



U.S. Department of Justice

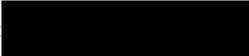
Immigration and Naturalization Service

Public Copy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



11 DEC 2001

File:  Office: Nebraska Service Center Date:

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)

IN BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

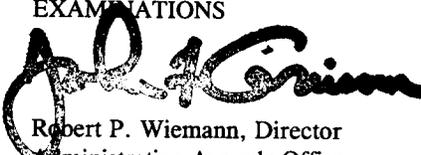
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

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

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

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations 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.

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 Service 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.

At the time of filing, the petitioner was a postdoctoral fellow at the University of Utah School of Medicine ("UUSM"). 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.

In his initial filing, the petitioner has not specified which of these ten criteria he claims to have satisfied. The principal evidence, however, appears to conform to the following two criteria:

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

The record contains several witness letters, and an affidavit from UUSM Professor Aaron Hoffman. Prof. Hoffman describes the petitioner's work and its significance:

[The petitioner] is an exceptionally accomplished researcher in materials science and engineering. . . .

[The petitioner] plays a critical role in research which I direct at the University of Utah of high priority to national health. My research interests are in bone ingrowth, biomechanics and biomaterials as they apply to hip and knee joint replacement implants. Improving joint implant technology is a matter of high priority to health care in the United States. . . .

[The petitioner's] research has demonstrated expertise in fabrication of two distinct ceramic systems: oxide, in his development of zirconia-alumina; and nonoxide, in his development of silicon carbide titanium carbide. He has significantly improved the mechanical properties of materials both for load bearing and rolling contact by introduction of surface compressive stresses and published papers on his results. . . .

[The petitioner] has been hired by develop ceramic acetabular components, which have ultra low wear against femoral components. [The petitioner's] development of an inherently tougher bioceramic will provide a novel solution to this critical problem. . . .

[The petitioner's] outstanding research accomplishments demonstrate extraordinary expertise in wear in ceramics as applied to bearing surfaces and as applied to rolling contact fatigue. His research has made significant contributions to the development of layered composite materials with improved wear and fracture toughness in load bearing and in rolling

contact fatigue from the introduction of surface compression to layered ceramics. . . .

The specific advanced ceramic which is the subject of [the petitioner's] research at the Department of Orthopedics is an ultra low wear composite ceramic which has been demonstrated in aerospace and engineering applications [to be] clearly superior to other ceramics. This composite has great potential for implant applications in virtually eliminating wear particle mediate osteolysis and consequent implant failures. The composite is also expected to alleviate the major clinical concern stemming from brittle fracture. Toughness enhancement over conventional ceramics will significantly reduce risk of tibial failure. . . .

[The petitioner] is expected to demonstrate the feasibility and merits of the advanced ceramic composites as a replacement for PE [polyethylene] in hip and knee implants. The use of the proposed novel ceramic composites . . . will lead to the virtual elimination of wear debris, thus addressing and eliminating one of the most important clinical problems in hip and knee implants.

Prof. Hoffman discusses potential outcomes and results, without specifying the extent to which the petitioner has already influenced hip and knee implants outside of the University of Utah. The fact that the petitioner's work might prove to be highly significant, provided certain unspecified conditions are met at some unknown point in the future, does not establish that the petitioner has already earned acclaim for significant contributions to his field.

Most of the remaining witness letters are from faculty members of the University of Utah and collaborators at Ceramatec, Inc. (one of whom is also an associate adjunct professor at the University of Utah). The only other witness, Dr. James Adair of Pennsylvania State University, had previously collaborated with the petitioner while the petitioner was a doctoral student at the University of Utah. These witnesses, like Prof. Hoffman, discuss the potential future impact of the petitioner's work rather than existing, tangible advances. For instance, UUMS Professor Roy D. Bloebaum, states:

Currently, there are problems with wear particles being liberated from total joint replacements causing the implants to fail. Ceramics offer the possibility to eliminate the wear problems and improve the endurance in total joint replacements. [The petitioner] possesses the unique talent and education to resolve this urgent problem in joint replacement."

Professor Dinesh K. Shetty of the University of Utah's Department of Materials Science and Engineering states that the petitioner's "efforts are expected to lead to the development of advanced ceramics for orthopedic applications without the health risks associated with current implant technology." Officials of Ceramatec also discuss the "potential impact" of research which, apparently, has yet to produce conclusive practical results. While this research is important, expectations and potential do not constitute contributions of major significance.

We note that passages in several witness letters are virtually or entirely identical to passages in Prof. Hoffman's affidavit. We are unable to determine the identity of the original author of these passages.

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

The petitioner submits copies of four articles pertaining to his research in materials science. We note that the articles do not specifically pertain to joint replacement implants or to orthopedic surgery in general. The petitioner also submits copies of seven articles, written by researchers in various countries, which contain citations of the petitioner's work.

The above-mentioned citations of the petitioner's work demonstrate that other scientists have found his research to be useful, but the petitioner has not shown that four articles, with a total of seven citations, represent an extraordinary publication record. We cannot find that the very existence of published material by the petitioner is *prima facie* evidence of extraordinary ability or sustained acclaim. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among postdoctoral researchers (such as the petitioner) who have not yet begun "a full-time academic and/or research career." This report reinforces our position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

The director informed the petitioner that the documentation submitted with the petition was not sufficient to establish the

petitioner as an alien of extraordinary ability. The director clearly set forth the criteria outlined in section 203(b)(1)(A) of the Act, and specified that the Service has defined "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."

In response to this letter, counsel asserts that the petitioner meets the regulatory criteria described above and also the following criteria.

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.

Counsel states that the petitioner has already submitted seven published articles about the petitioner's work, and that nine more articles accompany the response to the director's notice. Counsel here refers to bibliographic citations of the petitioner's published articles. Citation of the petitioner's work, however, does not establish that the articles containing the citations are "about" the petitioner or his work. The articles do not mention the petitioner in the body of the text, and the petitioner's specific findings are not the focus of the articles. Some of the articles contain dozens of citations, and we cannot conclude that the articles are "about the alien" simply because the alien petitioner is one of the dozens of cited authors. These citations are more appropriately considered in the context of the impact of the petitioner's own published work.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

Subsequent to the filing of the petition, the University of Utah appointed the petitioner to a sixteen-month term as an Adjunct Assistant Professor of Orthopedics. Counsel states that "[i]n this position [the petitioner] will judge the work of others in the field." Because the petitioner was not already a member of the "auxiliary faculty" at the time of the petition's filing, the position cannot establish his eligibility as of that date. See Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Furthermore, counsel has not explained how the petitioner's position would involve judging the work of others. Routine

professorial duties are, virtually by definition, shared by all college professors, and we cannot therefore conclude that all college professors (or temporary adjunct assistant professors) are therefore at the top of their respective fields.

The bulk of the petitioner's response to the director's request for further evidence consists of further witness letters, which counsel claims establish the petitioner's widespread reputation and acclaim. Dr. Stuart Adler, currently an assistant professor at Case Western Reserve University, asserts that the petitioner "is a world expert" in his field and that the petitioner's "work is of great scientific and engineering significance." Dr. Adler states that he has never met the petitioner personally, but he adds that he used to collaborate with Dr. Raymond Cutler, who in turn has collaborated with the petitioner both at Ceramatec and at the University of Utah.

Another witness with direct ties to the petitioner is R. Krishna Kumar, assistant professor at the Indian Institute of Technology ("IIT"), which the petitioner attended. Dr. Kumar states "[a]ny student who passes out of the IIT system should be in the top 1% when rated with his peers." We hold that university study is not a field of endeavor, but rather a method of training for future entry into a field of endeavor. We also hold that, whatever the reputation of a given college or university, the very act of graduating from that institution does not confer acclaim on the graduates.

Other witnesses, from a variety of institutions, discuss the future potential of the petitioner's findings. The witnesses do not discuss the extent to which the petitioner has already influenced joint replacement technology. One witness states that the petitioner's work "has the potential to be an excellent contribution" and "may improve" the durability of existing prostheses; another states that the petitioner's "research could contribute to improved prosthetic devices and bone implants." The letters show that experts around the world are monitoring the progress of research into novel orthopedic materials. We note, however, that Prof. Aaron Hoffman, who has supervised the petitioner's postdoctoral work, claims himself to be an internationally known figure in his field, in which case the petitioner's work will become known as a result of Prof. Hoffman's already-established following in the field.

In a letter dated August 2, 2000, Dr. Darrel S. Brodke of the University of Utah states "[i]n the past one and a half years [the petitioner] has provided valuable contributions to the field of orthopedic biomaterials." This letter is dated more than thirteen months after the petition's June 25, 1999 filing date, and thus the majority of this "one and a half years" occurred too late to establish the petitioner's eligibility as of that filing date.

However significantly the petitioner may have built an international reputation during 2000 and the second half of 1999, the letters in the record do not show that the petitioner enjoyed such recognition as of the filing date. Subsequent developments in the petitioner's career are best considered in the context of a newly-filed petition, although we can make no representations as to the expected outcome of any future petition. Also, the existence of a separate visa classification for alien researchers with international recognition (see section 203(b)(1)(B) of the Act) demonstrates that international recognition is not necessarily synonymous with sustained international acclaim (otherwise the second classification would be superfluous).

The director denied the petition, stating that while the petitioner's work "may well revolutionize the future of knee and hip joint replacement" at some point in the future, the petitioner has not established that he has already earned sustained acclaim or reached the top of his field.

On appeal, counsel claims that the petitioner met six of the regulatory criteria and has since satisfied two more. We have already discussed much of the evidence but will consider counsel's new arguments on appeal.

With regard to the petitioner's claimed activity as a judge of the work of others, counsel acknowledges that the petitioner was not yet an adjunct assistant professor at the time of filing, but counsel asserts that the director's decision "concedes [that] the Petitioner has presented evidence that he now judges the work of others." In the denial decision, the director stated "although the petitioner has been promoted to adjunct assistant professor the Service can only consider evidence available at the time of filing." The director did not "concede" that a temporary, part-time auxiliary faculty position establishes the petitioner as a judge of the work of others. We note that, as of December 28, 2000, after the petition had been denied and the initial appeal had been filed, University of Utah correspondence continues to refer to the petitioner as a "post doctoral fellow." This correspondence demonstrates that the university does not consider the petitioner to be first and foremost a member of the faculty.

While the petitioner had never before claimed to have satisfied it, counsel asserts that the petitioner's prior evidence has already satisfied the criterion pertaining to "display of the alien's work in scientific meetings." The actual and complete wording of the criterion is "evidence of the display of the alien's work in the field at artistic exhibitions or showcases." Counsel cannot make this criterion conform to the petitioner's work simply by removing the phrase "artistic exhibitions or showcases" and replacing it with "scientific meetings." Presentations at professional gatherings are intended to disseminate highly technical information

to a specialized audience, and thus are more akin to scholarly publications (already addressed) than to artistic exhibitions.

Another newly claimed criterion which counsel asserts the petitioner has already satisfied requires "evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." While witnesses have stated that the petitioner performs a vital role in specific projects at the University of Utah, it does not follow that the petitioner plays a critical role at the university-wide level, or that his specific research group is, itself, a distinguished organization or establishment.

Of the two criteria which, according to counsel, the petitioner has newly satisfied, one calls for "evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." On appeal, a letter from a University of Utah official indicates that the petitioner's "current salary is \$35,020.00. The average salary for a post doctoral fellow in the School of Medicine is \$30,635.00." The petitioner's field is not limited to postdoctoral researchers at the University of Utah, and therefore it cannot suffice to compare the petitioner's remuneration only with that limited and relatively inexperienced group.¹ The Department of Labor's Occupational Outlook Handbook, 1998-1999 edition, page 169, states "[a]ccording to a 1995-1996 survey by the American Association of University Professors, salaries for full-time faculty averaged \$51,000," with full professors earning an average (not a maximum) of \$65,400, nearly double the petitioner's salary of several years later. We cannot conclude that the petitioner is among the highest-paid experts in his field.

The other new criterion requires "evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." As with the above criterion pertaining to "artistic exhibitions," counsel has simply removed and substituted wording which plainly shows that the criterion does not apply to research scientists. Counsel states that the petitioner has attained "commercial recognition" because of "commercial interest in the products to be created from [the petitioner's] research." Even ignoring the issue that orthopedic materials research is not a performing art, speculation regarding potential future success is not evidence of existing commercial success. The petitioner has submitted no evidence that any manufacturer has actually created prosthetic implants using the

¹We note that the record does not show the extent to which the petitioner's appointment as an adjunct assistant professor may account for the salary differential.

petitioner's materials, let alone evidence that those materials are outselling rival implants.

Section 203(b)(1)(A)(i) of the Act requires "substantial documentation" of sustained acclaim. In this instance, the petitioner's strongest evidence consists of witness letters from a variety of sources, solicited specifically to support the visa petition. Apart from published articles (which a major competent authority deems to be "expected" of postdoctoral researchers), the record contains little in the way of objective documentation that would have existed whether or not the petitioner had filed this petition. The witness letters are certainly not without weight, but they cannot fully take the place of the variety of objective documentary evidence contemplated by the statute and regulations. The filing of the petition appears to have been premature at best.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Review of the record, however, does not establish that the petitioner has distinguished himself as a researcher 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 in the field of orthopedic materials, and that he is building an international reputation, but is not persuasive that the petitioner's achievements as of the June 1999 filing date set him significantly above almost all others in his field at a national or international level. 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.