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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536

[redacted]

File: WAC 02 133 52171 Office: California Service Center Date: MAY 13 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, a privately held software research and development company "started in July 2000," seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The petitioner seeks to employ the beneficiary as a "Computer Software Engineer." The director found that the petitioner has not established that the beneficiary is recognized internationally as outstanding in his academic field or that his primary duties are that of a researcher. The director also concluded that the petitioner had not established its ability to pay the beneficiary the proffered wage.

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):
>
> > (B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if-
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,
> > >
> > > (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
> > >
> > > (iii) the alien seeks to enter the United States --
> > >
> > > > (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
> > > >
> > > > (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
> > > >
> > > > (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-

based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

As used in this section, the term "academic field" means a body of specialized knowledge offered for study at an accredited United States university or institution of higher education. 8 C.F.R. § 204.5(i)(2).

The first issue to be determined in this matter is whether the beneficiary's duties for the petitioner involve conducting "research" in his academic area, information systems technology/optimization algorithms.

The beneficiary holds a Ph.D. in Aeronautics and Astronautics (specializing in information systems technology) and a M.S. in Electrical Engineering from Stanford University. In a statement accompanying the petition, counsel states:

[The beneficiary] holds a position as a Research and Development Engineer at FineGround Networks, Inc... His responsibilities include research on delta optimization algorithms to develop a system to accelerate the delivery of the web contents rapidly, while reducing usage of the bandwidth. He is also engaged in developing a delta optimization engine, the kernel of the company's product, FineGround Condenser.

A letter from [redacted], Vice-President of Engineering, FineGround Networks, Inc. states:

> [The beneficiary] has been working closely with me as an engineer in the Research and Development group from October 2000 to the present.... During this period he worked on various aspects of our software product called the FineGround Condenser. A key feature of the product is "Delta Optimization" that dramatically accelerates the delivery of web content while reducing bandwidth usage. [The beneficiary] has been actively engaged in research and development of the Delta Optimization algorithms and the Delta Optimization engine implemented in the product. His activities have included research, product development using C and C++ languages, performance measurement, analysis and product testing.... His research has enabled us to make advancements in the field, which enhances our competitive capabilities in the global market.

[redacted] President and CEO, FineGround Networks, Inc. states: "[The beneficiary] has made enormous contributions to furthering our technology base, including the development of the Delta Optimization algorithms and the Delta Optimization engine implemented in our company's key product, the FineGround Condenser."

The record also contains a job offer letter from the petitioner to the beneficiary (dated August 24, 2000) offering him "the position of Software Engineer of the Company." The job offer letter further states: "You will serve in a full-time capacity as a Software Engineer."

On September 12, 2002, the director requested that the petitioner submit additional evidence pertaining to the regulatory requirements at 8 C.F.R. § 204.5(i). The director's request stated that the petitioner should "outline in detail the specific duties of the beneficiary and his job title."

In response, the petitioner submitted a letter from [redacted] Controller, FineGround Networks, Inc. stating:

> [The beneficiary's] job title will be Research and Development Engineer and he will be performing the following duties:
>
> Research, design, and develop, and test, a robust super high performing, scalable highly available and easily manageable systems-level software capable of running in multiple hardware and software platforms. Research optimization algorithms, set operational specifications, and formulate and analyze software requirements. Apply principles and techniques of computer science, engineering, and mathematical analysis.

[redacted] describes the beneficiary's development of new optimization algorithms as "advanced theoretical research in the area of computer science, engineering and mathematics." He further states that the beneficiary's work extends beyond the theoretical realm through applying his "theoretical premises in a valid operation."

A second letter from [redacted] states:

> [The beneficiary] brought to FineGround Networks his expertise on Optimization Algorithms, Performance, and Distributed Processing. [The beneficiary] researched on these technical fields for five years at Stanford University, world-renowned as one of the finest educational institutes while he pursued his graduate study there. As I mentioned in my previous letter, [the beneficiary] has been actively engaged in research and development of the Delta Optimization algorithms and the Delta Optimization engine implemented in the product.... Thanks to his critical contributions, the FineGround Condenser accelerates the delivery of web content up to ten times faster while reducing bandwidth usage.
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> * * *
>
> [The beneficiary] is researching into extending the Delta Optimization technology to international character sets, thereby enabling the FineGround Condensor to accelerate the delivery of web content written in non-English languages as well.

The record also contains three articles published in August 2001 by the beneficiary in *IEEE Transactions on Systems, Man, and Cybernetics: Part B – Cybernetics*. The beneficiary's papers focused on "neural dynamic optimization for control of non-linear multi-input multi-output systems." The Editor-in-Chief of the journal states that the beneficiary's work is dedicated to "basic and applied research" and describes the development of optimization algorithms as "a subfield spanning such diverse areas as Aeronautics and Electrical Engineering."

Despite information from the petitioner indicating that the beneficiary was engaged in research and development of optimization algorithms, the director found that the beneficiary functions as "an engineer who uses existing principles and technology to solve practical problems rather than someone who engages in scholarly or advanced theoretical research." We withdraw the director's finding in this regard. In light of the job offer letter referring to the beneficiary simply as a "software engineer," the issue raised by the director does have some degree of merit. That being said, it appears that the totality of the petitioner's evidence (including the journal publications from 2001) indicates that the beneficiary's work to develop optimization algorithms would qualify as "scholarly or advanced theoretical research" in his academic area.

We also withdraw the director's finding that the petitioner has not established its ability to pay the beneficiary the proffered wage. On appeal, the petitioner has provided its federal tax returns for 2000 and 2001 and bank statements for 2002. Schedule L of the petitioner's IRS Form 1120 for 2001 indicates total company assets of $16,519,987. A bank statement for the month ending November 29, 2002 reflects an account balance of $3,510,672 in money market funds. Based on the evidence provided on appeal, we withdraw the director's finding that the petitioner has not demonstrated its ability to pay the beneficiary's $93,000 salary.

It remains to be determined whether the beneficiary is recognized internationally as outstanding in his academic area. The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding

professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." The regulation lists six criteria, of which the beneficiary must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. The petitioner submits evidence pertaining to the following criteria.

Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.

The petitioner submitted evidence that the beneficiary received a "Certificate of Recognition" from the Stanford University Student Chapter of the American Institute of Aeronautics and Astronautics for "outstanding performance as a teaching assistant for the 1996-97 academic school year." This award reflects institutional, rather than international, recognition. A teaching assistant award, by nature, is presented not to established international scholars with active professional careers, but rather to individuals pursuing graduate studies at a particular university who teach part-time as a part of their educational program.

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members.

The petitioner submits evidence of the beneficiary's membership in the Institute of Electrical and Electronics Engineers ("IEEE") and information regarding its membership requirements. The record, however, contains no evidence showing that this association requires outstanding achievement as an essential condition for admission to membership. An internet printout provided by the petitioner states that "professional competence" (rather than outstanding achievement) is all that is required for admission to membership. For example, an individual who has "received a baccalaureate degree or its equivalent from a program on the reference list" is eligible to become a member in the IEEE, which claims that it has over 375,000 individual members.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

In an occupation where "judging" the work of others is an inherent duty of the occupation, such as an instructor, teacher (including graduate student teaching assistants), professor or editor, simply performing one's job related duties demonstrates competency, and is not evidence of international recognition. The petitioner should demonstrate that the alien's international reputation resulted in his selection to serve as a judge of the work of others. Similarly, the judging should involve other accomplished professionals in the alien's field at an international level. For example, evaluating tenured research professors for an international award would be far more indicative of outstanding international reputation than would evaluating one's own graduate students on a dissertation committee.

The petitioner submitted evidence of two manuscript review requests submitted to the beneficiary via e-mail. Peer review of manuscripts is a routine element of the process by which articles are

selected for publication in scholarly journals. Occasional participation in peer review of this kind does not demonstrate that the beneficiary has achieved international recognition as outstanding in his academic field.

The first e-mail, dated September 28, 2001, from Dr. [redacted] Guest Editor, *IEEE Transactions on Industrial Electronics*, states: "If for some reason you cannot review the paper, can you recommend someone else to review it?" Dr. [redacted] willingness to accept someone other than the beneficiary to review the paper diminishes the strength of the assertion that the beneficiary was chosen to review this paper because of his international renown. We note that the beneficiary is a member of the IEEE, and it seems just as likely that the criteria for his selection was based on his membership in the IEEE rather than his international reputation. The record contains documentary evidence showing that the beneficiary completed the review.

The second e-mail, dated February 7, 2002, from Dr. [redacted] the Editor-in-Chief of *IEEE Transactions on Systems, Man, and Cybernetics: Part B – Cybernetics*, the journal in which the beneficiary had published his work in 2001, requests that he review a paper within eight weeks. Dr. [redacted] also requests the beneficiary to "suggest a colleague (with e-mail address) that could review the manuscript" if the beneficiary were unable to complete the review himself. The evidence does not suggest that the beneficiary was selected to review the paper due to his international recognition as outstanding in the academic field; it appears from Dr. [redacted] second letter discussed below that the beneficiary was most likely chosen based on having already been published in the journal. The record also contains a response from the beneficiary indicating that he would review the paper, but no evidence showing that the review was actually completed prior to the petition's filing date of March 12, 2002. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

In response to the director's request for evidence, the petitioner submitted a second letter from Dr [redacted] confirming that the editors of *IEEE Transactions on Systems, Man, and Cybernetics: Part B – Cybernetics* "look for reviewers who have published papers in *IEEE Transactions* which is also true for [the beneficiary]." A researcher's publication of scholarly articles, however, is not evidence of international recognition. Dr. [redacted] letter states that the beneficiary has been "asked to referee papers" for *IEEE Transactions*, but provides no information concerning the specific reviews performed or the dates of their completion. While Dr. [redacted] also asserts that his journal "search[es] for reviewers who are internationally renowned experts," it has not been shown that the numerous other reviewers selected to provide manuscript evaluations for either of the above journals are internationally renowned, and that the petitioner is among a select group.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

The petitioner submitted witness letters from individuals who all have direct ties to the beneficiary. For example, the individuals offering letters have either worked with the beneficiary, served as an editor for the single journal that published his work, or taught or studied at Stanford University during

the beneficiary's time there. The letters provided detail the beneficiary's education and employment experience and describe him as a capable researcher in the areas of optimization algorithms, neural networks, and nonlinear control, but they fail to establish that the beneficiary's findings have influenced the academic field at the international level.

Dr. [redacted] states:

> [The beneficiary] has shown how to use neural networks to control non-linear multiple input multiple output systems. This is a hard problem and he attacks it in a unique way by coming up with an approximation to the optimal solution that you could attain with dynamic programming. The problem with dynamic programming is that it would require you a few centuries (in many cases) to get the solution to your control problem, which must be solved and acted upon now. The solution would be optimal and [the beneficiary's] approach contains a theory about how to obtain a sub-optimal, but reasonably near optimal solution.

The fact that the beneficiary is credited with developing "an approximation to the optimal solution" attainable with dynamic programming carries little weight. Of far greater importance in this proceeding is the importance to the field of the beneficiary's theory. In this case, we must consider the significance, not just the originality, of the beneficiary's research. It can be argued that any Ph.D. thesis or article, in order to be accepted by a university or for publication, must offer new and useful information to the pool of knowledge. It does not follow that every researcher whose theories are accepted for publication or as a dissertation has made a significant contribution in his academic field. While the beneficiary has published three articles, there is no indication (such as heavy independent citation) that the beneficiary's research has had a substantial impact on the overall field. Counsel contends that the beneficiary has made such a showing but offers no support except for the statements from individuals having direct ties to the beneficiary. These statements do not establish that academic scholars outside of the beneficiary's professional contacts share similar opinions regarding the significance of his work.

The petitioner has not provided evidence that the beneficiary's research, to date, has consistently attracted significant attention from independent engineering researchers from throughout the world. In fact, all of the petitioner's witnesses are from the United States and therefore they fail to demonstrate that the beneficiary's work is "internationally recognized" as outstanding. An individual that is recognized internationally as outstanding should be able to produce ample unsolicited materials reflecting such a reputation. In this case, the beneficiary has not demonstrated any specific scientific or scholarly contributions that have been unusually influential or renowned within his field. While the witnesses have asserted in general terms that the beneficiary is an outstanding researcher, he appears to have earned a reputation only among individuals with whom he is professionally acquainted. The absence of substantial independent testimony raises doubt as to the extent of the beneficiary's recognition.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

The petitioner submits evidence of the beneficiary's co-authorship of three articles published simultaneously in the August 2001 issue of *IEEE Transactions on Systems, Man, and Cybernetics: Part B – Cybernetics*. Evidence showing the extent of the circulation of this publication (in terms of copies distributed beyond the country of publication) has not been provided.

The publication of scholarly articles is not automatic evidence of international recognition; we must also consider the academic field's reaction to those articles. Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the beneficiary's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the beneficiary himself has cited sources in his own articles. This is a universally accepted practice among academic scholars and researchers. Numerous independent citations would provide firm evidence that other researchers have been influenced by the beneficiary's work. Their citation of his published articles would demonstrate their familiarity with his work. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the international research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact - and international recognition - a researcher's work would have, if that research does not influence the direction of future research.

In this case, the record does not contain citation records or other evidence to establish that independent researchers on an international scale in the engineering field regard the beneficiary's published work as especially significant. While heavy citation of the beneficiary's published articles would carry considerable weight, the petitioner has not presented such citations here. It is also noted that the beneficiary's publication record (three articles at the time of filing) is far exceeded by the publication record of many of the petitioner's witnesses.

Beyond the decision of the director, we note that the record contains no evidence that the petitioner (a private company started in July 2000) "has achieved documented accomplishments in an academic field" as required by 8 C.F.R. § 204.5(i)(3)(iii)(C). In response to the director's request for evidence, counsel asserts that the petitioning entity was selected as "Best of the Best" at the 2001 Red Herring NDA Conference, that its FineGround Condenser was named a winner in the Open Systems Advisors, Inc. Ninth Annual Crossroads A-list Awards (2002), and that it was selected by *Upside* magazine to receive the 2002 Hot 100 Award. The petitioner, however, has provided no documentary evidence to support counsel's claims. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioning entity has provided no documentary evidence to establish that it was responsible for accomplishments of significance to the academic field (as of the petition's filing on March 12, 2002). *See Matter of Katigbak, supra*. Because this appeal will be dismissed on other grounds discussed above, this issue need not be addressed further.

In this case, the petitioner has shown that the beneficiary is a talented engineering researcher, who has won the respect of individuals from the institutions where he has studied and worked, while possibly securing some minimal degree of international exposure for his work. The record, however, stops short of elevating the beneficiary to an international reputation as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

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.