

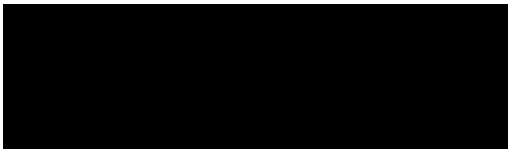


U.S. Citizenship
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FILE: EAC 02 218 50538 Office: VERMONT SERVICE CENTER Date: **NOV 18 2005**

IN RE: Petitioner:
Beneficiary:

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

s Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 and business. The director determined that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

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):

(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 into the United States will substantially benefit prospectively the United States.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "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).

In this case, the petitioner seeks classification as an alien with extraordinary ability in the sciences and business as an embedded systems software engineer and entrepreneur. Finding that the evidence initially submitted did not establish that the petitioner had achieved the requisite sustained acclaim, the director issued a Request for Evidence (RFE) on August 6, 2004 to which the petitioner timely responded on November 3, 2004. On appeal, the petitioner submits a brief and additional evidence. The petitioner's claims and the evidence submitted on appeal do not overcome the deficiencies of the petition and the appeal will be dismissed. We address the evidence submitted and the petitioner's contentions in the following discussion of the regulatory criteria relevant to the petitioner's case. The petitioner does not claim eligibility under any criteria not discussed below.

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

On appeal, the petitioner states that in the commercial technology business, prizes are only rarely “awarded to particular products, not the individuals that helped create them.” He further contends that most of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) “do not readily apply to professions that operate in a corporate environment, where financial remuneration takes the place of publicity and awards, and the corporate identity is emphasized well above individual contributions” and requests that awards granted to his past company, BitBand, and products that he worked on be considered as comparable evidence of his eligibility under this category pursuant to 8 C.F.R. § 204.5(h)(4).

In his letter submitted with the petitioner's RFE response, Junichiro Hamaguchi, Senior Project Manager at Konica Minolta who formerly worked with the petitioner, states, “Unlike the traditional computer industry, embedded software makes [sic], companies and individuals alike, live in relative obscurity, and do not get the same amount of attention from trade and financial press, and are seldom given any fame, except within the small circles of peer professionals.” Even if we accept this explanation as sufficient justification to invoke the comparable evidence provision of 8 C.F.R. § 204.5(h)(4), the record does not demonstrate that the petitioner has contributed to award-winning companies or products in a manner consistent with sustained national or international acclaim.

The record shows that from 1999 to 2001, the petitioner was the founder and Chief Technology Officer (CTO) of BitBand Incorporated (BitBand) in Israel. On appeal, the petitioner claims that BitBand has won several awards, but the record documents only one honor accorded to the company after the petitioner's departure. The petitioner submitted evidence that BitBand was chosen for the 2004 Tornado Insider Top 100 List of best-performing and innovative high-tech private companies in Europe and Israel. We cannot consider this evidence because it arose after the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, even if this honor had been granted prior to filing, it would still not be creditable to the petitioner. The petitioner states that after his departure from BitBand in 2001, he was still an advisor and shareholder of the company. Yet BitBand's 2004 honor cannot be attributed to the petitioner given his limited and indirect role with the company at that time.

Similarly, the honor accorded to Wind River Systems Incorporated (Wind River) in 2001 cannot be attributed to the petitioner. The record contains a press release dated November 30, 2001 and printed from Wind River's website, which states that the company was “named the leading embedded software development tools vendor by Gartner Dataquest in the research firm's recent worldwide market analysis of the embedded software tools market.” The petitioner's resume states that he left Wind River in January 1999. The record does not establish that the petitioner's work significantly contributed to the company's designation as a leading vendor in its field two years after the petitioner's departure.

Alexander Pavlovsky, Founder and Vice President of Hardware Engineering at Ranch Networks, explains that he worked with the petitioner when the petitioner was employed at RST Software Industries Limited (RST) and that he formerly led the development of “the Cajun switches” at Lucent Technologies (Lucent). Mr. Pavlovsky explains that he collaborated with the petitioner on the “‘Cajun’ Ethernet switch family, which was awarded in

[sic] Las Vegas Interop + WorldCom International exhibition. Also the ‘Cajun’ switches received award [sic] from Mier Communication Group.” Accompanying Mr. Pavlovsky’s letter is a printout from Lucent’s website with a press release dated February 14, 2000 announcing that the company’s Cajun P333T Switch earned a “NetWORKS As Advertised” award in the stackable 10/100/1000 megabits per second Ethernet switch category from Mier Communications. A second Lucent press release dated May 15, 2000 states that Lucent’s Cajun Campus Switching Series was a finalist in the Gigabit Ethernet Solution category of the 2000 Well-Connected Awards of *Network Computing*. The record show that the petitioner was the owner and general manager of RST from 1992 to 1997, but contains no corroborative evidence that he collaborated with Mr. Pavlovsky on the “Cajun” switch technology that was later used by Lucent. Even if the petitioner’s contributions were adequately documented, the record contains no independent evidence of Lucent’s NetWORKS As Advertised award, the significance of the award, or evidence that the award is nationally or internationally recognized.

The record contains no evidence of nationally or internationally recognized awards or prizes granted prior to filing and accorded to companies or products to which the petitioner directly contributed and which are thus attributable to the petitioner. Accordingly, the petitioner does not meet this criterion.

(iii) Published material 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.

On appeal, the petitioner requests that

all publications about *BitBand, Inc.* be considered equivalent to publications about the beneficiary – clearly, without the beneficiary’s vision and labor, the company would not come to exist. Moreover, since the beneficiary has clearly been the technological innovator driving this company, the press covering the technical merits of the company’s products should be directly contributed [sic] to the beneficiary by the AAO.

Even if we accepted the submitted articles as comparable evidence of the petitioner’s eligibility, they would not satisfy this criterion. The record contains six articles that discuss or mention BitBand. Four of these articles were published after the petition was filed and consequently cannot be considered. The petitioner must establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. The remaining two articles were submitted as printouts from the website of *PR Newswire*. The record contains no evidence that *PR Newswire* is a professional, major trade publication or another form of major media. In fact, the article entitled “BitBand Names Jeff Dykan Chairman and CEO” states that it was “[d]istributed by PR Newswire on behalf of BitBand Inc.” Press releases, paid advertisements or other promotional material from an alien, his employer, agent or other representative do not meet this criterion. Individuals who have achieved sustained national or international acclaim are generally the subject – not the source – of published material about themselves and their work. Accordingly, the petitioner does not meet this criterion.

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

The petitioner, through prior counsel, initially claimed to meet this criterion through his work at BitBand and RST. On appeal, the petitioner reiterates this claim and cites the submitted recommendation letters. The record contains six letters from professionals who have worked with the petitioner. While such letters provide relevant

information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in his field beyond the limited number of individuals with whom he has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has achieved sustained national or international acclaim. Accordingly, we review the letters as they relate to other evidence of the petitioner's contributions.

The petitioner initially submitted four letters. [REDACTED] Software Research and Development Engineer at ECI-telecom, simply states that she attended a "training program about vxWorks O/S and Tornado environment" conducted by the petitioner in 1997 where he "demonstrated an amazing knowledge of those subjects plus some extra information, and gave us very good advice about problems that specifically interested us." Amir Fuhrmann, owner of Sphinx Technologies, states that he has known the petitioner since 1986. Mr. [REDACTED] letter is unsigned and incomplete. The letter concludes, "Leonid is most innovative and creative. He has initiated activities that turned into successful companies. Leonid is a worldwide known authority on the [sic][.]" [REDACTED] Chairman of Tenta Technology, states that he has known the petitioner since 1990 when he supervised the petitioner at Applied Materials. [REDACTED] letter is also unsigned. Dr. [REDACTED] states that while at Applied Materials, the petitioner "provided some unique technical solutions for software [sic] real time control systems for the Semiconductor Equipment market. Those solutions were implemented successfully and commercialized in Applied Materials Inc (US) equipment." Another unsigned letter is attributed to [REDACTED] Chief Executive Officer of Tenta Technology. [REDACTED] states that he has known the petitioner for about 15 years and explains that in 1986 when he was a field service engineer at E&M Engineering in Israel, he gained valuable knowledge and advice from the petitioner as a "UNIX systems expert." In 1992, [REDACTED] states that he again depended on the petitioner's professional assistance and expertise when [REDACTED] was employed by Applied Materials. These letters indicate the petitioner's expertise and valuable assistance provided to these four individuals, but they do not document any original, major contributions that the petitioner made to his field.

With his RFE response, the petitioner submitted an additional three support letters. [REDACTED] of Konica Minolta, states

It is quite natural that not many people outside the embedded software industry have heard of Leonid and his work, but I can testify to the fact that a very large number of embedded programmers have come across his name, and many more are using the fruits of his labor, to produce innovative, life changing and at times life saving devices and instruments.

At Wind River, Leonid was primarily involved with the *embedded system storage* technologies and products, and has contributed to the advancement of the entire Wind River product line with his file system products, including the then revolutionary *DosFs 2.0* components, which is [sic] to this day, an integral part of the award winning Tornado® product line. . . .

I can disclose at confidence [sic] that many of Konica Minolta's office automation products are based on Wind River's Tornado, and depend on the management of embedded storage, handled by *DosFs 2.0*, which has proven to be one of the most reliable and economical solution [sic] of this kind in the industry, and provides my company's products with some critical differentiating features.

I also am aware of several digital camera manufacturers who use Leonid's work, namely DosFs 2.0 in their cameras to manage the assorted Flash-memory based digital storage media.

In addition to discussing his collaboration with the petitioner on the "Cajun" Ethernet switch family, Mr. [REDACTED] also states that at RST, the petitioner developed and executed "business programs for wide deployment of VxWorks in Israel, by that he became one of the top Israeli business expert [sic] in Hi-Tech [sic] area. In fact, he was chosen [sic] as a senior advisor by the Sequoia Venture to participate in the selection of Israeli Start-up companies to invest in." The record corroborates the petitioner's work for RST, but does not document his service as a senior advisor to Sequoia Venture. [REDACTED] further states that the petitioner "is nationally acclaimed and his achievements have been recognized in [sic] Israeli business community."

Michael Delimann III, Chief Engineer of Operating Systems for several NASA projects, states that he worked with the petitioner at Wind River. He explains:

Leonid authored both file systems and file system repair tools for Wind River's Real Time Operating system. . . . To balance the design of such a system requires an extremely high level of skill, a level I would guess that fewer than one tenth of one percent of software engineering professionals display. Weather [sic] Leonid knows of this or not, his file system has been used in satellites, medical scanners, and intelligent munitions systems, as his implementation of the DOS file system is very robust and fast. These are life-critical and mission-critical systems, meaning if the systems fail, someone who relies on them will likely die as a result. A few examples would include pacemakers made by Pacesetter, medical scanners made by G.E., intelligent munitions used by the Department of Defense, and satellites deployed by NASA.

The record contains a printout of an electronic mail message from Mr. Delimann telling the petitioner "your name is now almost ready to start walking across Mars, and your dosFsChkLib is very much a part of the picture."

As discussed above under the first criterion, the petitioner has been involved with companies and technology that won honors after his involvement ended. The record does not persuasively document his exact contribution to the "Cajun" switch technology, for which Lucent was later honored. On appeal, the petitioner contends that his "innovations have resulted in the acquisition of his first private company by the world leading company in embedded systems software – Wind River Systems, Inc." The record shows that the petitioner was the general manager and owner of RST, which was later acquired by Wind River. Yet Wind River was not named the leading embedded software development tools vendor until 2001, four years after its acquisition of RST.

Similarly, although the petitioner was the founder and CTO of BitBand, that company was not honored until three years after the petitioner's departure and two years after this petition was filed. On appeal, the petitioner contends that BitBand "was initially funded with \$4 million by one of the world's most prominent venture capital firm [sic]: Sequoia Capital (Menlo Park, CA), the same venture firm that founded Cisco Systems, Yahoo, Inc. and other highly successful technology powerhouses. Thais [sic] should be viewed as the ultimate proof of the beneficiary's technological innovation ability." BitBand's company profile and the 2001 article from *PR Newswire* state that BitBand is a private company "in which Sequoia Capital Seed Fund (jointly owned by Sequoia Capital and Cisco Systems) has invested." The record contains no documentation that this investment was worth four million dollars and the petitioner submitted no corroborative evidence of the reputation of the Sequoia Capital Seed Fund. Yet even if the record established these facts, they alone would not demonstrate

that the petitioner's work at BitBand constituted a major scientific or business related contribution to his field. Investment in a company by a prominent venture capital firm demonstrates the company's promise for future financial success. Such investment does not demonstrate the invested company's established achievements or show that the company has made original scientific or business related contributions of major significance to its field of endeavor.

The letters of [REDACTED] indicate that the petitioner is a highly skilled engineer whose work has contributed to several important products. We have noted [REDACTED] observation that embedded software engineers do not receive public recognition for their work and may not even be aware of the products in which their work is eventually incorporated. However, the record contains no evidence to corroborate the relative obscurity of the petitioner's profession as described by [REDACTED]. In addition, the record does not persuasively document the petitioner's exact contributions and their significance to his field. For example [REDACTED] in a printout of an electronic mail message submitted with his letter, explains that anyone who has worked at Wind River over the last decade was involved in the NASA Mars Pathfinder, Rover, space probes and other related projects. The significance of the petitioner's individual contribution is unclear from the evidence submitted. In fact, [REDACTED] message suggests that the petitioner's work has not yet been incorporated into a successfully launched NASA Mars project. Mr. [REDACTED] message is dated January 12, 2004 and states that the petitioner's name "is almost ready to start walking across Mars." The record thus indicates that the petitioner is a highly skilled expert in his field whose work is valued by the authors of his recommendation letters. Yet the evidence submitted does not establish that he has made original scientific or business related contributions of major significance to his field in a manner consistent with the requisite sustained acclaim. Accordingly, he does not meet this criterion.

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

The record contains copies of promotional materials, presentations and a programming manual purportedly written by the petitioner. Work products such as these are not scholarly articles published in professional, major trade publications or other major media. The petitioner also submitted a copy of an article co-authored by him entitled, "CONSIP A Concurrent Network Simulation Package for Local Area Networks." This article was included in a book published 16 years before this petition was filed. The petitioner submitted no evidence that this article was and continues to be consistently cited or otherwise recognized in his field. On appeal, the petitioner submits evidence that his paper, "TOOLweb Sensors Data Collection Principles," was accepted for online publication by *Solid State Technology* on March 17, 2005. This evidence does not support the petitioner's eligibility under this criterion because his paper was not published (let alone accepted for publication) prior to the filing of this petition. The petitioner must establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49.

On appeal, the petitioner claims that his writings posted on the electronic forums "VxWorks Exploder" and "VxWorks FAQ" meet this criterion. He submits evidence that the first forum has over 1,000 subscribers and that the second internet site was accessed 2,486 times in the month preceding the filing of this petition. The record contains printouts of numerous electronic mail messages written by the petitioner between 1988 and 2001. The messages relay technical advice and directions in response to questions posted on the VxWorks forum. [REDACTED] affirms that "[t]hrough his contributions on the Internet-based forums, [the petitioner] has many times helped engineers and researchers all around the world with their most critical issues, and

enabled their success.” This evidence shows that the petitioner has shared his valuable expertise with many individuals. Yet his electronic mail messages are not scholarly articles.

On appeal, the petitioner contends that he “is part of a deeply technical community that has adopted the Internet as their *main venue* for publishing and sharing knowledge, and hence most of the beneficiary [sic] published articles appear on several Internet sites.” We do not dispute that some forms of electronic media may constitute professional, major trade publications or other major media given evidence of their wide dissemination and readership, yet that proposition is an ancillary issue in this case. The crucial question here is whether or not the petitioner’s electronic mail messages are scholarly articles. The evidence submitted shows they are not. The petitioner’s messages provide valued technical expertise and advice, but they are not scholarly articles that discuss and analyze substantive issues in the petitioner’s field in depth. Moreover, the petitioner submits no evidence to corroborate his implication that such messages are the functional equivalent to scholarly articles in his field and hence, should be so considered under the comparable evidence provision of 8 C.F.R. § 204.5(h)(4). Accordingly, the petitioner does not meet this criterion.

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

The record documents the petitioner’s leading and critical role for BitBand. As discussed above under the first, third and fifth criteria, the evidence submitted shows that BitBand did not achieve significant recognition in the field until after the petitioner resigned from his leading and critical roles for the company. Moreover, the submitted articles about BitBand from *PR Newswire* appear to have been published at the company’s own instigation and hence do not reflect national or international acclaim. As was also discussed under the first, third and fifth criteria, the petitioner contributed to acclaimed products and companies. Yet those honors occurred after the petitioner’s departure from the companies or are not otherwise clearly attributable to him. Accordingly, the petitioner does not meet this criterion.

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The record contains evidence of the petitioner’s 2003 income, U.S. and California income tax returns for 2003, and his income from the first half of February 2005. While we understand that the petitioner submitted these documents in response to the director’s request in the RFE, we cannot consider this evidence because it arose after the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. The record contains no evidence that at the time of filing the petitioner’s income or other remuneration was significantly higher than other embedded software engineers or comparable to such engineers at the very top of their field in Israel or the United States. Accordingly, he does not meet this criterion.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the petitioner is a successful embedded software engineer, but the record does not establish that he had achieved sustained national or international acclaim placing him at the very top of his field

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at the time of filing. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his 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. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.