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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: WAC 01 032 53931 Office: California Service Center Date: 18 JUN 2002

IN RE: Petitioner: [redacted]
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: Self-represented

Public Copy

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, California 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.

The petitioner seeks employment as a research scientist at Therma-Wave, Inc. 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 which, he claims, meets the following criteria.

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

The petitioner asserts that his Graduate Research Award from the American Vacuum Society satisfies this criterion. By nature, however, this award is limited to graduate students. Graduate study is not a field of endeavor, but rather advanced training for future entry into a field. The nation's most established and experienced scientists, who are employed in their own right rather than still working on their degrees, are ineligible for consideration for the award and therefore we cannot conclude that a winner of a graduate student award stands at the very top of his field.

We note that, according to a letter from an official of the American Vacuum Society, the petitioner was one of nine graduate students to receive a Graduate Research Award in 1997, "with the awardees selected out of approximately 20 applicants," indicating that nearly half of the applicants received the awards.

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

The petitioner cites his published articles and conference presentations as evidence of his contributions. Published work falls under another criterion; to satisfy this criterion, the petitioner must show not only that his work was published, but that has major significance in the field. To that end, the petitioner submits several witness letters.

[redacted] of the Institute for Surface Modification [redacted] Germany, states that he met the petitioner in 1998, when the petitioner worked for [redacted] at Princeton University:

> [The petitioner] is an expert in scanning probe methods and, in particular, in scanning tunneling microscopy (STM) which became a primary tool for surface characterization on an atomic scale. . . .
>
> [The petitioner] is pioneering the STM studies on self-assembled organic semiconductors in [the] USA and he did some very important work on the growth of several organic molecules (PTCDA, NTCDA and CuPc) on gold surfaces discovering a number of new structural phases in films of these molecules. These experiments are difficult and require extraordinary experimental skills and deep scientific insight. These studies are very important since they expand our understanding of growth behavior of ordered organic films and shed light on the dependence of the molecular structure of these films on growth parameters. This information is critical for controlled growth of organic films with desired properties which is essential for organic electronic devices, such as thin-film transistors.
>
> [The petitioner] is a scientist who gained national and international acclaim through his numerous publications and presentations in the field of STM characterization of

> both inorganic and organic semiconductors. He is one of the leaders in this field. . . His extensive experience, extraordinary research contributions, publication and presentation record are well above average, and set him apart from others, and put him among the top few percent of scientists working in the field of STM surface characterization.

[redacted], an assistant professor at [redacted] states that the petitioner "is one of the leading experts in the field of scanning tunneling microscopy (STM) and other scanning probe methods, as well as in their use and application to the analysis of various solid surfaces and thin films in vacuum." She describes some of the petitioner's specific accomplishments:

> [The petitioner] has shown that not only monolayer films of organic molecules, but also multilayer films can be directly studied by the STM, thus, greatly expanding the capability of this technique. His results on the growth of multilayer films of PTCDA . . . revealed for the first time the connection between the structure of thin films and the bulk crystalline structure of PTCDA. The new structural phases of PTCDA monolayers discovered by [the petitioner] may lead to entirely novel structures, such as two-dimensional arrays of ordered organic molecules of two different types and are very likely to open new and exciting opportunities in the field. Another area where [the petitioner] has made and continues to make key contributions is the research on growth of organic films on organic substrates, which is important for the understanding of the formation of organic/organic interfaces, a critical area for the development of new and efficient organic light-emitting diodes, thin film transistors and other devices. . . .
>
> [The petitioner] has made critical contributions to the understanding of adsorption of metals on the Si(111) surface, development of scanning tunneling luminescence and surface structure of compound semiconductors. In particular, his studies of the GaAs(001) surface were widely cited and discussed in the scientific literature by two U.S. and international researchers. . . . He has undoubtedly established himself as one of the top experts in STM surface analysis.

[redacted] states that the petitioner "is clearly at the top of his field of scanning probe methods and their applications to surfaces of solids," and that the petitioner's "findings have attracted both national and international acclaim within the scientific community." While we do not doub[redacted] sincerity, it is perhaps instructive to compare Prof. Feenstra's own record to that of the petitioner. [redacted] impressed with the petitioner's graduate award from the American Vacuum Society, but he himself is a fellow of the same society. Election to such a fellowship would appear to be a significantly greater honor from the American Vacuum Society than the graduate award.

[redacted] states that the petitioner's "15 scientific papers have appeared or are about to appear in the leading international journals within the field of condensed matter physics and surface science," but Prof. Feenstra himself has "authored or co-authored more than 100 papers. . . . My

work has been cited more than 1000 times in scientific publications by other authors." [redacted] observes that "in 1998 [the petitioner] has received the select appointment to work at [redacted] one of the leading surface scientists in the world." In this position, the petitioner worked as a postdoctoral fellow, in what amounts to a temporary training position. [redacted] does not explain why one of the top figures in his field would be working for another professor instead of holding a faculty position of his own. In general, while there may be interest in some of the petitioner's recent work, the record indicates that [redacted] has risen considerably higher than the petitioner in their common field.

Other witnesses offer similar testimony, indicating that they and others are impressed with the petitioner's work, but at the same time establishing professional credentials that dwarf those of the petitioner. These witnesses credit the petitioner with discoveries of major significance. Nevertheless, such accomplishments, by regulation, cannot suffice to establish sustained acclaim; the petitioner must satisfy at least two other criteria.

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

The very existence of published work by the petitioner is not dispositive. 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 researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

Witnesses state that the petitioner has written 15 articles, some of which had not yet been published at the time the witnesses wrote their letters. The petitioner has submitted evidence that other scientists have cited his work 22 times. When considering whether these figures place the petitioner at the top of his field, we must examine whatever comparative evidence is available in the record. As we have noted above, one of the petitioner's witnesses, Professor Feenstra, has written over 100 papers, which have been cited over 1,000 times in the aggregate. In the face of this information, we must require persuasive evidence that the petitioner's own publication record is indicative of extraordinary ability and sustained acclaim.

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

The petitioner earns $81,000 per year, compared to what he calls an industry average of less than $62,700 for "Physics Ph.D.'s employed in industry." The latter figure, from the American Institute

of Physics, is not an average for the entire field. Rather, it is the "median full-time annual salary secured by Physics PhD's in the winter following their degree, class of 1998." A median is not the same thing as an average. More importantly for our purposes, the vast majority of physicists now working obtained their doctorates before 1998, and the class of 1998 is not a field unto itself. Similarly, a survey by the Commission on Professionals in Science and Technology indicates that physicists employed in business and industry earn a median salary of $62,000, but this survey, like the one above, does not cover the entire field but rather "Recent Doctoral Graduates." The regulation demands that the alien's salary be high "in relation to others in the field," rather than others in the alien's age group within that field. Therefore, the figures in these surveys are of little if any use in showing that the petitioner is among the highest-paid physicists overall.

The director instructed the petitioner to submit additional evidence, stating that the initial submission did not establish sustained acclaim or extraordinary ability. In response, the petitioner asserts that his initial submission establishes his eligibility. The petitioner's arguments in this regard are not persuasive. For instance, with regard to his Graduate Research Award, the petitioner asserts that he has submitted letters attesting to the prestige of the award. With the exception of a printout from the American Vacuum Society's web site, submitted with the petitioner's response, the petitioner states "[t]o the best of my knowledge there does not exist any other information about this award that I can possibly obtain." It would appear that, if the award were a nationally significant award, there would at least be coverage of the award in trade publications. More importantly, however, it remains that the award is only for graduate students, and therefore under the best of circumstances it can establish only that an award recipient is at the top of those who, at the time, are graduate students studying in areas "of interest to the American Vacuum Society."

The petitioner adds that his "salary exceeds $90,000." A letter from the petitioner's employer confirms an annual salary of $91,000. This amount is $10,000 higher than the amount the petitioner was earning at the time he filed the petition. A subsequent salary increase cannot retroactively make the petitioner eligible as of the filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and 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.

Aside from the above, the petitioner has not shown that a salary of $81,000 or even $91,000 places him at the very top of the field. The petitioner submits a graph from Physics Today to establish that his $91,000 salary is near the top of the salary range. The graph, however, is arranged by "Years Since Ph.D." For a physicist with 0-4 years of post-doctorate experience, $91,000 is indeed close to the top of the range, which is roughly $55,000 to $98,000. The salary figures climb significantly, however, with experience; the salary range for physicists who are 30 or more years past their Ph.D. degrees is roughly $70,000 to $145,000, with three-quarters of them earning more than $91,000. The petitioner's salary crosses below the median at the 15-year mark. Because physicists with one, ten, and thirty years of experience all work in the same field

of endeavor, it is entirely appropriate to look at all of their salaries instead of limiting consideration to what the petitioner deems his "peer group," i.e. physicists who only very recently entered the profession in earnest after completing their graduate studies.

The director denied the petition, stating that while the petitioner has obtained favorable letters from witnesses, the record contains no objective documentation to show that the petitioner is nationally or internationally acclaimed as one of the very top figures in his field. On appeal, the petitioner offers several arguments and submits a new letter from an official of the company that employs him.

[redacted] director of Product Engineering, Integrated Metrology at Therma-Wave, states that the petitioner is "critical to the development of the Integrated Metrology Product line" and that the petitioner will benefit the United States because Therma-Wave's anticipated profits "will translate into more than *substantial* tax revenue for the U.S. government over the next four years as well as aid the U.S. balance of trade" (emphasis in original). The company's reliance on the petitioner is not indicative of sustained acclaim, and the assertion that the petitioner will substantially benefit the United States by aiding in his employer's commercial success is not persuasive.

The petitioner argues that the director incorrectly categorized the petitioner's initial witnesses as colleagues and associates. The petitioner observes that "out of 8 letters, 5 were written by individuals who were not 'former colleagues, research associates, and research advisors" as of the time of filing. We duly note the petitioner's observation, but the director's mischaracterization of these individuals does not appear to have led to the denial of a petition which would otherwise have been approved. Even if we were to find that the witnesses' letters establish the petitioner's contributions of major significance, that finding would fulfill only one of the criteria at 8 C.F.R. 204.5(h)(3); if the petitioner cannot fulfill at least two more, the petition cannot be approved.

The petitioner argues at length that his awards, publications, and other evidence have satisfied the necessary criteria and thus established eligibility. We have already discussed this evidence, above, and the petitioner's arguments on appeal do not materially affect our findings (such as, for instance, our observation that the petitioner's salary is high only if we exclude from consideration almost all physicists with more experience than him). The petitioner submits no new evidence on appeal that pertains to these criteria.

The petitioner has clearly impressed some figures in the field with his work. These individuals, however, appear to rank significantly higher than the petitioner himself by a variety of objective criteria. The gulf between the petitioner and his witnesses makes it difficult to draw the conclusion that the petitioner (a recent graduate who had not yet completed his postdoctoral training when he filed the petition) has reached the top of his field. We must consider the petitioner as a physicist, rather than as a "young physicist" or "postdoctoral physicist." It is also unacceptable to define the petitioner's field so narrowly that almost all other physicists are excluded. While the petitioner stands at the threshold of a promising career, and has already won

some degree of recognition for his innovative work, we cannot find that the evidence of record places the petitioner among the small percentage at the very top of his field.

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 physicist 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 is not persuasive that the petitioner's achievements 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.