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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

MAR 21 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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. Specifically, the director determined that the petitioner had only established that he meets two of the regulatory criteria, of which an alien must meet at least three to be eligible for the classification sought. 8 C.F.R. § 204.5(h)(3).

On appeal, the petitioner submits a personal statement asserting that he meets a third criterion through his contributions to the field. *See* 8 C.F.R. § 204.5(h)(3)(v). For the reasons discussed below, we uphold the director’s finding that the petitioner has not established that he meets the criterion set forth at 8 C.F.R. § 204.5(h)(3)(v) as claimed on appeal. Moreover, we withdraw the director’s finding that the petitioner meets the criterion set forth at 8 C.F.R. § 204.5(h)(3)(iv)(relating to judging the work of others).

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

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). 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 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 a postdoctoral associate, an inherently entry-level position. While the statute and regulations do not preclude those at the beginning of their post-academic career from establishing eligibility, such petitioners bear a heavy burden. We will not narrow the petitioner's field to those at the beginning of their post-academic career. Rather, the petitioner must be among that small percentage at the top of his field, including the most experienced and renowned members of that field. 8 C.F.R. § 204.5(h)(2).

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.¹

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 initially submitted evidence of his senior membership in the American Institute of Aeronautics and Astronautics (AIAA) and his membership in Institute of Electrical and Electronics Engineers (IEEE). In response to the director's request for additional evidence, the petitioner submitted evidence that membership in IEEE is open to an individual with a three-to-five year university-level or higher degree from an accredited institution or program whose degree is either in an IEEE designated field or who has three years of professional work experience in an IEEE designated field or who has six years of professional work experience and has demonstrated competence. The petitioner also submitted evidence that senior members in AIAA "shall be persons who have demonstrated a successful professional practice in the arts, sciences or technology of aeronautics or astronautics of the equivalent of at least eight (8) years."

On appeal, the petitioner does not challenge the director's conclusion that neither senior membership in the AIAA nor regular membership in the IEEE requires outstanding achievements and we concur with the director.

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

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 does not challenge the director's conclusion that articles reporting the work of other researchers or reviewing the field in general that cite the petitioner's work in a footnote do not constitute published material about the petitioner. We concur with the director.

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.

The petitioner relies on his volunteer services reviewing unpublished manuscripts submitted for publication in prestigious journals to meet this criterion. The petitioner cites the "Adjudicator's Manual" for the proposition that peer-review meets this criterion. The director accepted that the petitioner meets this criterion.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. According to the record, *Applied Physics Letters* alone received 9,700 manuscripts in 2006 that had to be reviewed. Thus, peer review is routine in the field; not every peer reviewer enjoys sustained national or international acclaim. Without evidence that sets the petitioner apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the petitioner meets this criterion.

The petitioner submitted evidence that he has reviewed manuscripts for *Physics of Plasmas*, *Applied Physics Letters*, the *Journal of Applied Physics*, *Journal of Physics: D*, *Physics Letters A* and the *ASME Journal of Fluids*. The petitioner submitted letters from the editors of these journals noting the importance of peer review, a position we do not contest. F. [REDACTED] Editor of *Physics of Plasmas* asserts that the journal relies on "expert reviewers, established as knowledgeable and competent in their field, who do this as a service to the journal and to their profession." [REDACTED] Editor of *Applied Physics Letters*, provides a nearly identical statement. Competence is not

necessarily indicative of sustained national or international acclaim. Editor of the *Journal of Applied Physics*, asserts that peer review for that journal is conducted by “distinguished scientists who are experts in their field.” [REDACTED], Publisher of the *Journal of Physics D*, asserts that referees are “carefully selected from the top names in the international research community.” Neither [REDACTED] nor [REDACTED], however, explain how the petitioner came to their attention as a potential reviewer. Specifically, they do not indicate whether the petitioner volunteered his services or whether they initiated contact with him based on his overall reputation in the field.

We note that the only publicly available materials submitted by the petitioner relate to *Physics Letters A*. These materials reflect that referees “are matched to the paper according to their expertise.” The materials further state that the database of referees is constantly being updated and that the journal “welcomes suggestions for referees from the author.” Significantly, the manuscripts reviewed by the petitioner for *Applied Physics Letters* and the *Journal of Applied Physics* were authored by [REDACTED] the petitioner’s former coauthor and collaborator. In addition, the request to review manuscripts for the ASME Journal of Fluids, which asserts that the petitioner is being contacted as a “noted expert” is from Subrata Roy, another one of the petitioner’s coauthors and collaborators.

The evidence submitted to meet a given criterion must be indicative of or consistent with sustained national or international acclaim if that statutory standard is to have any meaning. We are not persuaded that the petitioner’s level of participation in the peer-review process, which requires the services of numerous referees to maintain the integrity of the process, sets him apart from other members of his field. Thus, we withdraw the director’s finding that the petitioner meets this criterion. Even if we upheld the director’s finding regarding this criterion, for the reasons discussed above and below, the petitioner falls far short of meeting a third criterion.

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

On appeal, the petitioner asserts, in a footnote, that CIS is not qualified to question the originality of work published in journals that only accept original work. The petitioner also, however, requests that we review the abstracts of his research. We concur that we do not have the expertise to evaluate the scientific significance of a given article. We further acknowledge that journals typically do not publish work that is not original. The petitioner’s field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), however, an alien’s contributions must be not only original but of major significance. We must presume that the phrase “major significance” is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner’s work.

The petitioner further asserts that he has submitted the type of evidence that can demonstrate a contribution of major significance according to the “Adjudicator’s Manual.” Specifically, the petitioner asserts that he has submitted unsolicited requests for copies of his work and “entries (particularly a goodly number) in a citation index which cite the alien’s work as authoritative.” As stated above, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See Ashkenazy Property Management Corp.*, 817 F. 2d at 75; *R.L. Inv. Ltd. Partners*, 86 F. Supp. 2d at 1022. Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d at 989. Finally, the petitioner notes that he submitted “five letters of endorsement from renowned scientists in support of my significantly advancing the field of endeavor.”

██████████, the Director of the Computational Plasma Dynamics Laboratory at Kettering University, discusses the petitioner’s work in that laboratory. ██████████ asserts that the petitioner “has worked hard in developing models for plasma discharges under atmospheric conditions and its interaction with inert and real gases.” ██████████ further notes that this work is funded by the Air Force. Most if not all research receives funding from some source. We are not persuaded that every researcher working with a government grant has already made a contribution of major significance indicative of or consistent with sustained national or international acclaim. ██████████ does not provide any examples of the petitioner’s models being used outside of Kettering University.

██████████, a technical area leader at the Air Force Research Laboratory, asserts that he knows of the petitioner’s work through his own collaboration with ██████████. ██████████ de asserts that the petitioner “has been a crucial contributor in developing a cutting-edge framework to numerically simulate the complex processes that occur when plasmas (essentially electrically conducting fluids) are employed to control fluids.” While ██████████ discusses the potential benefits of aircraft developed using this research, he does not reference a specific program that is now utilizing the petitioner’s models.

Finally, the petitioner submitted three letters from other colleagues at Kettering University. The authors provide general praise and emphasize his credentials. None of these colleagues provide examples of independent research teams successfully using the petitioner’s models.

The above letters are all from the petitioner’s collaborators and immediate 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.

The petitioner failed to provide letters from independent experts. Regardless, the opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the

petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

More specifically, letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

We acknowledge that the petitioner has authored several articles, including several listing him as the sole author. 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." The Department of Labor's Occupational Outlook Handbook 224 (2006-2007 ed.) reflects that university faculty spend a significant amount of their time doing research and often publish their findings. In addition, the handbook acknowledges that faculty face "the pressure to do research and publish their findings." *Id.* at 225. This information reinforces CIS's position that publication of scholarly articles is not automatically evidence of a contribution of major significance; we must consider the research community's reaction to those articles.

The petitioner implies that his work is widely and frequently cited. The record does not support this conclusion. None of the petitioner's individual articles have been cited more than five times and several of the citations submitted, especially those that apply the petitioner's model, are authored by [REDACTED] the petitioner's former coauthor. Other citations are from other research teams at the Indian Institute of Technology, where the petitioner previously worked. These citations cannot demonstrate that independent research teams have been widely influenced by the petitioner's models.

While the petitioner submitted evidence that he has received correspondence regarding his articles, he has not demonstrated that this minimal correspondence is beyond the typical professional discussion that occurs in the petitioner's 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 scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance to the field as a whole. Thus, the petitioner has not demonstrated that he meets this criterion.

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

The director concluded that the petitioner meets this criterion and we concur with this determination.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner initially asserted that his scientific presentations serve to meet this criterion. On appeal, the petitioner does not challenge the director's conclusion that this criterion does not apply to the sciences. We concur with the director. The petitioner's conference presentations are comparable to scholarly articles. As noted above, the petitioner's publication and presentation record serve to meet the scholarly articles criterion at 8 C.F.R. § 204.5(h)(3)(vi).

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

The petitioner initially asserted that his position as a postdoctoral associate serves to meet this criterion. On appeal, the petitioner does not contest the director's conclusion that this inherently entry-level position cannot serve to meet this criterion and we concur with the director.

Finally, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a postdoctoral associate, relies on his publications, minimal citation record, participation in the peer-review process and the praise of his immediate circle of peers. While this may distinguish him from other postdoctoral associates, we will not narrow his field to others with his level of training and experience. [REDACTED] is an elected fellow of two associations and an associate editor of a journal. [REDACTED] is an associate editor of a journal and served as an invited guest editor of a special issue of another journal. These achievements suggest that the top of the petitioner's field is far higher than the level he has obtained.

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 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 as a postdoctoral associate, 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.