



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

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 17186384

Date: JUN. 30, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a producer of telecommunications hardware and software, seeks classification of the Beneficiary as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the Beneficiary met the initial evidence requirements for the requested classification, the record did not establish that he had sustained national or international acclaim or is one of the small percentage at the top of his field of endeavor.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

**I. LAW**

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability 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 into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

## II. ANALYSIS

The Beneficiary earned a master of science degree in electrical and computer engineering from the University [redacted] in 2011, and is currently employed by the Petitioner as its Head of [redacted]. The record shows that he co-founded [redacted] in 2011, which later became known as [redacted], and served as the company's vice president of research until it was acquired by the Petitioner in 2019.

### A. Evidentiary Criteria

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must show that he satisfies at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Beneficiary met four of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to his contributions of major significance to the field, authorship of scholarly articles, performance in a leading or critical role for an organization with a distinguished reputation, and high salary in relation to others in the field. However, in conducting the final merits determination, he did not find that the Beneficiary qualified as an individual of extraordinary ability. On appeal, the Petitioner submits additional evidence and asserts that the Director discounted the evidence of patents on which the Beneficiary is listed as an inventor. It further stresses that media articles that are not about the Beneficiary nevertheless discuss his work and were not properly considered in the Director's final merits determination. After reviewing all of the evidence in the record, we agree with the Director's conclusions regarding the contributions, author, and salary criteria, but we do not agree that the evidence sufficiently shows that [redacted] has or had a distinguished reputation to meet the criterion at 8 C.F.R. § 204.5(h)(3)(viii). Nevertheless, because we agree that the Beneficiary has met the requisite three criteria and thus meets the initial evidence requirement for this classification, we will conduct a final merits determination of the totality of the evidence to determine whether he qualifies as an individual of extraordinary ability.

## B. Final Merits Determination

In a final merits determination, we examine and weigh the totality of the evidence to determine whether the Petitioner has sustained national or international acclaim and is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation. Here, the Petitioner has not offered sufficient evidence that the Beneficiary meets that standard.

In its appeal brief, the Petitioner primarily focuses on the patents authored by the Beneficiary for [redacted] technology he developed and which led him to co-found [redacted]. In particular, it stresses that the commercialization of the technology in those patents led to its acquisition of [redacted]. The first issue it addresses concerns the number of patents in which the Beneficiary is named, which the Director characterized as 20 patent applications based upon the Beneficiary's Google Scholar profile. On appeal, the Petitioner asserts that it provided evidence of more than 75 patents authored by the Beneficiary which have been issued. We first note that beyond the Google Scholar profile and documentation of 6 U.S. patents and 10 patents in other jurisdictions, this evidence submitted in response to the Director's request for evidence (RFE) consists of tables apparently created by the Petitioner which list information about other patents, some of which these documents indicate are still pending. Such documentation may serve as reference material, but it does not serve to verify the existence of the listed patents, whether pending or issued. While the Petitioner submitted further evidence of the Beneficiary's United States and international patents on appeal, the RFE specifically requested further evidence of patents and their licensing and utilization. Where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In addition, and more importantly for purposes of this analysis, the evidence does not indicate that each of the patents listed in these documents represents a new innovation or original contribution to the field, but rather that many of them were filed to secure intellectual property protection for an existing and already patented innovation in an additional jurisdiction. While this does not diminish the value of the Beneficiary's original contributions, the Petitioner has not established that the number of patents and patent applications listing the Beneficiary as an inventor is sufficient to show his elevated status within the field of wireless communications.

Concerning the commercialization of the Beneficiary's [redacted] technology for which the patents were filed, the Petitioner asserts that the Director did not consider the evidence of contracts to deploy that technology, as well as media coverage of [redacted] and its purchase by the Petitioner. This evidence includes a statement of work (SOW) between [redacted] and [redacted] in the amount of \$50,000 for an approximately six month term. The SOW, dated May 18, 2016, lists the Beneficiary as "Technical Representative" and calls for [redacted] to provide software to support [redacted] technology for [redacted] devices. Additional evidence includes a contract between [redacted] and [redacted] a [redacted] company in Sri Lanka, for the provision of "a software application to enable [redacted] data transmission." The Petitioner also submitted a press release from [redacted] dated February 26, 2019, announcing its demonstration of its [redacted] with [redacted] at [redacted]. Although the contracts indicate that the Beneficiary's innovations have begun to be deployed in the

telecommunications industry to some extent, it is insufficient to show that this limited commercialization of his technology has impacted the broader telecommunications field already or brought him sustained national or international acclaim in the field. For example, we note that the press release regarding the [redacted] demonstration does not indicate that [redacted]'s software has already been deployed, but that it "can be utilized to update existing [redacted] devices."

Several of the reference letters submitted by the Petitioner also highlight the potential of the Beneficiary's work rather than the effect it has already had on the telecommunications field.<sup>1</sup> [redacted] co-founder and CEO of [redacted] writes that he joined [redacted]'s advisory board in 2013 based upon his impression of the Beneficiary's [redacted] technology. While he praises the Petitioner's solution as the most cost-effective to address the demand for wireless connectivity, he then states that it "could be a revolutionary approach to cellular networks that may help address the burgeoning need for wireless connectivity," and notes that "we are only at the beginning."

Another former member of [redacted]'s advisory board is [redacted], CEO of [redacted]. Similar to [redacted]'s letter, he writes that the company's technology "has the potential to change the way the telecom sector will operate in the coming years," and describes it's software solution as "likely to be the most cost-effective alternative to come to market in the next several years." Although both of these letters mention the ongoing commercialization of the Beneficiary's technology, neither is specific in describing the impact it has already made.

An additional reference letter was submitted by [redacted] of the University [redacted] [redacted] who notes that he met the Petitioner in 2011 at the university and fully supported him and the seed financing for [redacted] from the University of [redacted]. Like the letters above, he mentions that the technology developed by the Petitioner "has the potential to be the most cost-effective way to improve the efficiency of cellular networks," that the "real work has just started." While the patents and evidence relating to [redacted] show that Petitioner has already significantly contributed to the development of telecommunications technology, these letters do not establish that the commercialization and impact of his innovations are at a point where he is of the small percentage of engineers at the top of the telecommunications field.

The record also includes several media articles discussing [redacted] and the technology developed by the Beneficiary. As noted by the Director in his decision, none of the articles are about the Beneficiary, but instead focus on [redacted] it's launch, financing and purchase by the Petitioner, and the benefits and drawbacks of the technology it produces and markets. Some of these materials appeared as blogposts, some as press releases from [redacted] and the Petitioner, while three of the articles were news items posted on websites focusing on information technology and startup companies such as [www.geekwire.com](http://www.geekwire.com) and [www.technologyreview.com](http://www.technologyreview.com). We note that while the latter articles appeared on well-known media and discuss the Petitioner [redacted] and the technology developed by the Beneficiary, none of them mention him by name. Further, the publication of these three articles is spread out over five years, covering the period from [redacted]'s beginnings to its purchase by the Petitioner, which does not indicate that the company or technology was receiving significant or frequent interest from industry or mainstream media. This not only reflects upon whether [redacted] had a distinguished reputation, as briefly

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<sup>1</sup> All reference letters in the record have been reviewed, including those not specifically mentioned in this decision.

referenced above, but also does not show that the Beneficiary was the recipient of sustained national or international acclaim for his work.

Turning to the evidence of three scholarly articles written by the Beneficiary and published in one scientific journal and two conference proceedings, the Petitioner asserts on appeal that the Director's statements regarding the level of citations to this work are *ultra vires* since citations are not mentioned in the pertinent regulations or in USCIS guidance relating to the criterion at 8 C.F.R. § 204.5(h)(3)(vi). However, we note that the Director made this statement in his final merits determination, and had already granted the criterion relating to the publication of scholarly articles. In addition, the Petitioner does not explain how these three papers, when viewed within the totality of the evidence, have garnered acclaim for the Beneficiary at the national or international level or mark him as one of the few at the top of his field. The Petitioner instead refers to the evidence of the Beneficiary's patents, which were discussed above, and the evidence that citations to them "number over 400." While it suggested in responding to the Director's RFE that those citations serve as evidence of widespread commentary or notice, the record does not include evidence of the nature of any commentary included with those citations, and the Petitioner does not otherwise explain how the citations support the Beneficiary's eligibility as an individual of extraordinary ability.

Regarding evidence of the Beneficiary's salary and total remuneration, the Director concluded in his decision that the evidence established that he met the criterion at 8 C.F.R. § 204.5(h)(3)(ix) based upon the evidence initially submitted. However, in discussing that evidence in the final merits determination, the Director used the language from that criterion to diminish the significance of that evidence, stating that it did not establish that "his salary or remuneration is significantly high relative to others working in the field." The two-step adjudication process put forth in *Kazarian* and the associated USCIS policy<sup>2</sup> dictates that after a petitioner has established that they meet the requisite three criteria under 8 C.F.R. § 204.5(h)(3), the next step is to consider whether the totality of the evidence shows that the person has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the person is one of that small percentage who has risen to the very top of the field of endeavor. Here, the Director incorrectly applied the same standard to the evidence of the Beneficiary's remuneration in the final merits determination as he had under the relevant criterion, and also reached a different conclusion.

This evidence shows that in 2019, the Beneficiary received total remuneration from [redacted] in the amount of \$818,267.92. In addition, receipts from three two-week pay periods in 2020 show that the Petitioner was paying him a salary at the annual rate of approximately \$185,000, and also reflect a one-time amount marked "payout" in the amount of \$201,056.85.<sup>3</sup> The Petitioner explains on appeal that the figure shown in the 2019 Form W-2 reflects the Beneficiary's base salary and "his royalties and stock option payouts," but the record does not include information which shows how much of this total was comprised of base salary, royalties, and stock option payouts. Nevertheless, although we agree that this evidence is sufficient to demonstrate that the Beneficiary meets the relevant evidentiary criterion,

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<sup>2</sup> See 6 USCIS Policy Manual F.2(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2>.

<sup>3</sup> On appeal, the Petitioner submits for the first time a 2019 IRS Form 1099-B which shows that he received gross proceeds from the sale of [redacted] of over \$1.4 million. As noted above, where a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). We will therefore not consider this evidence in our decision.

the Petitioner must establish that the Beneficiary has enjoyed sustained national or international acclaim in his field in order to establish eligibility, and this evidence covering approximately 18 months does not support such an assertion.

The evidence establishes that the Beneficiary developed novel software applications for use in the telecommunications industry and successfully launched a company to develop and market his innovations which received investor funding and was ultimately bought out by the Petitioner. In addition, he continues to lead the development of this technology, which has begun to find its way into telecommunication equipment, under the Petitioner's employment. However, the evidence does not show that his achievements have been widely recognized in the telecommunications industry through sustained acclaim in the form of awards or significant media attention, or that his innovations have influenced the industry to the extent that he is one of the small percentage at the top of his field.

### III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of the Beneficiary's work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Beneficiary has garnered national or international acclaim in the field, and that he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

**ORDER:** The appeal is dismissed.