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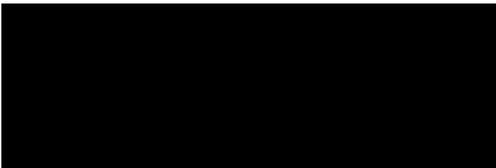


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is described as an "R&D and networked storage equipment manufacturer." It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a principal scientist. The director determined that the petitioner had not established documented accomplishments in an academic field. The director also concluded that the beneficiary's duties are not those of a researcher.

On appeal, the petitioner submits witness letters and a brief from a company official.

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):

(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.

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

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:

- (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
 - (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
 - (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
 - (D) 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;
 - (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
 - (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;
- (ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien; and
- (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.

The first issue in contention is whether the petitioner has documented accomplishments in an academic field, as required by the above-cited regulations at 8 C.F.R. § 204.5(i)(3)(iii)(C). Peter Wang, the petitioner's chief technology officer, describes the company:

[The petitioner] develops technologies and solutions that radically reduce the complexities faced by organizations when storing and managing data. [The petitioner's] networked

storage solutions, based upon advanced technologies that leverage the cost and performance advantage of Ethernet, will revolutionize the way storage is installed and managed and enable IT organizations to offer a new generation of high performance, scalable storage services.

Our company was founded in September 2000 and currently employs over seventy employees. . . . [The petitioner] has secured a total of \$28 million in venture capital financing in two rounds of funding.

Mr. Wang's letter is divided into sections, addressing different regulatory requirements. Under "Evidence that [the petitioner] employs at least three full-time researchers and has achieved documented accomplishments in the academic field," Mr. Wang states only that "we are currently offering [the beneficiary] the regular, full-time position of Principal Scientist . . . at our company in San Jose, California, which employs four other full-time researchers." Mr. Wang identifies no documented research accomplishments. Elsewhere in his letter, Mr. Wang indicates that the petitioner will "in the near future" file several patent applications. He does not elaborate. The assertion that the petitioner intends to patent unidentified inventions is not evidence of documented accomplishments in the academic field. There is no evidence that the petitioning company has had any media coverage for its research accomplishments. Two press releases in the record, announcing venture capital funding of the company, do not relate to research accomplishments. Rather, these press releases underscore the very new nature of the company, which was founded some 27 months prior to the petition's filing date.

The director instructed the petitioner to "[s]ubmit evidence that demonstrates that the [petitioner] employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field." In response, Peter Wang, the petitioner's chief technology officer, asserts that the petitioner "employed four full-time researchers with doctoral degrees" and "several individuals with Master's degrees who also perform research." The petitioner's response does not address the issue of documented research accomplishments.

Acknowledging the petitioner's lack of self-generated income (as opposed to venture capital funding), counsel states "it often takes several years to develop a good product," during which time young companies rely on infusions of investment capital. This assertion underscores the director's concerns about documented research accomplishments.

The director denied the petition, in part because the petitioner had failed to submit, as requested, evidence of documented accomplishments in an academic field. The director stated "[t]he evidence presented by the petitioner simply demonstrates its *potential* in the area of information storage rather than actual achievements."

On appeal, counsel asserts "[t]he company has 8 U.S. patents pending, the results of original inventions in the area of storage networking." The filing of a patent application does not guarantee its eventual approval. A pending patent application is not a documented research accomplishment. Counsel adds that the petitioner's "product, IP5000, has been shipping since July 2003." This product was not available when the petition was filed in December 2002, and thus it does not constitute a documented research accomplishment as of the petition's filing date. The same is true of conference presentations which took place months after the petition was filed. If a petition was not approvable as of its filing date, subsequent developments cannot overcome the initial deficiency. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The petitioner submits new witness letters on appeal, from individuals who have collaborated with the beneficiary, but these letters focus mainly on the question of whether the beneficiary's work constitutes research. In any event, these letters did not exist at the time of filing, and thus the newly written letters could not overcome the director's finding that the petitioner has failed to show documented accomplishments as of the filing date.

The statute and regulations require evidence of documented accomplishments, and also evidence that the petitioner employs researchers. The existence of these two separate requirements suggests that "documented accomplishments in an academic field" does not simply mean evidence that research is taking place at the petitioning company. Otherwise, the requirement that the company have researchers on its staff would be sufficient, and the "documented accomplishments" clause would be redundant.

In sum, the evidence presented shows that the petitioner is a very new corporation, still in a "start-up" phase at the time that it filed its petition in December 2002. While the petitioner has accelerated its research program, we do not find that the petitioner had documented accomplishments in an academic field as of the petition's filing date.

The other basis for denial is the director's finding that the beneficiary appears to be an engineer/designer rather than a researcher. The petitioner has indicated that the beneficiary "conducts advanced research into intelligent, distributed software networking, with focus on scalability and ease of use. He is also responsible for designing [the petitioner's] system architecture." The director stated "[t]he beneficiary appears to utilize existing principles and technology to solve practical problems and to develop effective methods of improving information storage." The director concluded that the beneficiary does not conduct "scholarly or advanced theoretical research."

The director noted "the proffered wage for the position is \$140,000 per year, a salary not typically paid to a researcher by definition." On appeal, counsel argues that the beneficiary's high salary is a sign of the demand for his services, rather than *prima facie* evidence that the beneficiary does not work as a researcher. We agree with counsel that, while the beneficiary's salary is high for a researcher, this does not demonstrate that the petitioner is not a researcher. Furthermore, the beneficiary's salary appears to be substantially higher than the median salary of computer software engineers, and therefore the beneficiary's salary does not inherently support the contention that the beneficiary is an engineer rather than a researcher.

In the computer software field, there is not always a sharp distinction between research and engineering or product design/development. In this instance, the beneficiary is not merely a systems analyst or programmer, customizing existing software to suit the needs of individual clients. Rather, the beneficiary is involved with more fundamental issues such as data storage and retrieval. Upon review of the available evidence, it is reasonable to conclude that the beneficiary's activities at the petitioning company constitute research. Therefore, we withdraw the director's conclusion in this regard, although the denial still stands, owing to the other ground of denial, which the petitioner has not overcome.

The director, in denying the petition, did not address the question of whether the beneficiary qualifies as an outstanding researcher. Review of the record indicates that the petitioner has not met its burden of proof in this regard. As noted above, CIS regulations at 8 C.F.R. § 204.5(i)(3)(i) require evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. The petitioner must submit evidence to fulfill at least two of six listed criteria. Peter Wang, in his introductory letter, claims that the petitioner has fulfilled five of the six criteria.

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

Mr. Wang asserts that the beneficiary “is a four-time recipient of 3Com Corporation’s Annual Inventor Award. . . . The criteria for winning this award is that the recipient must be a 3Com employee who is either a named inventor of at least two patent applications filed within the past year, or a named inventor of at least one patent granted within the past year. Each year only approximately 100 to 150 out of a total of approximately 14,000 employees qualifies for the award.”

The petitioner has not shown that the 3Com Annual Inventor Award is a major award that confers international recognition. The annual figure of 100 to 150 winners is quite high, even without considering that the pool of potential winners is limited to one company. The comparison between the 100-150 winners to the total of 14,000 3Com employees is somewhat misleading, because many 3Com employees (e.g., administrative staff) presumably work in occupations that do not involve creating new inventions that are subject to patents. Thus, only a fraction of 3Com’s total employee base would be in a position to vie for the award in the first place. Most importantly, the act of applying for or receiving a patent does not automatically confer international recognition.

Published material in professional publications written by others about the alien’s work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.

Mr. Wang asserts that the beneficiary’s “work has been extensively cited and referred to by other scientist[s] and engineers.” Such citations are not published materials about the beneficiary’s work; they are published materials about areas of common interest, containing brief references to numerous earlier articles. Citations are more properly considered as a gauge of the impact of the beneficiary’s own published work, which falls under a separate criterion further below. We note that several of the citations of the beneficiary’s work actually appear in graduate theses or dissertations. There is no evidence that these papers have been published in professional publications, as the regulations require.

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.

Mr. Wang states “[b]ecause of [the beneficiary’s] reputation as an expert in the industry, he is frequently asked to judge the quality of papers written by other scientists and scholars that have been submitted for publication.” The petitioner has not shown that manuscript review of this kind is a special privilege reserved for elite scientists, rather than a fairly routine duty expected of competent and active researchers.¹

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

Under this criterion, Mr. Wang cites the beneficiary’s “numerous approved and pending U.S. patents . . . as well as the multitude of publications that he authored.” Published materials are covered by a separate criterion. The beneficiary’s patents prove that he is a productive innovator, but these patents do not demonstrate international

¹ We note the American Chemical Society’s *Ethical Guidelines to Publication of Chemical Research*, which indicates “[i]nasmuch as the reviewing of manuscripts is an essential step in the publication process, and therefore in the operation of the scientific method, every scientist has an obligation to do a fair share of reviewing.” While the beneficiary is not a chemical researcher, there is no evidence that the mechanics of peer review are dramatically different in the beneficiary’s field than in the discipline of chemistry.

recognition. Statistics available online from the United States Patent and Trademark Office² indicate that hundreds of thousands of patent applications are filed each year, with roughly half of them eventually being approved. Without additional evidence attesting to the significance of the beneficiary's contributions, we cannot find that documentation of patents is sufficient to satisfy this criterion.

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

Mr. Wang observes that the beneficiary has written numerous published articles, as well as a book chapter. As noted above, Mr. Wang asserts that the beneficiary's work "has been extensively cited." The petitioner lists 56 citing articles, and submits partial copies of 50 of them. This evidence demonstrates that the beneficiary's published work has been influential in the field at an international level, and thereby satisfies this criterion.

Because the petitioner has satisfied only one of the six criteria listed at 8 C.F.R. § 204.5(i)(3)(i), we cannot find that the beneficiary qualifies as an outstanding researcher. This represents an additional reason that the petition cannot be approved, beyond the already sufficient grounds for denial cited in the director's decision.

In this matter, the petitioner has not established documented accomplishments in an academic field. Therefore, the director acted properly in denying the petition. We have also found that the petitioner has not established that the beneficiary qualifies for the classification sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² Source: http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm