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FILE: EAC 03 108 52624 Office: VERMONT SERVICE CENTER Date: **AUG 31 2005**

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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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.

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.

The applicable regulation defines the statutory term "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). Specific 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 comparable evidence 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).

In this case, the petitioner seeks classification as an alien with extraordinary ability in the sciences. The record indicates that he is employed as an Electro-Optical Engineer/Scientist for Photuris, Incorporated (Photuris). The petitioner submitted supporting documents including a support letter from Photuris, his academic credentials, curriculum vitae, documentation of two scholarships, one newspaper article mentioning the petitioner, citation information for some of his published articles, documentation of 11 patents awarded to the petitioner and his

colleagues, evidence of his review of manuscripts for three scientific journals, and six recommendation letters. The director found the record did not establish the requisite sustained acclaim. On appeal, counsel submits a letter and additional evidence including three recommendation letters, updated citation lists for some of the petitioner's articles, an updated publication list, two additional patents awarded to the petitioner and his colleagues and additional evidence of the petitioner's review of manuscripts for scientific journals and conferences. Much of the evidence submitted on appeal 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), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The remaining evidence submitted on appeal does not overcome the deficiencies of the petition and the appeal will be dismissed. We address the evidence submitted and the petitioner's claims in the following discussion of the regulatory criteria relevant to the petitioner's case.

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

The petitioner claims to meet this criterion by virtue of his receipt of a scholarship to support his graduate studies, a travel grant to conduct research while a doctoral student, and a "Bellcore Special Team Award." The record contains a letter from the Technical University of Denmark which affirms that the petitioner was a doctoral student at the university from 1990 to 1993 and that "[t]he Danish state through the University funds the study." A second letter from the Danish Research Agency confirms that the petitioner "was granted 50.626 d. kr. from the Danish Research Agency (formerly: the Danish Research Academy) in 1991, when he was studying at Bell Communications Research, New Jersey." These letters document financial funding for the petitioner's graduate study and research. Even if prestigious, these scholarships do not meet this criterion because only students – not established scientists – receive such funding.

The record contains no primary evidence of the petitioner's "Bellcore Special Team Award." [REDACTED] President of BeLight, Incorporated and the petitioner's former supervisor at Bellcore, explains that the petitioner "was actively involved in the implementation of the Bellcore Research Network (BRN) Testbed for emerging optical network applications This [BRN] was the first such optical network in New Jersey and . . . [a]s a result, in 1993, [the petitioner] received a Bellcore Special Team Award for his work on the [BRN]." Mr. [REDACTED] does not explain the eligibility criteria or selection process for this award, which appears to be an internal prize honoring outstanding work performed at Bellcore. The record contains no evidence that this award is nationally or internationally recognized in the petitioner's field. Accordingly, the petitioner does not meet this criterion.

(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.

The support letter from Photuris claims the petitioner meets this criterion through his inclusion "in a group of internationally renowned Danish optical engineers as published in an article appearing in the May 9, 2001 edition of the *Borsen*, which is the Danish equivalent of the *Wall Street Journal*." The record contains a copy of this article, entitled "Optical Strength Affected by Brain Drain." The article discusses the loss of Danish-trained optical engineers to the United States. The article mentions Photuris as an example of a U.S. company that benefited from employing Danish engineers, including [REDACTED]. The petitioner is mentioned in the following sentence: "With him [REDACTED] has recently drawn his younger colleague [REDACTED] who

was recruited from the otherwise successful Danish company Ionas.” This article discusses the “brain drain” of engineers such as Mr. ██████████ and the petitioner. It does not document any established association of such Danish engineers.

Photuris' letter also claims the petitioner satisfies this criterion because he was “invited to act as a reviewer/referee for one of the leading Engineering [sic] journals in the world – *Electronics Letters* of The Institution of Electrical Engineers [IEE], published in the U.K.” The record evidences the petitioner’s review of manuscripts for *Electronics Letters*, but the petitioner submitted no evidence that his review resulted in, or was in any other way connected to, his membership in IEE. The petitioner’s curriculum vitae states that he is a member of the Institute of Electrical and Electronics Engineers (IEEE) Lasers and Electro-Optics Society, but the record contains no evidence to corroborate his IEEE membership. Simply going on record without supporting documentary evidence is not sufficient to meet 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)). Accordingly, the petitioner does not meet this criterion.

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The record contains one newspaper article that briefly mentions the petitioner: “Optical Strength Affected by Brain Drain,” published in the May 9, 2001 edition of the *Borsen*. As addressed under the second criterion, this article discusses the loss of Danish-trained optical engineers to the United States. The article is not about the petitioner or his work. Rather, the article simply mentions the petitioner in passing in a discussion about the petitioner’s colleague, ██████████. Moreover, the record contains no evidence that *Borsen* is a professional, major trade publication or a form of other major media. Photuris' letter describes *Borsen* as “the Danish equivalent of the *Wall Street Journal*,” but the record contains no documentation to support this claim. Again, simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Id.*

The petitioner also claims to meet this criterion through the citation of his work by other experts in his field. Yet citations of an alien’s work by other scientists in their scholarly publications rarely meet this criterion because the citing articles are primarily about the authors’ own research, not the work of the alien. The record contains no copies of articles which cite the petitioner’s work or other evidence that such citing articles feature or substantively discuss his work, rather than citing it to establish a subsidiary point. The citation of the petitioner’s work is more relevant to and is discussed below under the fifth and sixth criteria. Neither the *Borsen* article nor the citations of the petitioner’s work constitute published materials about the petitioner. Consequently, he 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.

Photuris' letter claims that the petitioner satisfies this criterion because he was “an external examiner for Engineering Ph.D. thesis papers at the Technical University of Denmark in 1998 [and] he also supervised Master degree students for the university.” The record contains no evidence to corroborate this claim. Again, simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165.

The record includes evidence that the petitioner has reviewed articles for scientific journals in his field. The petitioner submitted an excerpt from an undated edition of *Electronics Letters* entitled "Referees July 1997 – June 1998." The petitioner's name is included in a list of referees who reviewed manuscripts for the journal during this time. The excerpt also states, "the acceptance percentage [for *Electronics Letters*] has for many years hovered around the 40% mark. . . . The citation rate for papers published in *Electronics Letters* is very high – over 10,000 citations for the 1995 issues. This is amongst the highest citation rate for any journal and higher than that for any other engineering journal." The petitioner also submitted copies of letters and electronic mail messages thanking him for his review of ten manuscripts for *Electronics Letters* between January 1993 and July 2002, two manuscripts for the *Journal of Lightwave Technology* in 1993 and 1999, and four manuscripts for *IEEE Photonics Technology Letters* between 1998 and 2000.

On appeal, the petitioner submitted additional evidence of his review of manuscripts for *Electronics Letters* and *Photonics Technology Letters* and of his assignment to review papers for one scientific conference in his field. We cannot consider this additional evidence because it arose after the petition was filed. 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. 45 at 49. Nonetheless, the record demonstrates that the petitioner has consistently reviewed manuscripts for three scientific journals in his field from 1993 through 2002. We find this evidence sufficient to meet this criterion.

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

Photuris' letter cites the petitioner's patents, publications and recommendation letters as evidence of his eligibility under this criterion. The petitioner also submitted six support letters with the petition and submits an additional three letters on appeal. While such letters provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in his field beyond the limited number of individuals with whom he has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has sustained national or international acclaim. Accordingly, we review the letters as they relate to other evidence of the petitioner's contributions.

Dr. [REDACTED] Technical Section Lead for Transmission Technology at [REDACTED] who knew the petitioner as a graduate student at the Technical University of Denmark, explains that the petitioner's "research began with his significant work on application of optical amplifiers in fiber-optic telecommunication systems at a time where these devices were [sic] just appearing out of research laboratories. Today, optical amplification is used in most commercially deployed fiber optic telecommunication systems The work of [the petitioner] has contributed substantially to these developments." Dr. [REDACTED] adds that the petitioner went on to do "important work on a number of different aspects of WDM technologies for fiber-optic telecommunications. . . . [He] contributed groundbreaking work on the use of Raman amplification to enable greater capacity and longer transmission distances in fiber-optic telecommunication systems at a time where [sic] Raman amplification was considered a difficult technology to implement."

Dr. [REDACTED] Director of Optical Networking Systems at Tellium and the petitioner's former supervisor at Bell Communications (Bellcore), states that while at Bellcore, the petitioner's "work on noise in

optical systems and on the spectroscopy of optical amplifiers truly broke new ground, and is still part of the crucial, most commonly referenced literature in the field.” Dr. [REDACTED] Technical Manager of the [REDACTED] who has met the petitioner on several occasions, affirms that the petitioner first “distinguish[ed] himself with his outstanding and ground-breaking work on interferometric noise impairments in optical transmission systems. This was very important work that substantially advanced the understanding of optical crosstalk and has been referenced by all subsequent papers on this topic by other groups.” The record indicates that the petitioner is a co-author of two articles, of which Dr. [REDACTED] is the lead author, that have been widely cited by other researchers. The first article, published in 1994 in *IEEE Photonics Letters*, has been cited 89 times. The petitioner is one of two co-authors of Dr. [REDACTED] on this article. The second article, published in 1995 in *IEEE Photonics Letters*, has been cited 58 times. The petitioner is the only co-author of Dr. [REDACTED] on this article. Dr. [REDACTED] who also worked with the petitioner at Bellcore, affirms the importance of his work in contributing to the Bellcore Research Network for which he received a Bellcore Special Team Award. However, as discussed under the first criterion, the record contains no corroborative evidence of this award. The record also documents two U.S. patents assigned to Bell Communications Research, Incorporated (Bellcore) in 1994 and 1995 of which the petitioner is a co-inventor along with Dr. [REDACTED] and their former colleagues.

Dr. [REDACTED] explains that the petitioner went on to do “seminal work on long-distance repeaterless lightwave systems employing multiple colors of light” at AT&T Bell Laboratories (AT&T Bell Labs) where he and his co-workers “were the first in the world to accomplish this feat. . . . This work was truly visionary.” Dr. [REDACTED] Director of Lightwave Systems Research and a former colleague of the petitioner at AT&T Bell Labs, explains that the petitioner “made significant and record setting contributions to the field of non-repeated DWDM transmission. . . . [and] investigated the influence of interferometric noise on optically preamplified receivers as well as exhaustively studied the noise properties of distributed Raman amplifiers and the associated transmission limitations.” Alan E. Willner, Professor of Electrical Engineering – Systems at the University of Southern California, Los Angeles and a former colleague of the petitioner at Bellcore, states that the petitioner’s “work on un-repeated DWDM transmission systems stands out as exceptional. [The petitioner] and his colleagues were able to increase transmission distances beyond conventional thinking by applying new methods not seen before including remote pumping of EDFAs and Raman amplification.” Dr. [REDACTED] affirms the importance of this work by stating that the petitioner’s research “resulted in extraordinary and world-record breaking results for non-repeated dense WDM systems. . . . This work was the first to utilize dispersion-compensating fiber with low polarization mode dispersion to combat the chromatic dispersion of optical transmission fibers. Dispersion compensating fiber is now an integral part of all transmission systems, both terrestrial and submarine, and is a multi-million dollar business for the American optical fiber industry.”

Dr. [REDACTED] Optical Layer Architect for Photuris, states that he first worked with the petitioner at AT&T Bell Labs where they worked “to investigate the ultimate capabilities of repeaterless submarine communication system” and “leapfrog” the then leading company in this area, Alcatel. Dr. [REDACTED] explains that the petitioner “was an exceptional contributor on the project and our work produced several world record setting results, which transformed the field. In the process we placed AT&T in front of Alcatel and their internationally recognized team of researchers. . . . In particular our research on remote amplification and Raman amplification build [sic] an understanding of those concepts and extended the capabilities of such systems tremendously. Several patents were filed and later granted securing the intellectual property for AT&T. Today these technologies are being exploited commercially and support live data and telecom traffic.” Dr. [REDACTED] adds that he and the petitioner “continued our work on Raman amplification extending the application space to include terrestrial networks. . . . Much of the research we carried out during that time is now the foundation for the

current state-of-the-art transmission system being marketed by Lucent Technologies (as the system manufacturing arm of AT&T became known after its spinoff).”

The petitioner is one of several co-authors of three articles on Raman amplification, of which Dr. [REDACTED] is the lead author. The first article, published in 1996 in *IEE Electronic Letters*, has been cited 14 times by other researchers. The second article, published in 1997 in *IEEE Photonics Technology Letters*, has been cited 16 times. The third article, published in 1998 in *IEEE Photonics Technology Letters*, has been cited 20 times. The record also documents that the petitioner is co-inventor of 9 U.S. patents issued between 1995 and 2001, eight of which are assigned to Lucent Technologies Incorporated and one of which is assigned to the AT&T Corporation.

During the petitioner’s subsequent employment at Ionas, Dr. [REDACTED] states that the company brought “DFB fiber lasers from being a laboratory curiosity to a reliable and highly specialized product. I am sure that [the petitioner] was a significant contributor to the success of this company.” Dr. [REDACTED] Chief Technology Officer of Koheras A/S in Denmark and the petitioner’s former colleague at Ionas, explains that the petitioner joined the fiber-optic components department of Ionas in 1997 where he worked on developing “new types of fiber-optic based DFB lasers and fiber gratings.” Dr. [REDACTED] affirms that the petitioner “was instrumental in transferring the results from the research environment to full scale production. The fiber components department was later spun off as a separate company, KOHERAS A/S, and much of its success can be attributed to the invaluable contributions that [the petitioner] made.” The record documents one U.S. patent assigned to Ionas A/S for “Temperature Stabilization of Optical Waveguides” of which the petitioner is one of four co-inventors. On appeal, the petitioner submitted evidence of one additional U.S. patent assigned to Koheras A/S, of which the petitioner is a co-inventor, but we cannot consider this evidence because the patent was awarded after the petition was filed. 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. 45 at 49.

Dr. [REDACTED] later recruited the petitioner to join him at Photuris where, he states, “our research and development activities have benefited significantly from his discoveries; several patent applications have been filed during his time with Photuris.” Dr. [REDACTED] also comments on the petitioner’s recent work at Photuris, which has “introduced the use of reconfigurable optical add-drop multiplexers, ROADMs, into the metro-regional market space for dense WDM transmission systems. . . . Photuris was the first institution to develop a ROADM and build a system around it. . . . Their system is years ahead of any of their competitors, and there is no doubt in my mind that [the petitioner] made vital contributions to their end product.”

Dr. [REDACTED] Director of Strategic Technology Planning at Corning Incorporated, summarizes the petitioner’s “novel and pioneering” work in the areas discussed above and states that the petitioner “has provided substantial contributions to the understanding, techniques, and improved performance in these disciplines, and has established a solid worldwide reputation. In each of these cases the results have had enormous impact on commercial deployments of these systems.”

The record indicates that the petitioner has made major contributions to his field in a manner reflective of the requisite sustained acclaim. His work has been widely cited by other researchers and has resulted in 12 patented inventions from 1994 through 2002, the significance and importance of which are confirmed by support letters from nine experts in his field. Accordingly, the petitioner meets 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.

The petitioner submitted a list of 81 of his co-authored articles that were purportedly published in scientific journals and conference proceedings in his field (prior to the filing of this petition). Yet the record contains no primary evidence of any of these publications. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165. The petitioner submitted no reprints, copies or excerpts of the petitioner's manuscripts to verify their publication in scientific journals. The record provides secondary evidence of the publication of just five articles through citation lists printed from the Web of Science. Yet these five articles do not meet this criterion. The most recent of these articles was published in January 1998, five years before this petition was filed. Although the record demonstrates that these articles have been widely cited, it fails to document the publication of any of the petitioner's articles published after 1998. The petitioner's publication record, as documented here, does not reflect 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.

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. Where an alien has a leading or critical role for a section of a distinguished organization or establishment, the petitioner must establish the reputation of that section independent of the organization itself. In this case the petitioner claims to meet this criterion through his work at AT&T Bell Labs and Ionas.

Dr. [REDACTED] one of the petitioner's former supervisor's at AT&T Bell Laboratories states, "In 1996 [the petitioner] transferred into my department . . . [and] was one of a few key researchers around whom I rebuilt the Lightwave Systems Research Department at Bell Labs. . . . [He] was a key contributor in our department and I believe that he exhibited outstanding performance in comparison with other recognized researchers here at Bell Laboratories." While the petitioner may have played an important role in Dr. [REDACTED] department, the record contains no independent evidence to document the reputation of that department independent of Bell Laboratories as a whole.

Dr. [REDACTED] the petitioner's former colleague at Ionas, states that the petitioner worked as "the production manager" and in "close collaboration with the engineering research team" in the department of fiber-optic components at Ionas. Dr. [REDACTED] describes the petitioner as "instrumental" to the development of new products, but his letter does not indicate that the petitioner played a leading or critical role for the department or for Ionas as a whole. Moreover, the record contains no evidence that Ionas or its fiber-optic department have distinguished reputations. Accordingly, the petitioner does not meet this criterion.

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

Photuris' letter claims the petitioner meets this criterion because "[h]is salary at Photuris exceeds \$100,000 per year plus stock options and any bonuses." The Form I-140 lists the petitioner's salary as \$108,000, but the record contains no evidence to corroborate his income. Simply going on record without supporting

documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165.

On appeal, counsel states that the petitioner's "current salary is \$120,000 per year plus bonuses for patents applied for and other achievements. This is significantly higher than the prevailing wage" (emphasis in original). Again, the record does not document the petitioner's current salary, but even if it did, we could not consider his increased compensation because it was awarded after the petition was filed. 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. 45 at 49.

On appeal, the petitioner also submits a printout identified by a handwritten note as "OES Wages." The printout lists the Level 2 Wage for electrical engineers in three counties of an unidentified state as \$83,720. This information is not probative. The relevant comparison here is the salaries of electro-optical engineers employed in the field of fiber optic telecommunications. The record contains no documentation of the petitioner's salary or evidence that his remuneration is significantly higher than other electro-optical engineers or comparable to such engineers at the very top of his field. 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 has made major scientific contributions to his field and has judged the work of other researchers. However, the record does not establish that the petitioner had achieved sustained national or international acclaim placing him at the very top of his field at the time of filing. 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.