U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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MAR 07 2005

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 98 203 52577

IN RE: Petitioner:
Beneficiary: [redacted]

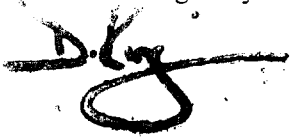
PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the petitioner's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

In a supplementary appellate brief, counsel draws the AAO's attention to a recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland Int'l*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, Citizenship and Immigration Services (CIS) may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.[1]

According to the record of proceeding, the petitioner lives in California; thus, this case did not arise in the Second Circuit. *Firstland Int'l* was never a binding precedent for this case. Even as a merely persuasive precedent, moreover, *Firstland Int'l* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, __ Stat. __ (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically

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[1] Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant on May 30, 1997, over one year prior to the filing of the Form I-140 immigrant petition and more than seven years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited to file the petition until after he or she arrived in the United States.

applies to the present matter and counsel's *Firstland Int'l* argument no longer has merit. Finally, we note that the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

Counsel's remaining arguments will be discussed below.

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):
>
> (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
>
> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a senior software engineer. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, he claims, meets the following criteria.[2]

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

Initially, counsel asserted that the petitioner's "work has won international telecommunications industry awards." [redacted] asserts that the

[2] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

petitioner made "an outstanding and significant contribution" to Siemens' EWSD switch, designated "most reliable" in an annual telecommunication ranking of switches. a market development architect for Lucent Technologies, reiterates that the petitioner made a "significant contribution" to the EWSD switch, asserting that the switch "won Bellecore's golden rating in 1996 for telephone switching equipment with the least down-time in the United States." adds that the petitioner's "research and methods were instrumental in helping Siemens attain this honor." Whil confirms the petitioner's contributions to the switch, he makes no mention of a Bellecore award. The petitioner submitted promotional materials for the switch, which indicate it is best selling switch but does not mention any awards.

In the notice of intent to revoke and again in the final decision, when discussing this criterion, the director evaluated the petitioner's presentation at a NATO workshop whose participants are described as "leaders" in the field. As noted by counsel on appeal, the petitioner has never claimed the workshop relates to this criterion. While the director engaged in a semantics discussion distinguishing "leader" from one of the very few at the top of the field, the more obvious problem with this evidence, as it relates to this criterion, is that an invitation to present one's work, regardless of the prestige of the workshop, is not an award or prize. Thus, as acknowledged by counsel, this evidence simply does not relate to this criterion. The problems with counsel's characterization of this evidence will be discussed below.

The evidence that was actually submitted to address this criterion is not persuasive. First, the record does not contain the ranking or award from Bellecore. Second, the record does not contain any evidence about the significance of the award, such as how many switches received a similar rating. Third, while the petitioner's colleagues attest to the importance of the petitioner's contribution to the switch, the record does not contain the patent for the switch confirming the petitioner's inclusion as an inventor. Finally, according to the attestations about the award, it was issued to not the petitioner. The clear language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of the *alien's* receipt of the award or prize. The petitioner has failed to establish that the beneficiary satisfies this criterion.

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

Initially, counsel asserted, "material about [the petitioner's] work has been published in professional publications." Counsel references exhibit 13, a magazine whose cover features a robot allegedly designed by the petitioner. The portion of the cover submitted does not credit the petitioner with the design of the robot.

In the notice of intent to revoke, the director concluded that no evidence had been submitted to meet this criterion. The petitioner's response did not address this criterion and the director reaffirmed the conclusion in his final decision. Counsel does not challenge this conclusion on appeal.

Materials that do not identify the petitioner cannot garner the petitioner any acclaim. Moreover, the magazine cover, dated July 1990, bears the word The petitioner obtained his Ph.D. at the University of n 1989. Local or school publications cannot be considered major media. Moreover, the magazine is dated nine years before the date of filing and is not evidence of sustained acclaim as of that date. Thus, we concur with the director that the petitioner does not meet this criterion.

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

Counsel initially asserted that the petitioner's designs of an assembly line robot and award-winning telecommunications switching system are original contributions. According to counsel, "the most credible indication of the value of [the petitioner's] research is the fact that [he] **was invited to present his findings to the NATO Workshop for Multisensor Computer Vision, held in France in 1989**." (Emphasis in original.) Counsel referenced this "invitation" as evidence that the petitioner is "recognized as one of the pioneer leading experts in artificial intelligence." Counsel continues to emphasize this workshop presentation. For example, in response to the notice of intent to revoke, counsel notes that the preface to the volume containing the revised papers affirms that "[e]ach participant is a recognized leader in his or her area in the academic, governmental, or industrial research community." Counsel asserts that leadership in the field is the same as being at the top of the field. The director rejected this comparison. On appeal, counsel reiterates that only leaders in the field were invited to this workshop and that leaders are those who have risen to the top of the field.

We do not find the director's distinction between "leaders" and those at the top of their fields to be useful. Of more significance is the fact that the invitation in the record is addressed to the petitioner's mentor. Specifically, Exhibit 9 contains a December 19, 1988 letter from [redacted] he editor of the publication of the revised papers, to [redacted] inviting him to present a paper. The same exhibit includes [redacted] January 13, 1989 response to Professor Aggarwal submitting an abstract of his work, coauthored with the petitioner, for consideration. A final letter accepting the paper for presentation, dated April 20, 1989, is addressed to "Workshop Participant." The petitioner's name is handwritten after the salutation. That the petitioner is the first author of the paper submitted for presentation is irrelevant as to whether he was the actual invitee as a leader in the field. The letters discussed in this paragraph do not support counsel's continued assertion that the petitioner was invited to this workshop as a leader in his field. The petitioner cannot demonstrate his own acclaim through affiliation with his mentor. That the petitioner's own mentor selected an article for presentation coauthored by the petitioner is not evidence of the petitioner's acclaim beyond his mentor. We note that in 1988, when Professor Aggarwal issued the first invitation, the petitioner was a Ph.D. student with a single published paper.

While the petitioner's presentation at the NATO workshop is not, in and of itself, indicative of his recognition for contributions of major significance, the remaining evidence must be considered. The petitioner obtained his Ph.D. from the University of Karlsruhe in Germany in 1989. He then worked for Siemens, ultimately as a senior software engineer, until 1997, when he left to join TCSI in the United States as a senior software engineer.

At the University of Karlsruhe, the petitioner worked in the Robotics and Computer Vision research group headed by [redacted] asserts that the petitioner "developed a new and original solution" to the problem of unreliable recognition of 3-D objects by robots. Specifically, the petitioner introduced data fusion, combining data from the robot's illumination sensor and range data from its laser sensor. According to [redacted] his work was "a major breakthrough" in that it allowed "substantially more robust object recognition results."

Chair of the Computer and Electronics Engineering Technology Department at ITT Technical Institute, asserts that the petitioner's robotic work "inspired my research team." of the University of Hamburg asserts that he has "been a beneficiary of [the petitioner's] work since 1986 when he was a research scientist working at [the University of Karlsruhe]." Director of Research and Development a asserts that between 1986 and 1991 he requested and used four of the petitioner's reports and manuscripts. These letters confirm that the petitioner's Ph.D. work was useful. Without evidence of widespread credit, such as numerous journal citations or references in patent applications, however, we cannot conclude that this work constituted a contribution of major significance. Moreover, the work referenced in these letters occurred more than nine years before the petition's filing date. The petitioner needs to demonstrate sustained acclaim for those nine years.

TM Switch Research Manager discusses the petitioner's work on the EWSD/EWSX switch at that company. ndicates that Siemens is one of ten companies worldwide able to produce such switches and that 9,000 employees work on this project states:

> [The petitioner] was put in charge of Object Modeling Defined Object Models (DOM) Table Facility for the Q3 Platform. This became the central and crucial part of the Q3 Platform dealing with CMIS/CMIP protocol for our ATM Switch. . . . It has repeatedly been shown that [the petitioner's] design and implementation of the DOM subsystem stabilized the run time behavior of the platform, strengthening considerably the competitive advantage of the Siemens ATM Switch. [The petitioner's] DOM Table Facility for the Q3 platform design was without a doubt a significant breakthrough in the development of Telecommunication Management Network (TMN) Q3 technology.

concludes that the petitioner's "grasp of the new standardized operating interfaces, as demonstrated by his ability to quickly and competently design System Architecture around them, played a crucial role in allowing Siemens to maintain its lead in this critical area during this period of rapid technological and regulatory change." Other letters in the record provide similar information.

The record lacks evidence that the switch was highly ranked by Bellecore as claimed. The promotional materials about the EWSD switch, while they do suggest that the EWSD switch is "the best-selling switching system in the world," are not as persuasive as independent evaluations of the switch by trade publications. Moreover, the petitioner has not submitted any foreign or U.S. patents naming him as an inventor of any component of the switch or the switch itself.[3]

a principal software engineer at TCSI Corporation, explains that many transactions are routed through the phone system but that phone companies cannot afford a massive upgrade of their switching systems. Thus, they seek "intelligent software to better utilize their switch resources." asserts that the petitioner's background in artificial intelligence allows him to design systems that prioritize tasks and "maximize the productivity of the expensive switch equipment [the phone companies] own and hold down costs."

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[3] U.S. Patent information is publicly available. A search of the U.S. Patent Office's website, www.uspto.gov, reveals no patents listing the petitioner as an inventor.

> [The petitioner] is the leading researcher and has made significant contribution to the design and implementation of the Configuration Management and the Fault Management parts for our flagship product: SolutionCore™, an application environment for building and deploying large, distributed TMN system for the telecom industry. Central to TMB System Architecture is the Q3 Platform, without which a TMB cannot work properly. [The petitioner] has been designing TMB's and Q3 Platform since 1992, when he worked for [a] public telephone network division of Siemens, the European company. His unusually high level of expertise in TMN system architecture makes him an indispensable addition to TCSI's software development team who has been playing a critical role in solving the most challenging problems.

[redacted] oncedes, however, that as of 1998, the technology on which the petitioner was working had yet to be tested and released. As such, it is not clear how the petitioner's work at TCSI can be considered a contribution of major significance to the field as of the date of filing.

While the record contains the petitioner's written work and academic credentials, the evidence of alleged acclaim consists entirely of reference letters. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner initially submitted his 1989 dissertation, a 1986 published article, and his revised paper originally presented at the 1989 NATO Advance Research Workshop on Multisensor Fusion for Computer Vision. The petitioner's coauthor, [redacted] asserts that the University of Karlsruhe "has received repeated requests from academics and high-tech firms for copies of [the petitioner's] research results." The petitioner [redacted] mentor, [redacted] rovides two examples of researchers citing the petitioner's work, the most recent in 1992, seven years prior to the filing date of the petition. In the notice of intent to revoke, the director noted the lack of reprint requests in the record.

In response, counsel asserts that the NATO presentation was significant for the reasons discussed above. The petitioner submitted letters from members of the field affirming that they have requested and applied the petitioner's published work.

In his final decision, the director concluded that the photocopy of the NATO workshop papers does not confirm the petitioner's authorship. On appeal, the petitioner submits the entire volume, which does contain the petitioner's article, a copy of which was part of the petitioner's initial submission.

The petitioner's most recent published work is from 1989, ten years prior to filing the petition. While the record contains some attestations of reliance on these articles, the record contains no suggestion that the petitioner's work is widely and frequently cited in peer-reviewed journals. Moreover, reliance on the petitioner's work should be demonstrable through submission of published articles or patent applications citing the petitioner's work as a reference. We are not persuaded by counsel's assertion on appeal that such evidence is no longer

available. Prior to the on-line citation indexes now available, bound citation indexes, available in academic libraries, were used to catalog citations. A lack of recent citations of the petitioner's work, however, suggests that his publication record is not indicative of sustained acclaim up until 1998 when the petition was filed.

Finally, we note that one of the petitioner's references, a professor at the University of Hamburg, purports to have authored over 100 technical papers, five book chapters, and two "research monographs." Thus, the top of the petitioner's field, as represented by scholarly articles, appears to be far higher than the level the petitioner has achieved.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

Counsel initially asserted that the petitioner's work "has been showcased at the NATO Workshop for Multisensor Computer Vision and other international scientific conferences." As noted by the director, this criterion does not apply to the petitioner's field. It could be argued that an invitation to participate in a highly prestigious scientific workshop designed solely for participation by leaders of the field is comparable evidence to meet this criterion. Even if we accepted that principle, for the reasons discussed above, the petitioner was not the primary invitee.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The petitioner first claims to have met this criterion in response to the director's notice of intent to revoke, relying on his contributions to his employers discussed above. The director concluded that the petitioner's role as a member of a group at Siemens could not serve to meet this criterion.

On appeal, counsel asserts that the petitioner's achievements while at Siemens attests to his critical role with that distinguished company.

We have already considered the petitioner's claims of contributions to the field above. While counsel is correct that a petitioner need not submit evidence that only those with extraordinary ability work for his employer, the plain language of the criterion requires evidence that the position the petitioner was hired to fill is a leading or critical role for the employer.

The petitioner was a senior software engineer for Siemens from 1992 through 1997. According to 9,000 employees worked in the same department dedicated to the EWSD product line. does not indicate how many senior software engineers are included in that number. states that the petitioner was "put in charge" of the DOM table facility for the Q3 Platform. It is not clear that every team leader for a large project involving several components is a leading or critical role. The evidence does not indicate that a senior software engineer is a critical or leading role for Siemens other than the obvious need for a successful telecommunications company to employ competent engineers.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a senior software engineer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a senior software engineer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.