claimed the awards were given to the company because of the beneficiary's "proprietary methods," there was no proof offered to substantiate this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also submitted the beneficiary's academic credentials and certificates of completion of various courses and other qualifications in furtherance of his petition. However, the petitioner failed to show that this evidence constituted awards. Rather, it appears that this evidence demonstrates solely that he was qualified to hold a position in high tech sales and/or in the software engineering field.

In addition to the above-detailed deficiencies, the petitioner also failed to provide documentation that any of these alleged awards constitute nationally or internationally recognized prizes for excellence in the beneficiary's field, such as evidence regarding the awards' prestige, selection process or candidates that the beneficiary was competing against or some other evidence consistent with national or international acclaim at the very top of the field. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the beneficiary's awards be nationally or internationally *recognized* in the field of endeavor and places the burden on the petitioner to establish every element of this criterion. Without such information, the petitioner failed to establish the national or international recognition of these "awards."

In light of the above, the petitioner has not established that the beneficiary meets 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.

The petitioner did not claim this criterion initially, in response to the RFE or on appeal. However, the AAO considered this criterion because the petitioner provided a certificate from the Project Management Institute ("PMI") indicating that the beneficiary was a member of this organization which is "dedicated to advancing the methods of project management."

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. Membership requirements based on employment or activity in a given field, minimum experience, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. In addition, it is clear from the regulatory language that members must be selected at the national or international level, rather than the local or regional level. Therefore, membership in an association that evaluates its membership applications at the local or regional chapter level would not qualify. Finally, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

In this case, the petitioner failed to provide any evidence to show that PMI requires outstanding achievements of its members, as judged by recognized national or international experts in the beneficiary's field or an allied one. The certificate provided failed to state the requirements of membership, the types of outstanding achievements necessary for membership, or whether membership is judged by recognized national or international experts in the field. As the record lacks evidence demonstrating that the beneficiary's admission to membership in PMI required outstanding achievement or that prospective members are evaluated by national or international experts in consideration of their admission to membership, we cannot conclude he meets this criterion.

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

Counsel for the petitioner initially provided a brief wherein he argued that,

> [The beneficiary] developed an innovative approach to creating a long-term, relationship-based selling strategy that has virtually eliminated or neutralized the obstacles that stand in the way of many high tech sales. This approach involves the practice of Discovery Services and Project Management Office. This is proprietary and cannot be found in any text or brochure that discusses high-tech sales methods. For his current employer, the approach has resulted in increase sales of $5,000,000.00 over three years and allowed the company to more than double in size, as well as expand internationally.

The petitioner also provided its financial statements and accountants' compilation report. However, the report does not indicate that any of the figures are attributable to the beneficiary or his sales methods.

In the RFE, the director noted that the record lacks any documentation to show that the beneficiary made a contribution and that such contribution has had a major impact on his field. The director pointed out, as claimed by petitioner's counsel, that if the beneficiary's approach is "proprietary and cannot be found in any text or brochure that discusses high-tech sales methods," then such an unknown method could not be found to be a contribution that has risen to the level of national or international acclaim. As such, the director asked for evidence from those outside the alien's circle of colleagues to demonstrate that his work was especially valuable, as well as documentary evidence of the contribution. The petitioner failed to submit any evidence in response to the RFE or on appeal.

The director found the petitioner failed to show that the beneficiary met this criterion. We agree with the director, finding also that the petitioner did not satisfy this criterion because the record lacks evidence regarding any contribution made by the beneficiary and lacks documentation that any contributions have made a major significance in the field. The alleged contribution made by the beneficiary was described as "proprietary" and, as such, was never specifically explained. Moreover, according to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner claims, through counsel, that the beneficiary's method made a contribution to the company, there is no evidence demonstrating that his sales approach had a major significance in the field beyond his immediate employer. For example, the record does not indicate the extent of the beneficiary's influence on the field of high-tech sales or software engineering nationally or internationally, nor does it show that the field has somehow changed as a result of his approach. Moreover, as his approach is unknown and has not been used by any company other than the petitioner, this suggests that his method is clearly not of major significance in his field. Therefore, the evidence submitted by the petitioner is not sufficient to demonstrate that the beneficiary meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The petitioner's initial brief proffered that the beneficiary's salary was $108,000 per year, and that he is also eligible for bonuses based upon his performance. The brief contends that the beneficiary's base salary alone is "more than $30,000 above his peers in the field of high-tech sales" and states that the beneficiary's title is "best-categorized as a Sales Engineer." The petitioner submitted internet printouts from the Department of Labor's website that did not list the median wages for the beneficiary's field. Additionally, the petitioner submitted pages from O*NET OnLine that indicated the median annual wage in 2006 for Sales Engineers was $77,720. The petitioner indicated in the beneficiary's Immigrant Petition for Alien Worker ("Form I-140") in Part 6 that the beneficiary earns $1,923.08 per week as a Software Engineering Manager. The petitioner failed to provide any new information in response to the RFE or on appeal.

In his decision, the director found that the evidence failed to establish that the beneficiary received a high remuneration for his services in relation to others in his field. We concur with the director, and also find that the record lacks any objective evidence regarding the beneficiary's salary. We also agree with the director that there is a discrepancy between the beneficiary's salary as claimed by petitioner's counsel ($108,000 annual) and his salary listed on the Form I-140 ($1,923.08 per week or $100,000.16 annual). As inconsistencies exist, it is incumbent upon the petitioner to resolve such inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the inconsistencies themselves arose from different claims made in the petition and brief. None of this evidence was supported by independent evidence, such as the beneficiary's tax returns or W-2 Forms. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the plain language of this regulatory criterion requires the petitioner to submit evidence that the beneficiary has commanded a high salary "in relation to others in the field." However, the petitioner again provided inconsistent information on the Form I-140 and in counsel's brief regarding what position the beneficiary holds. Without knowing whether the beneficiary is a Sales Engineer or a Software Sales Manager, there is no basis for comparison to show that the beneficiary's compensation was significantly high in relation to others in his field. Even assuming that the petitioner is a Sales Engineer who earns approximately $30,000 more than the median wage for that position, there is no indication that the petitioner has earned a level of compensation that places him among the highest paid Sales Engineers in the United States or any other country.

Accordingly, the petitioner has failed to demonstrate that the beneficiary meets this criterion.

Regarding counsel's additional arguments it is noted that, on May 13, 2008, in response to the RFE, counsel requested additional time to secure more evidence on behalf of the beneficiary. With regard to the director's issuance of a request for evidence, the regulation at 8 C.F.R. § 103.2(b)(8)(iii) permits the petitioner to respond "within a specified period of time as determined by USCIS." Further, 8 C.F.R. § 103.2(b)(8)(iv) indicates that a petitioner may not be granted additional time to respond to an RFE. In his appeal brief dated August 20, 2008, over three months later, counsel argues that "such evidence to substantiate the assertions in counsel's original letter is now available and should be allowed into the record at this time for a fair and equitable consideration." However, such additional evidence was never provided on appeal, despite its alleged availability, for the AAO to review and consider. Therefore, even if the director had committed a procedural error by failing to provide the petitioner additional time to respond to the March 31, 2008 RFE, which he clearly did not, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner's counsel asserted on appeal that he had obtained the additional evidence to supplement the record, but still failed to submit this alleged evidence on appeal. 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 that it allegedly had in its possession when it submitted its appeal.

On appeal, counsel argues that the "prospective benefit to the U.S. economy" should be considered as comparable evidence of the beneficiary's extraordinary ability in high-tech sales and/or software engineering. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the beneficiary's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of the regulatory criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Further, given that all ten criteria at 8 C.F.R. § 204.5(h)(3) relate to past achievements, we fail to see how future benefit is "comparable" evidence. Regarding prospective benefit, this office has previously found that an alien's demonstration of his or her prospective benefit is not even enough for a national interest waiver, which falls under a lesser classification. Rather, the alien still has to make a showing of a past track record of success. *See Matter of New York State Dep't. of Transp.*, 22 I. & N. Dec. 215, 219 (Commr. 1998).[1]

Moreover, if, as counsel argues, evidence of prospective benefit could be used as comparable evidence of the beneficiary's extraordinary ability, it would negate the statutory provisions specifically mandated by Congress. As previously cited, section 203(b)(1)(A) contains three distinct requirements: (1) that the alien has extraordinary ability which has been demonstrated by sustained national or international acclaim and whose achievements in the field have been recognized through extensive documentation; (2) the alien seeks to enter the U.S. to continue to work in the area of extraordinary ability; and (3) the alien's entry into the U.S. will substantially benefit prospectively the U.S. The regulation at 204.5(h)(3) describes the evidence that must be submitted in order to establish that the alien meets section 203(b)(1)(A)(i) and "has sustained national or international acclaim and that his or her achievements have been recognized in the filed of expertise." The statutory clause regarding sustained national or international acclaim would be rendered meaningless if, as counsel argues, once an alien establishes his or her substantial benefit, then he or she need not demonstrate sustained national or international acclaim and that his or her achievements in the field have been recognized. Counsel's argument is not persuasive given the clear language of the statute.[2]

---

[1] While we generally reference national interest waivers in this case, we are making no determination of the beneficiary's eligibility for a national interest waiver.

[2] We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). In the present matter, the AAO will not consider the legislative history of the applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need in inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

Finally, other than counsel's claim regarding the beneficiary's prospective benefit, the petitioner has failed to submit objective evidence to demonstrate that the beneficiary's past achievements in his field have impacted the U.S. economy to the extent justifying significant prospective benefit to the United States. As previously indicated, the unsupported statements of counsel are not considered evidence. *Matter of Obaigbena* at 534 n.2; *Matter of Laureano*, at 3 n.2; *Matter of Ramirez-Sanchez* at 506. Accordingly, we find that the petitioner has failed to establish that the beneficiary's entry into the United States will substantially benefit prospectively the United States.

In this case, the petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that the beneficiary meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3).

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that the beneficiary may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set his significantly above almost all others in his field at the national or international level. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A)(i) of the Act and the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.