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U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DG

FILE: SRC 06 800 11077 Office: TEXAS SERVICE CENTER Date: FEB 02 2009

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in science. The petitioner states that it is engaged in the research and development of fuel cell batteries. It seeks to employ the beneficiary as a physical scientist for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary had achieved sustained national or international acclaim and was one of the small percentage who had risen to the very top of his field. In denying the petition, the director noted that the petitioner did not submit evidence to establish any of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B).

On appeal, the petitioner submits a brief and additional evidence. The petitioner asserts that the beneficiary can satisfy at least three of the evidentiary criteria for extraordinary ability in science pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(B).

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

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

> *Extraordinary ability in the fields of science, education, business, or athletics* means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

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

> *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.

It is noted that the decision of U.S. Citizenship and Immigration Services (USCIS) in a given 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 satisfies the criteria and is eligible for O-1 classification. The evidence submitted must establish that the beneficiary qualifies as an alien of extraordinary ability. *See* 59 Fed. Reg. 41818-01, 41820.

The beneficiary in this matter is a native and citizen of Austria. The record shows that the beneficiary completed his Ph.D. studies at the Technical University of Graz in Austria and has been involved in the development of a lower-cost, high performance alkaline fuel cell (or hydrogen fuel cell) with applications in the home and automobile markets. The petitioner indicates that it is prepared to manufacture the fuel cell in the United States and requires the beneficiary's services for the opening of its fuel cell plant.

At the time the petition was filed on March 13, 2006, the petitioner submitted a Form I-129 nonimmigrant petition; a peer consultation letter dated October 2001 from [redacted] and [redacted] of the Technical University of Graz; and a letter dated March 1, 2006 summarizing the terms of the beneficiary's proposed employment. On March 24, 2006, the director issued a request for additional evidence (RFE), advising the petitioner that the initial evidence did not satisfy the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii). The director instructed the petitioner to submit evidence demonstrating that the beneficiary has met at least three of the eight criteria provided at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner's response to the RFE consisted of an updated peer consultation letter dated April 5, 2006 from [redacted], a letter from the petitioner, a list of seven technical papers and presentations stated to be "based largely on the work of [the beneficiary]," and a copy of a U.S. Patent, issued on March 21, 2006, for [redacted] which lists the beneficiary and one other scientist as inventors. The petitioner did not reference the regulatory requirements for the visa classification or otherwise indicate which three criteria the beneficiary meets based on the submitted evidence.

The director denied the petition on April 18, 2006, concluding that the petitioner failed to establish that the beneficiary had met at least three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The director acknowledged the evidence of the beneficiary's patent, but noted that the record contained no evidence other than the petitioner's statements to establish that the patent represents a scientific contribution of major significance, as required by 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*). The director further found that a mere list of the beneficiary's papers and presentations was insufficient to establish that he has a sustained national or international reputation as a result of his authorship of scholarly articles published in professional journals, and therefore did not satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*6*). Finally, the director concluded that the petitioner did not attempt to establish the beneficiary's eligibility under any other criteria.

On appeal, the petitioner submits additional documentary evidence in support of its claims that the beneficiary can satisfy three or more of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), but does not contend that the director erred in denying the petition for lack of evidence of eligibility.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit much of the requested evidence and now submits it on appeal. However, the AAO need not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO therefore concurs with the director's decision that the petitioner failed to submit evidence of the beneficiary's sustained national or international acclaim and recognition for achievements in his field. Accordingly, the appeal will be dismissed.

Furthermore, the AAO notes that evidence submitted on appeal is also insufficient to establish that the beneficiary is one of the small percentage who has risen to the very top of his field of endeavor.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award, such as the Nobel prize, 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. Here, the petitioner has not submitted evidence that the beneficiary has received a major, internationally recognized award, nor has the petitioner claimed 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).

In order to meet criterion number one, the petitioner must submit documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 214.2(o)(3)(iii)(*1*). The petitioner does not claim that the beneficiary meets this criterion, and has not submitted documentary evidence of the beneficiary's receipt of such prizes or awards, or otherwise mentioned any internationally recognized prizes or awards received by the beneficiary. Therefore, the AAO concludes that this criterion has not been met.

In order to establish that the beneficiary meets the second criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*2*), the petitioner must document 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.

On appeal, the petitioner states: "[The beneficiary] is a member of the Society of Austrian Chemists." The petitioner failed to submit documentary evidence of the beneficiary's membership in the society, nor did it submit evidence that the society requires its members to have outstanding achievements in the field as judged by national or international experts. 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)). Consequently, the beneficiary does not meet this criterion

The third criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3), requires the petitioner to submit 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. While the evidence of record shows that the beneficiary has co-authored many published articles, the petitioner has not submitted published materials that are *about* the beneficiary and his work. The record also shows that the beneficiary's work has been cited by other scientists; however, mere citations of an alien's work by other scientists in their scholarly publications do not meet this criterion because the citing articles are primarily about the authors' own research, not the work of the alien. The beneficiary is also mentioned by name in the acknowledgements of the *Fuel Cell Handbook* (Sixth Edition), published in November 2002, as a member of the "fuel cell community" who contributed to the book. While this mention of the beneficiary is notable, it does not reflect sustained national or international acclaim. Accordingly, the beneficiary does not meet this criterion.

In order to meet the fourth criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(iii)(B)(4). The petitioner has not submitted evidence to satisfy this criterion.

The fifth criterion requires the petitioner to submit evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field. 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*). On appeal, the petitioner once again references the beneficiary's U.S. patent, and states that it was "the first patent issued in the United States for an Alkaline Fuel Cell which can be used in terrestrial applications for vehicles and stationary applications and which can be produced at a low cost." The petitioner further explains:

> The new patent covers a high capacity, Hydrogen-Air Fuel Cell with low cost electrodes (the most expensive part of a fuel cell is the electrode) which can be used on the Earth for cars, power plants for homes and for cell phones. This is a major contribution to the science of fuel cells and will make the coming Hydrogen Economy a reality (commercial fuel cells must operate on hydrogen and air).

The petitioner emphasizes that President George W. Bush, in his 2003 State of the Union address, called for the early introduction of hydrogen fuel cell cars as a national priority to relieve the United States of its dependence on foreign oil and high gasoline prices. The petitioner states that "the Alkaline Fuel Cell is the answer."

The petitioner has also submitted a peer consultation letter from of Graz University of Technology. Dr. [redacted] states that the beneficiary has contributed to the production of an advanced Alkaline Fuel Cell which operates at a very high fuel conversion efficiency, and notes that demonstration units of the fuel cell have been publicly shown at international Fuel Cell seminars. Dr [redacted] emphasizes that the beneficiary has worked under the guidance of [redacted] who is described as a "renowned fuel cell pioneer," and notes that the beneficiary is the author or co-author of a large number of scientific papers, presents at international

conferences, contributed a chapter to the *Handbook of Fuel Cells*, and has co-authored "several recently filed patents on fuel cells." Dr. [redacted] does not, however, discuss the significance of the beneficiary's scientific contribution.

While the petitioner clearly believes the beneficiary's work on the alkaline fuel cell to be of major significance in the field, the lack of independent evidence discussing the beneficiary's work and the significance of his contribution cannot be ignored. Not every alien who co-authors a patent is eligible for O-1 classification, and not every patent awarded may be deemed to be a contribution of major significance. The director specifically noted in his decision that evidence apart from the petitioner's statements regarding the significance of the scientific contribution is required in order for the petitioner to meet this criterion. While former President Bush's remarks regarding the hydrogen fuel cell car are noted, they are not an indication that the beneficiary himself has achieved national or international recognition for a scientific contribution of major significance. Rather, the remarks reflect that the scientific community at large is encouraged to develop hydrogen fuel cell technologies for everyday use. If the beneficiary's contributions to the field are indeed significant enough to be considered "major" scientific contributions, it is reasonable for the petitioner to be able to present independent evidence of recognition received by the beneficiary for such contribution, beyond the patent and the petitioner's own statements.

Furthermore, while [redacted] peer consultation letters provides relevant information about an alien's experience and accomplishments, it cannot by itself establish the alien's eligibility under this criterion because it does not demonstrate how the alien's work is of major significance in his field Even when written by independent experts, letters solicited by an alien in support of a visa petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has achieved sustained national or international acclaim.

Based on the above, the AAO concludes that the beneficiary does not meet this criterion.

The sixth criterion, at 8 C.F.R. 214.2(o)(3)(iii)(B)(6) requires the petitioner to submit evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.

It should be noted that duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii) do not demonstrate national or international acclaim if they are inherent or routine to the occupation itself. As frequent publication of research findings is inherent to success as a research scientist, publications alone do not necessarily indicate the sustained acclaim requisite to classification as an alien with extraordinary ability.

In this case, the record shows that, at the time of filing, the beneficiary had published approximately eight articles in professional journals between 1998 and 2005. The petitioner is the lead author of two of these articles. The petitioner does not provide information regarding the frequency with which the beneficiary's work has been cited by independent research teams. The beneficiary has also presented his work at nearly 20 fuel cell and power sources symposiums, conferences and seminars, frequently as a member of a research team comprised of five or more members. Participation in research symposiums is inherent to the beneficiary's field and does not reflect national or international acclaim. It is unclear based on the evidence submitted whether the beneficiary's published articles and presentations have significantly influenced other scientists in his field or related specialties

in a manner consistent with sustained national or international acclaim. The petitioner has not established that the beneficiary meets this criterion.

The seventh criterion requires the petitioner to submit evidence that the alien has been employed in a critical or essential capacity for organizations that have a distinguished reputation. 8 C.F.R. § 214.2(o)(3)(iii)(B)(*7*). The petitioner has not submitted the beneficiary's curriculum vitae. However, it appears from the evidence submitted that the beneficiary has spent his entire academic and professional career at the Technical University of Graz, Institute for Chemical Technology of Inorganic Materials, where he obtained his master's and doctoral degrees, in 1997 and 2001, respectively. While the beneficiary has continued his work in the development of alkaline fuel cell technology at the university, in a program supported by the U.S. petitioner, the evidence of record does not identify his specific employment capacity with the Technical University of Graz. Dr. [redacted] indicates that the beneficiary has worked "under the guidance o[redacted] a renowned fuel cell pioneer," so it is clear that the beneficiary has not been in charge of the university's program. Without additional information and evidence regarding the beneficiary's role at the university's Institute for Chemical Technology of Inorganic Materials, the AAO cannot conclude that he has been employed in a critical or essential capacity. Accordingly, the beneficiary has not been shown to meet this criterion.

The eighth and final criterion requires the petitioner to submit evidence that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence. 8 C.F.R. § 214.2(o)(3)(iii)(B)(*8*). At the time of filing, the petitioner submitted a letter dated March 1, 2006, addressed to the beneficiary, confirming the verbal agreement between the parties regarding the beneficiary's temporary employment. The beneficiary was offered an annual salary of $72,000 plus stock option for 50,000 shares of the Company. The director determined that the offered salary had not been shown to be high in comparison to others in the field.

On appeal, the petitioner asserts that it intends to increase the beneficiary's salary to $120,000 per year after his first six months of employment. The petitioner indicates that it intends to become a public company in 2006 or 2007 and as a result, the beneficiary's stock option will have a value of "at least $750,000." Finally, the petitioner indicates that it intends to establish a profit sharing program for key employees "which could double his salary." The petitioner submits a different letter, also dated March 1, 2006, which is nearly identical in content to that previously submitted. However, the beneficiary's proffered salary has been changed to $75,000, to be increased to $120,000 after six months of service.

The petitioner provides no explanation as to why it would have executed two different employment agreements with the beneficiary on the same date. Under the circumstances, the AAO finds the letter submitted at the time of filing to be more credible. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner's statements regarding its public offering and profit sharing program are speculative in nature. There is no evidence on the record regarding the current value of 50,000 shares of the petitioner's stock. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner

has not established through the submission of reliable evidence that the beneficiary has received or will receive a high salary for his services.

Overall, the record does not establish that the beneficiary has extraordinary ability in science, which has been demonstrated by sustained national or international acclaim and that his achievements have been recognized in the field through extensive documentation, as required by section 101(a)(15)(O) of the Act. The petitioner submitted no evidence that the beneficiary has received a major, internationally recognized award and the documentation submitted does not meet three of the eight other evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). Consequently, the beneficiary is not eligible for nonimmigrant classification under section 101(a)(15)(O) of the Act and the petition must be denied.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements have not yet risen to this level.

Finally, the AAO acknowledges that USCIS previously approved an O-1 classification petition filed by the petitioner on behalf of the beneficiary in 2001. The petition was approved for a one-year period commencing on March 1, 2002. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Based on the lack of required evidence of eligibility in the current record, and the petitioner's failure to submit a complete response to the director's request for additional evidence, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.