

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

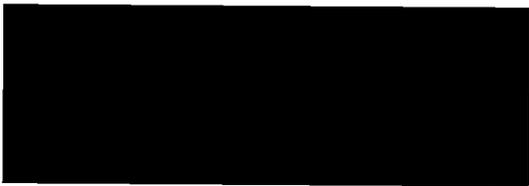
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090

**PUBLIC COPY**

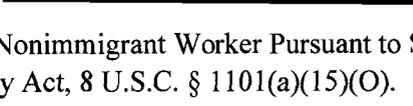


**U.S. Citizenship and Immigration Services**

Dg.



FILE: WAC 09 166 51258    Office: CALIFORNIA SERVICE CENTER    Date: **AUG 11 2010**

IN RE:            Petitioner:   
                    Beneficiary: 

PETITION:      Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O).

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, an Internet software development company, filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the field of science. The petitioner seeks to employ the beneficiary as a senior software architect for a period of three years.

On July 21, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has received "sustained national or international acclaim" or to demonstrate that he is one of the small percentage who has risen to the very top of his field of endeavor. Specifically, the director determined that the evidence submitted did not satisfy the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in determining that the evidence submitted failed to satisfy the evidentiary criterion at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(6), (7) and (8). Counsel submits a brief and additional evidence in support of the appeal.

## **I. The Law**

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of 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 . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability . . . .

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 extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, [REDACTED], "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:

*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 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 alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach recently set forth in a decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9<sup>th</sup> Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. Cf. 8 C.F.R. § 204.5(h)(3).

Specifically, the *Kazarian* court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at \*6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

*Id.* at \*3.

Thus, ████████ sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

Although the director's decision pre-dates the *Kazarian* decision, AAO finds the *Kazarian* court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has submitted evidence pertaining to several of the evidentiary criteria, but has not established that the beneficiary has risen to the very top of his field or that he has achieved sustained national or international acclaim. 8 C.F.R. §§ 214.2(o)(3)(ii) and (iii).

## **II. The Beneficiary's Eligibility under the Evidentiary Criteria**

The beneficiary in this matter is a native and citizen of China. The beneficiary holds a Ph.D. in Computer Science from the University of California at Los Angeles that was conferred in 1997. The beneficiary also holds a Master of Science in Computer Science from the University of Louisville (1993), and a Bachelor's degree in Electrical Engineering from Zhejiang University in China (1991).

In this case, the petitioner seeks classification of the beneficiary as an alien with extraordinary ability in the sciences, specifically in computer science. The petitioning company was formed in January 2008 and states that it is "creating a unique interactive site for on-line shopping," focusing on price comparison of bundled products through its patent-pending search engine and related core technologies.

The petitioner initially submitted a job offer for the beneficiary and comparative salary information, the beneficiary's résumé, the beneficiary's publications and conference presentations, evidence of citations to the beneficiary's major work, information regarding the petitioner, evidence related to the beneficiary's patents and patent applications, the beneficiary's educational diplomas, and a reference letter. In response to a Request for Evidence ("RFE") dated May 27, 2009, the petitioner submitted two supplemental letters and other background information regarding the significance of the beneficiary's publications and conference presentations.

On July 21, 2009, the director denied the petition, finding that the beneficiary meets only two of the eight regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 214.2(o)(3)(iii)(B). On appeal, counsel contends that the beneficiary meets at least three additional criteria, specifically, 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(6), (7), and (8).

After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. 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.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulations cite to the Nobel Prize as an example of a major award. *Id.* There is no evidence that the beneficiary has received any major awards in his field, and the petitioner does not claim that the beneficiary meets this criterion.

As there is no evidence that the beneficiary has received a major, internationally recognized award, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).<sup>1</sup>

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

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), the petitioner must submit evidence that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in the field.

---

<sup>1</sup> The petitioner has not claimed to meet or submitted evidence relating to the criteria not discussed in this decision.

At the time of filing the petitioner claimed that the beneficiary meets this criterion based on three granted U.S. patents. In the RFE, the director advised the petitioner that patents are not considered national or international prizes or awards and cannot be used to satisfy this criterion. The AAO agrees with the director, and the petitioner does not contest the director's finding that the beneficiary's patents do not satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1). The beneficiary's patents will be considered under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6) and in the final merits determination.

2. *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*

In general, in order for published material to meet this criterion, it must be primarily "about" the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>2</sup>

The director concluded that the petitioner submitted evidence that meets this criterion. The AAO disagrees and will withdraw the director's finding. As noted above, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

The petitioner did not initially claim that the beneficiary meets this criterion. In response to the RFE, the petitioner claimed eligibility under this criterion based on "numerous and continuous citations" to the beneficiary's co-written article, "Cooperative Mobile Robotics: Antecedents and Directions," which was published in the journal *Autonomous Robots* in 1997. The petitioner's claims are supported by documentary evidence of the number of citations to this work. Regarding the scientific articles that merely reference the petitioner's published work, we note that the plain language of this regulatory criterion requires that the published material be "about the alien." The submitted citations to the beneficiary's work do not discuss the merits of his work, his standing in the field, any significant impact that his work has had on the field, or any other aspects of his work so as to be considered published material *about* the beneficiary as required by this criterion. Instead, these citations are more relevant to the regulatory criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(5) and (6) and the final merits determination, and thus will be addressed further below.

In light of the above, while the citation evidence is relevant as to the significance of the beneficiary's scholarly articles and contributions in the field of publication, it does not meet the plain language requirements for qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iii)(3). Accordingly, the petitioner has not established that the beneficiary meets this criterion.

---

<sup>2</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

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

At the time of filing, the petitioner submitted evidence that the beneficiary has been granted two U.S. patents in support of its claim that the beneficiary meets the criterion for having made original scholarly contributions of major significance in the field, pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The petitioner has also submitted a total of four recommendation letters from prior employers which further address the significance of the beneficiary's work. In addition, as discussed above, the citation evidence pertaining to the beneficiary's published scholarly articles may be considered under this criterion.

With respect to the beneficiary's patents, the petitioner submitted Issue Notifications for the following inventions: *Method and Apparatus for Entity Search* (U.S. Patent number [REDACTED], issued January 27, 2009), and *Method and Apparatus for Awareness of Geography and Languages* (U.S. Patent number [REDACTED], issued April 21, 2009). The petitioner also submitted a Notice of Allowance and Fee(s) Due for the invention *Method and Apparatus for Freshness and Completeness of Information*, and noted that a patent number is expected in the second quarter of 2009.<sup>3</sup> The petitioner provided receipts for four additional U.S. patent applications submitted by the beneficiary and currently pending, and a patent application submitted to the World Intellectual Property Organization.

The director determined that the petitioner met this requirement based on the evidence related to the beneficiary's patents alone, and did not further discuss this criterion. The AAO disagrees with the director's conclusion that the beneficiary's receipt of patents is sufficient to establish that the beneficiary has made an original contribution of major significance in the field. The grant of a patent demonstrates only that an invention is original. This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.*

The petitioner initially submitted a letter from [REDACTED], in support of this requirement. Mr. [REDACTED] stated that he met the beneficiary through one of his former students in 2004, and later worked with him on "a joint project in which [the beneficiary] played a leadership role for several months." Mr. [REDACTED] further states:

Throughout most of 2006, [the beneficiary] and his friends tried to apply search technology to transportation and logistics. The opportunity was a multi-billion dollar one, the technology made sense and the team was strong. I was invited to be on the advisory board of this startup. The board was very enthusiastic and active so I flew to Los Angeles many times to attend meetings and work with [the beneficiary] on the strategy and architecture of the product

---

<sup>3</sup> This notice clearly states it is "not a grant of patent rights," although the application was examined and is allowed for issuance as a patent.

being developed. [The beneficiary's] expertise and his enthusiastic leadership keep [sic] the team focused and driven that entire year.

In April 2006, [the beneficiary] and his leadership team came to Cleveland at my invitation and presented this new technology to [REDACTED], the renowned Senior Editor of [REDACTED]. [REDACTED] was significantly impressed by the technology and agreed with the business vision of the team. The venture attracted significant attention in the industry and was very close to being funded with \$5 million but it fell short in late 2006 due to circumstances outside the control of [the beneficiary] and his team.

Since late 2007, I have had the pleasure of working with [the beneficiary] again, this time as an advisory board member of [the petitioning company]. The technology developed by [the petitioner] under [the beneficiary's] guidance is some of the most progressive search engine technology in the world. Several applications have already been developed which are generating revenue and which can be expanded to significant international audiences. [The petitioner] has received significant funding well beyond anything experienced during the effort in 2006.

Mr. [REDACTED] further states that the beneficiary "is on a successful path as a world-class innovator and entrepreneur," and indicates that he appreciates the beneficiary's "expertise, tenacious work ethic and growth as a person of extraordinary talent."

In a second letter dated July 6, 2009, Mr. [REDACTED] reiterates that the beneficiary's "recent effort has been in applying search technology to specific industry domains such as transportation, logistics and online shopping." He notes that the beneficiary's "vision and efforts have attracted the active support and investment," of prominent individuals. Mr. [REDACTED] further states that the beneficiary's "vision is now being fulfilled at [the petitioning company]," and without the beneficiary's patented inventions, the petitioning company would not have been formed.

While Mr. [REDACTED] speaks highly of the beneficiary's work in the Internet search technologies field as progressive, innovative, and attractive to investors and entrepreneurs, he offers no support for a finding that the beneficiary's work has been recognized beyond the scope of his current and former employers, and their circle of investors, such that it equates to an original contribution of major significance in the field.

The petitioner has also submitted a letter from [REDACTED], a Ph.D. candidate at Rutgers University and former co-worker of the beneficiary. While the letter from Mr. [REDACTED] was submitted primarily to establish that the beneficiary was employed in a critical or essential capacity by [REDACTED], Mr. [REDACTED] commented that he was aware of the beneficiary's recent U.S. patent applications, noting that he "especially liked the one invention making sites auction in order to display their information the first on a search engine." He further states that "current engines have no capacity of this sort," and that "search engine companies should hurry and buy this product."

While Mr. Wei acknowledges the beneficiary's expertise in Internet search technologies, his statements that he personally "likes" the beneficiary's invention, and considers it to be an original search engine with promising commercial and investment value, do not lead us to a determination that the beneficiary has already made an original contribution of major significance in the field based on the recently patented technology.

A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Rather than providing specific examples of how the beneficiary's work has already had a significant impact in the field, both Mr. Baney and Mr. Wei suggest that the beneficiary's inventions in the Internet search technology field have not been fully implemented and remain at the start-up stage. In short, they speak to the possibilities of the beneficiary's invented technologies rather than any tangible present application in the field. There is no evidence showing that the beneficiary's patented technologies have been successfully marketed, or otherwise had a significant national or international impact in the industry such that it equates to an original contribution of major significance in his field. The petitioner indicated on Form I-129 that it has one employee and no gross or net annual income. While the petitioning company may indeed be built around technology that was primarily developed by the beneficiary, the petitioner must establish that the beneficiary's technology has had an influence beyond serving as the impetus for the formation of a start-up company and attraction of investors.

Finally, the petitioner submits on appeal a letter from Tao Yang, Senior Vice President and Chief Scientist at Ask.com (formerly Ask Jeeves). Mr. Yang's letter was also submitted primarily to establish that the beneficiary was employed by this organization in a critical or essential role. However, he spoke generally of the beneficiary's experience in the field of search technologies as follows:

[The beneficiary] possesses extraordinary skills in search technologies that are possessed by the small percentage of software engineers who have arisen to the very top of their field. I personally recruited [the beneficiary] because he has a great deal of knowledge about cutting edge search technologies. He had performed extensive prior research and had written several influential scholarly articles about the innovative ways to apply search technologies. His prior research in the field gave him a firm understanding of our company's products and how they could be applied to future algorithmic search engine capabilities.

Mr. Yang speaks in general terms regarding the beneficiary's influential scholarly articles and his approach to search technologies, but does not identify the beneficiary's original contribution.

According to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), an alien's contributions must be original but of major significance. We must presume that the phrase "major significance" has some meaning, and, thus, that it has some meaning. While the evidence indicates that the beneficiary was involved on the projects to which he was assigned and is considered an innovator by those with whom he worked, the submitted documentation does not establish that he has made original scientific