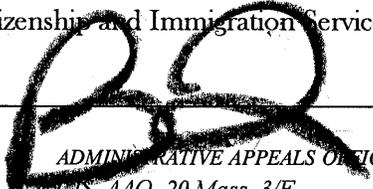


U.S. Department of Homeland Security

Citizenship and Immigration Services



ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

PUBLIC COPY



File: 

Office: California Service Center

Date: **OCT 27 2003**

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:



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

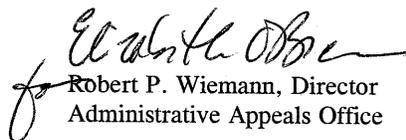
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


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 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. 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 CIS regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The petitioner submitted evidence of his membership in the Materials Research Society (MRS), the Optical Society of America (OSA), and the Institute for Electrical and Electronics Engineers (IEEE). Counsel praised the organizations in his cover letter and the petitioner submitted Internet materials regarding the size and mission of the organizations. The petitioner, however, did not initially submit any evidence regarding the membership requirements for these organizations.

In his request for additional documentation, the director requested "the minimum requirements and criteria used to apply for membership in the association in which the petitioner claims membership." In response, counsel stated:

Although the organizations include those members with truly extraordinary ability in the respective field, it is true that other less qualifying individuals are also allowed to join as a member for those organizations. As such, the petitioner respectfully requests that this portion of his credentials and accomplishments be viewed in conjunction with the rest of his extraordinary academic and research accomplishments and recognitions [sic]. The petitioner hopes to convey the true characteristics of his extraordinary abilities, which will benefit the United States, as an entire set of evidence and hopes that the Service will look upon the entirety of the evidence in adjudicating his self-petition.

In his final decision, the director concluded that the petitioner had not established that the associations of which he is a member require outstanding achievements of their members. In response to counsel's argument, the director concluded that even considering the evidence "in totality" did not suggest that the petitioner was one of the very few at the top of his field.

On appeal, counsel states:

[T]he Self-petitioner pleads that despite the fact that his particular memberships may not be quite up to par with the exclusive standards established by the Service for the purpose of guidance, that the entirety of the Self-petitioner's extraordinary ability not be overlooked as a result of his membership or lack thereof. If not a direct indicator of extraordinary ability, such membership is strong indicia of the Self-petitioner's diligence and active participation in his field of endeavor. Moreover, the particular memberships of the organizations to which the Self-Petitioner holds, includes in its membership such as [sic] those who have been awarded with the Nobel Prize.

Therefore, in response to the Director's reasoning that the entry level requirement for the said memberships do not require extraordinary ability, the Self-Petitioner wishes to submit that its memberships also include extraordinary members but they are not particularly distinguished from the other members and thus no conclusive evidence

regarding the extraordinary abilities of even Nobel Prize recipients can be described by the said membership documentations [sic].

Counsel appears to be arguing that since the membership does not distinguish between Nobel Prize-winning members and ordinary members, the membership should be considered qualifying. We do not find this argument persuasive. The plain language of 8 C.F.R. § 204.5(h)(3)(ii) requires that the association require outstanding achievements of its members. We do not find that membership in an association that happens to have prestigious members but is open to most professionals in the field is evidence that every member is one of the very few at the top of his or her field. As counsel concedes, there is no distinction between the Nobel laureate caliber members and the ordinary members. Thus, the memberships in and of themselves are meaningless in establishing the petitioner's alleged acclaim.

Nor do we find that we must look to other evidence in the record when evaluating whether the petitioner meets this criterion. Even if we concluded that the petitioner met another criterion, which we do not for the reasons discussed below, the petitioner must meet three of the regulatory criteria in order to establish his eligibility. That requirement would be meaningless if meeting a single criterion obligated CIS to conclude that a petitioner meets other criteria for which the evidence is clearly insufficient as is the case with the evidence submitted to meet this criterion. Nor can evidence relating to two criteria but not indicative of or consistent with national acclaim under either criterion somehow be combined to be considered sufficient.

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.

The petitioner did not initially claim to meet this criterion. In response to the director's request for additional documentation, counsel acknowledges the lack of "significant articles" about the petitioner, but requests that the Service (now CIS) consider reference letters submitted at that time. The director concluded that letters from the petitioner's immediate circle of colleagues could not serve to meet this criterion. Counsel does not challenge this conclusion on appeal. We concur with the director. Reference letters prepared in support of the petition cannot be considered published materials about the petitioner in professional or major trade publications or other major media. Thus, they do not meet the plain language of the criterion. We will, however, consider the content of these letters as they relate to other criteria.

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

The petitioner relies on his patents and published articles as evidence to meet this criterion. The petitioner submits one U.S. patent and eight Korean patent applications listing him as a co-author. In his request for additional documentation, the director noted that the record did not establish that the petitioner's patent applications had been approved. The director also requested evidence regarding how the patented work constitutes a "major contribution of significance to the field . . . compared to all others in the field." In response, counsel asserts that the petitioner's publication history is indicative of

his contributions of major significance to the field. Counsel discusses at length the peer-review process for scientific publication and states:

Despite the above-described difficulties in having one's scholarly articles published in scientific journals, [the petitioner] has incredibly managed to have twenty (20) of his scholarly articles published by varying scientific journals and periodicals which can only be described as "prestigious" in its respective field in the global setting.

Such uncanny feat is an indication of [the petitioner's] wealth of knowledge from one perspective, but also an indicator of [the petitioner's] voluminous contribution to the Control & Instrumentation Engineering and MEMS field in a very significant way as each article authored by [the petitioner] contained an idea or finding or a result that was not only widely concurred by his colleagues but also quite noteworthy or newsworthy to be published to advance the field of science and engineering.

The petitioner also submitted reference letters. Dr. Dongil Dan Cho, the petitioner's thesis advisor at Seoul National University, asserts that the petitioner co-invented four Korean patents, one pending Korean patent and one U.S. patent in the area of vehicle detector technology and two additional patents used in products manufactured by Chromux, the petitioner's employer. Dr. Cho also provides general accolades of the petitioner's patent and publication history, asserting that he "has demonstrated extraordinary skills in the area of MEMS technology." On his own resume, Dr. Cho indicates that he has 20 domestic and 10 international patents, and has published 58 journal articles.

Dr. Jong Duk Lee, a professor at Seoul National University, discusses the petitioner's doctoral work at that university. Dr. Lee states that the petitioner's traffic detector system was employed by the Korean Highway Traffic Controlling Systems. Dr. Lee continues:

In addition, [the petitioner] showed his ability to develop the methods of making sensors and actuators. In particular, he has achieved in developing the optical cross connector and micro-mirror array with MEMS technologies, designed the electronics to actuate the systems and enhanced the control algorithms for stable movement of optical cross connector and micro-mirror array using [a] microprocessor. Based on profound knowledge of control theory, he applied modern control algorithms to the MEMS optical cross connector and micro-mirror array. [The petitioner] is one of the few in the world that has knowledge and experience in both MEMS and control area, which is also very helpful to tackle new research areas such as the nano-technology and the bio-MEMS.

Kwi Hyen Nam, President and Chief Executive Officer of Anam Electronics Co., Ltd., discusses the petitioner's participation with a three-company project to develop digital video cassette recorders (DVCR) and digital camcorders. As Vice President of Daewoo Electronics Com., Ltd., at the time, Mr. Nam reviewed all the research results. According to Mr. Nam, the petitioner worked on developing an advanced automatic track following algorithm for DVCRs and digital camcorders,

which "significantly contribut[ed] to the research of [the] DVCR and [the] Digital Camcorder in Korea."

Finally, Dr. Kevin H. Ryu, the petitioner's supervisor at Chromux Technologies, Inc., asserts that the petitioner has accomplished "many difficult tasks given to him in the manufacture of optical micro-mirror array by using one of the most advanced technologies, called MEMS (Micro Electro-Mechanical System) technology." Dr. Ryu further asserts that the petitioner has demonstrated "technical excellence in manufacturing" optical add/drop multiplexers (OADMs) and variable optical attenuators, but provides no details on these alleged contributions. While Dr. Ryu indicates the petitioner is one of the "main authors" of a pending patent application relating to micro-mirror array chips, he does not indicate that the innovation has already generated interest among Chromux's clients. Nor does the record contain letters from any independent companies expressing their intention to purchase the technology.

The director noted that all of the above references worked directly with the petitioner. The director concluded that eligibility cannot rest wholly or primarily on subjective statements from the petitioner's immediate circle of colleagues and noted the lack of evidence reflecting that the petitioner's achievements "have been widely recognized by others in the field." Regarding the petitioner's articles, the director concluded that publication is often required for graduation, and that the publication evidence did not set the petitioner apart from others in his field. Finally, the director determined that the evidence did not demonstrate that the petitioner's Korean patent applications had actually been approved.

On appeal, counsel argues that the petitioner's status as a student should not detract from the fact that he has published scholarly articles and that the regulations do not specify a time frame during which the articles must be published. Counsel notes that the same work published in the journal articles led to the issuance of patents, and asserts that CIS should defer to the findings of the U.S. and Korean patent offices. Counsel also challenges the director's concern with the number of co-authors on the patent application. Finally, counsel argues that the director erred in dismissing the petitioner's reference letters from his colleagues because the director's logic precludes the use by any petitioner seeking this classification from submitting letters from prominent experts with whom they are in contact.

First, we read the director's decision as expressing concern over the lack of evidence setting the petitioner apart from other engineers publishing articles and patents in the field. While the director mentions that the patent application lists co-authors, the director does not appear to be concluding that that fact alone disqualifies the petitioner from eligibility. We concur with the director's concerns.

Despite the director's expressed concern regarding the lack of evidence that the Korean patent applications have been approved, the petitioner submits no evidence regarding this issue on appeal. Regardless, the simple receipt of a patent cannot be considered evidence of a contribution of major significance. This office has held that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of*

Transp., supra, at 221 n. 7.¹ Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* Counsel's argument that we must defer to the U.S. and Korean patent offices is not persuasive. Patents are issued to the inventors of original processes or devices that are useful. No evaluation as to the significance of the invention is made. It is a property right, not recognition for contributions viewed as significant by experts in the field.

Rather than accepting every patent as a contribution of major significance, CIS must determine the significance of the innovation on a case-by-case basis. *See generally id.* The petitioner's U.S. patent is assigned to Dr. Cho in Korea. Dr. Lee asserts that the petitioner's Korean patent was "qualified for Korea government proving test" and that the Korean Highway Traffic Controlling Systems "deployed" the petitioner's innovation. The record, however, contains no confirmation of these assertions from Korean highway officials attesting to the significance of the patent. We note that one of the petitioner's references has been awarded 30 patents, suggesting that the top of the petitioner's field is higher than the level he has achieved.

We also concur with the director's concern that all of the references are from the petitioner's immediate circle of colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's national or international acclaim. Specifically, they do not demonstrate that the petitioner's innovations are known beyond his collaborators and thesis advisor.

Finally, for the reasons discussed below, the petitioner has not demonstrated that his publication record is indicative of national or international acclaim. As will be discussed in more detail below, the record contains no evidence that any of the petitioner's articles have been widely cited, or even cited at all. The petitioner has not provided other comparable evidence that his articles have been influential, such as major or even minor media coverage in the U.S. or Korea of his innovations. Thus, the petitioner has not demonstrated that his published work constitutes contributions of major significance in the field.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the engineering community. Any thesis or research, in order to be accepted for graduation or publication, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains an advanced degree or is published has made a contribution of major significance to the field. The record does not establish that the petitioner's work represented a groundbreaking advance in MEMS research.

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

¹ While this precedent decision relates to a lesser classification, it can be extrapolated that if a patent in and of itself is insufficient to establish a track record of success with some degree of influence on the field, it cannot demonstrate a contribution of major significance, a higher burden.

The petitioner initially submitted his journal articles and published conference presentations. The director requested evidence regarding the significance and importance of the articles. In response, counsel asserts at length that the peer review process for articles is so rigorous that "many of the scholars fail to have even one of their scholarly articles published in a periodical for such field in their entire lifetime."

The director noted that students are generally required to perform research and concluded that the petitioner had not demonstrated the significance of his articles. On appeal, as stated above, counsel asserts that the petitioner's student status at the time of authorship is irrelevant.

We do not read the director's decision as dismissing the petitioner's articles because they were written while he was a student. Rather, the director concluded that because students are required to perform original research and prepare written theses, there is nothing about publishing research while a student that sets the petitioner apart from others in his field.

We concur with the director. A petitioner cannot establish eligibility for this classification merely by submitting evidence that relates to at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of sustained national or international 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 are 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 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.

As stated above, the petitioner has not submitted evidence that any independent researchers have cited the petitioner's articles or comparable objective evidence of the articles' influence. Thus, the petitioner has not demonstrated that he meets this criterion.

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

In response to the director's request for additional documentation, counsel references the petitioner's "process engineer" position with Chromux Technologies, Inc. The petitioner initially submitted a letter from Kenneth Chong, Administrative Manager of Chromux, confirming the position. In response to the director's request for additional documentation, the petitioner submitted the above-mentioned letter from Dr. Ryu.

The director concluded that the petitioner had not demonstrated Chromux's distinguished reputation or that the petitioner performs a leading or critical role for the company. On appeal, counsel asserts that

the petitioner authored two patents “currently used in Chromux’s company products” and that the petitioner debugged the company’s OADM prototype “to make it a real product today.”

The petitioner submits materials downloaded from Chromux’s website. The materials reference the ROADplexier™, a reconfigurable OADM. As stated above, Dr. Ryu asserts that the petitioner has technical excellence in manufacturing OADMs, but provides little detail as to his specific contribution to that project. Moreover, we have considered the claims regarding the petitioner’s contributions while at Chromux above. What is relevant for this criterion is the nature of the role itself. A letter from Chromux indicates that the petitioner is a process engineer. The “about us” section of Chromux’s website does not list the petitioner as one of the company’s notable employees. The petitioner has not established that the role of process engineer is a leading or critical role at Chromux beyond the obvious fact that an engineering company cannot function without engineers.

In addition, it remains that the petitioner has not submitted any evidence of Chromux’s national reputation beyond the materials posted on its own website and information regarding its investor corporations. The record contains no media coverage or other objective evidence relating to Chromux or its products. Thus, the petitioner has not established that Chromux has a distinguished reputation nationally.

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

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

ORDER: The appeal is dismissed.