



U.S. Citizenship
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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: OCT 27 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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, Director
Administrative Appeals Office

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

In this case, the petitioner seeks classification as an alien with extraordinary ability in the sciences as a physicist. At the time of filing, the petitioner was employed as a postdoctoral research fellow in the Department of Physics and Astronomy at Northwestern University ("Northwestern"). The petitioner submitted evidence including his academic credentials, membership in scientific associations, review of manuscripts for scientific journals in his field, copies of some of his co-authored articles and citation thereto, and nine support letters from scientists who know or have worked with him. In response to the director's Request for Evidence (RFE), the petitioner submitted additional documentation relating to one of his association memberships, service as a peer-reviewer for journals, new co-authored publications, income and position at Northwestern, participation at scientific

conferences, and two new support letters. On appeal, counsel submits a brief and further evidence of the petitioner's service as a peer-reviewer for scientific journals, his position at Northwestern, his presentations at conferences, copies of recent articles co-authored by the petitioner, and two additional recommendation letters.

On appeal, counsel repeatedly cites an unpublished decision of this office. Counsel's reliance on that decision is misguided. Although designated and published decisions of the AAO are binding precedent on all Service employees in the administration of the Act pursuant to 8 C.F.R. § 103.4(c), unpublished decisions have no such precedential value. We address counsel's remaining contentions and the evidence submitted in the following discussion of the regulatory criteria relevant to the petitioner's case.

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

The petitioner claims to meet this criterion through his second-place award in the 1995 Ukrainian National Student Physics Olympiad. Although the petitioner includes this award in his curriculum vitae, the record contains no documentation of this prize. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Even if documented, the award would not meet this criterion because it is a scholastic award for which only other students – not established scientists – compete. Accordingly, the petitioner does not meet this criterion.

(ii) 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 claims to meet this criterion through his membership in the Institute of Nanotechnology, the Optical Society of America (OSA), and the American Physical Society (APS), but only submitted evidence of his membership in the former two associations. The record shows that the petitioner is a "professional member" of the Institute of Nanotechnology. A submitted printout from the Institute's website explains that professional membership includes two subcategories, "Fellow" and "Full Member," and that applicants for professional membership must "provide information on their experience and evidence of their qualifications. Applications will be assessed as to 'Fellow' or 'Member' status by the board." The printout does not show that outstanding achievements are prerequisite to professional membership in the Institute. Similarly, the submitted printout from the OSA website states that regular membership (the level held by the petitioner) is for "scientists, engineers, technicians, and individuals currently working or interested in optics or a related field." The record contains no evidence that outstanding achievements are prerequisite to OSA regular membership. Accordingly, the petitioner does not meet this criterion.

(iv) 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 submitted numerous copies of correspondence from scientific journals in his field requesting his review of manuscripts submitted for publication. While these requests indicate that the petitioner has expertise in his field, they do not document his actual review of the manuscripts. However, the record does document his review of eight manuscripts for the *Journal of the Optical Society of America B*, *Applied Optics*, *Applied Physics Letters*, *Physical Review Letters*, and *Physical Review B*. On appeal, the petitioner submits two letters

confirming his service as a referee for OSA and APS. In a letter dated November 4, 2003, [REDACTED] Director of the OSA Manuscripts Office, confirms that the petitioner completed "reviews of five manuscripts for *Applied Optics*, *J. Opt. Soc. Am. B*, and *Optics Letters* during the past two years." In a letter also dated November 4, 2003, Stanley G. Brown, APS Editorial Director, confirms that the petitioner serves "as a referee for *Physical Review B* and *Physical Review Letters*" and that he has completed four reviews since April 2002. Neither Ms. Cohen nor Mr. Brown state how many reviews the petitioner completed before his petition was filed.

We cannot ignore that most scientific journals are peer reviewed and rely on many scientists to evaluate submitted articles. Thus, peer review is routine in the field and not every peer reviewer enjoys sustained national or international acclaim. Without evidence that sets a petitioner apart from others in his or her field, such as evidence that he or she has reviewed an unusually large number of articles or has served in an editorial position for a distinguished journal, we cannot conclude that the petitioner meets this criterion. The record in this case shows that the petitioner completed eight reviews for reputable journals in his field from 2002 to 2003. While this evidence indicates that the petitioner was beginning to be recognized as an expert in his field at the time of filing, it does not reflect the requisite sustained acclaim. Accordingly, the petitioner does not meet this criterion.

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

The record contains 13 support letters from scientists who discuss the petitioner's research and its significance to their field. Individuals who know or have worked with the petitioner wrote ten of these letters and other scientists who are familiar with the petitioner's work only through his publications and presentations wrote the remaining three letters. While such letters provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in his field beyond the limited number of individuals with whom he has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has sustained national or international acclaim. Accordingly, we review the letters as they relate to other evidence of the petitioner's contributions.

Alexander Lisyansky, Professor and Chair of the Physics Department of Queens College at the City University of New York and the petitioner's doctoral advisor, describes the petitioner as an "internationally recognized scientist with broad range [sic] of interests who has successfully tackled a broad range of problems in physics localization, optical spectra or complex crystals, and wave propagation in heterogeneous structures." Specifically, Professor Lisyansky explains that the petitioner's "work on the electromagnetic wave propagation through heterogeneous nanostructures opens new horizons in creating ultrafast electrooptic devices. . . . [His] research of optical spectra of mixed crystals led to [an] explanation of numerous experiments that were not understood for decades. He was also the first who obtained a correct criterion for single parameter scaling in absorbing localized systems."

Lev Deych, Assistant Professor of Physics and the petitioner's former colleague at Queens College, states that the petitioner "made important contributions in the theory of optical properties of Bragg Multiple Quantum Well Structures with defects. Later these results laid a foundation for my proposal funded by the Air Force Office of Scientific Research." Professor Deych also notes the petitioner's work "on optical properties of mixed crystals

[where] he skillfully applied a concept of local polaritons, developed earlier by my colleagues and me, to mixed crystals, and contributed to developing a clear physical explanation to a vast number of previously unexplained experimental results.” M. Foygel, Professor of Physics at the South Dakota School of Mines and Technology, also worked with the petitioner at Queens College on “electro-magnetic properties of semiconductors in the so called polariton region” and their collaborative work has been published in journals and presented at conferences.

Bart Van Tiggelen, Research Professor of Physics at the *Centre National de la Recherche Scientifique*, states that he met the petitioner when the petitioner was a graduate student at Queens College. Professor Van Tiggelen explains that the petitioner introduced “the concept of a local polariton” and that “[a]n extremely convenient feature of local polaritons discovered by [the petitioner], and with potential applications, is that they can be ‘tuned’ (in energy) by thermo- and photo-excitation of the localized electron states or by trapping of injected charge carriers.” Yet Professor Van Tiggelen also notes that the petitioner received his doctoral degree just one year ago and that “[i]n science that is just too early to judge the importance or impact of scientific activities.”

Ara Asatryan, Research Fellow at the University of Technology, Sydney, Australia, states that he met the petitioner at a conference and again later at Northwestern. Dr. Asatryan explains that the petitioner “developed a theory of localized optical phonons/polaritons in mixed polar crystals and studied how these optically active modes influence a so-called restrahlen band . . . of the host ionic lattice. The work by [the petitioner] represents a fundamental contribution to infra-red optics of phonons in polar crystals.”

Vladimir Sobolev, on the faculty of the South Dakota School of Mines and Technology, states that he has known the petitioner since his graduate studies at Queens College. Dr. Sobolev explains that “among the most important results achieved by [the petitioner] is the large enhancement of spontaneous emission rates of InAs quantum dots in GaAs microdisks, manifestation of photonic band structure in small clusters of spherical particles, study of random laser modes in disordered photonic crystals, and dynamic nonlinear effect on lasing in random medium. These results stand at the forefront of modern photonics and are important for development of new materials known as photonic crystals.”

Allen Taflove, Professor in the Department of Electrical and Computer Engineering at Northwestern, states that he is very familiar with the petitioner’s work at Northwestern and his previously published research. Professor Taflove explains that the petitioner “achieved a key nonintuitive insight (since experimentally verified) that a finite amount of disorder in a photonic structure can actually reduce the lasing threshold. Based upon his scaling analysis, it appears that partially ordered random lasers could have ultra-low lasing thresholds. The success of [the petitioner’s] research will result in a new class of low-cost, highly efficient lasers that would boost U.S. industrial competitiveness broadly in areas from telecommunications to consumer electronics.”

Sergey A. Gredeskul, Research Professor at the Department of Physics at Ben Gurion University in Isreal, states that he does not know the petitioner, but is familiar with his published work. Professor Gredeskul describes the petitioner as “one of the top experts in the field of polariton optics of mixed crystals” who “made a fundamental contribution in this field by explaining what happens when two crystals with different polariton gaps are mixed together. . . . Prior to the [petitioner’s work] there were no consistent physical models able to describe the observed optical phenomena or predict new one[s].”

On appeal, the petitioner submits support letters from two independent experts in his field: Valdimir M. Shalaev, Professor of Electrical and Computer Engineering at Purdue University, and Gennady Shvets,

Associate Professor in the Department of Biological, Chemical and Physical Science at the Illinois Institute of Technology. Professor Shalaev states that the petitioner “made a key contribution to the understanding the [sic] physical mechanism of formation of the defect band (impurity polariton band) in the impure polar crystals in the infrared part of the spectrum. His discovery has led, for the first time, to the explanation of the phenomenological classification (“table of elements”) of the mixed polar crystals based on their optical properties.” Professor Shalaev further states that the petitioner’s work has formed a basis for other studies in this area, but he does not cite any of these studies.

Professor Shalaev also explains that the petitioner “made important contributions in the area of wave propagation in random media. . . . His study of partially ordered photonic crystals made a significant impact in bringing the potential applications closer to final commercial products. . . . [His] study opened a path to low cost ultra-low threshold photonic lasers, which was not feasible before. His contributions to the field have opened inroads for further scientific development in the field of laser optics, and are a watershed event in this area of science.”

Professor Shvets states that “[i]n a series of papers dated in 1999-2002, [the petitioner] introduced and successfully applied a novel physical concept: local polariton. . . . His finding promises a whole new generation of photo-sensors, switches, and other optical devices based on Multiple Quantum Well (MQW) nano-structures.” Professor Shvets further explains that “[i]n his groundbreaking work, [the petitioner] was able to obtain a unified description of IR optical properties of mixed polar crystals. . . . [His] discovery has finally given the answer to the long standing question of the nature of defects appearing in polariton bandgap. I am one of the large number of researchers working in the field of optics, who have directly benefited from the crucial findings of [the petitioner]. His works were instrumental in my current research project on left-handed . . . materials in infra-red spectrum.”

Despite the importance attributed to the petitioner’s graduate work by the recommendation letters, the record contains little evidence that the petitioner’s work has made a significant contribution to his field at large. The petitioner submitted copies of ten articles concerning his graduate work at Queens College and co-authored by Professors Lisiansky, Deych, and Foygel. Two of these articles have been cited once each in the publications of other researchers. The petitioner also submitted copies of several abstracts of his work presented at various conferences in his field between 1999 and 2001, but no evidence that he was an invited or featured speaker at any of these events.

Regarding the petitioner’s subsequent research at Northwestern, Hui Cao, Associate Professor in the Department of Physics and Astronomy at Northwestern, explains that the petitioner came to Northwestern in 2001 and that his work “bridges the two important and hot areas in physics: photonic crystals and light localization. His pioneer work is very important not only to the advancement of fundamental physics, but also to the practical applications.” Professor Cao states that the petitioner presented his findings at the Optical Society of America Annual Meeting in 2002 where his talk “was well received by the international audience of peers.” The record contains an excerpt from the program for this meeting which includes a listing for the petitioner and Professor Cao, but the program indicates that theirs was not an invited presentation and the record is devoid of any other evidence that the petitioner’s work was particularly well received at the conference.

R.P.H. Chang, Professor and Director of the Materials Research Science and Engineering Center at Northwestern and a member of the hiring committee for the petitioner’s postdoctoral fellowship at Northwestern, states that “[i]n less than one year, [the petitioner] has begun to make major contribution[s] to the

study of the mechanism of action of random laser, one of the smallest sources of coherent radiation. [The petitioner] has already published two papers in peer-reviewed journals in this area of research . . . [He] was able to demonstrate that introduction of the order in random laser significantly reduces the value of the laser threshold needed to achieve lasing. This work opens up a possibility for a practical/commercial use of these devices in the integrated optical circuits, inscription and optical communication devices.” Dr. Asatryan also affirms that the petitioner was “one of the first people who proposed to take advantage of light confinement in photonic crystals to improve the performance of a random laser, opening the road to the potential applications.”

At the time of filing, the petitioner had co-authored only one published article concerning his work at Northwestern. The record documents the petitioner’s presentation of his work at three conferences, but contains no evidence that his work was specially featured or particularly well received at these events. In his RFE response, the petitioner submitted a letter inviting him to present a paper at an international conference in his field, but we cannot consider this letter because it was written after the petition was filed. On appeal, the petitioner submits copies of his three more recent articles, which we also cannot consider because they were published after the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Similarly, we cannot consider the evidence concerning the petitioner’s contributions to the National Science Foundation (NSF) grant, which the record indicates was awarded to Professor Cao after the petition was filed. *Id.*

The evidence shows that the petitioner has made valuable contributions to his field as a graduate student at Queens College and a postdoctoral fellow at Northwestern, as attested by the 13 support letters. Yet the record documents only 11 published articles co-authored by the petitioner and only two citations of his work by other researchers. This minimal recognition of the petitioner’s work by other researchers indicates that he had not made major contributions to his field at the time of filing. Accordingly, the petitioner does not meet this criterion.

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

Frequent publication of research findings is inherent to success as an established scientist and does not necessarily indicate the sustained acclaim requisite to classification as an alien with extraordinary ability. Evidence of publications must be accompanied by documentation of consistent citation by independent experts or other proof that the alien’s publications have had a significant impact in his field.

In this case, the record contains copies of 11 articles co-authored by the petitioner. The petitioner is the lead author of two of these articles. The petitioner submitted evidence that other researchers have cited only two of his co-authored articles once each. The petitioner also submitted a citation list for a third article that consists entirely of self-citations. Self-citations, while normal and expected in scholarly articles, do not demonstrate national or international acclaim. Although the record documents the petitioner’s participation in several conferences in his field, there is no evidence that he was a featured, invited speaker or that his presentations were especially well received at any of these meetings. This minimal documentation of the recognition of the petitioner’s work does not reflect the requisite sustained acclaim. Accordingly, he does not meet this criterion.

(vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

Counsel cites internal correspondence of the former Immigration and Naturalization Service (INS) as authority for the acceptability of scientific conference presentations as evidence under this criterion. As clarified by the Office of Programs, such letters “do not constitute official Service policy and should not be considered as such in the adjudication of petitions or applications.” Memo. from Thomas Cook, Acting Asst. Cmmr., Off. of Programs, INS, *Significance of Letters Drafted by the Office of Adjudications*, (Dec. 7, 2000). In addition to the Act, regulations and AAO precedent decisions, only policy memoranda are considered official Citizenship and Immigration Services (CIS) policy. *Id.* The cited letter of Acting Assistant Commissioner Lawrence J. Weing is internal correspondence responding to an inquiry from a service center director. It is not a CIS policy memorandum and thus warrants no deference. We have considered the evidence regarding the petitioner’s conference presentations in our discussion under the fifth and sixth criteria.

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

The petitioner claims to meet this criterion through his work as a postdoctoral researcher at Northwestern. The director determined that “the evidence does not reflect the alien petitioner’s role at [Northwestern] would be considered ‘leading or critical’ such as a department head or lead researcher.” On appeal, counsel contends that “[t]here is no statutory requirement that one has to be in a position of formal authority, nor specifically a department head or lead researcher, to be considered playing a critical role or being lead [sic] figure at the institution.” Counsel then refers to two Nobel laureates whose award winning work was performed very early in their careers. While a position of formal leadership is not required to meet this criterion, the petitioner must establish the nature of the alien’s role within the entire organization or establishment and the reputation of the organization or establishment. Where an alien has a leading or critical role for a section of a distinguished organization or establishment, the petitioner must establish the reputation of that section independent of the organization itself. Moreover, although an alien’s early work may later be recognized as seminal to his or her field, we are bound to assess the petitioner’s eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49.

Professors Lisiansky and Cao attest to the importance of the petitioner’s work to their respective research teams. Professor Lisiansky states that the petitioner “obtained the most important results published by [Professor Lisiansky’s research] group within the last five years [and] his research determined main directions where group efforts are currently being applied. His results in electromagnetic wave propagation through [a] multiple quantum well Bragg structure were instrumental for securing a substantial grant from US Air Force Research Office This is the largest grant ever obtained by the Physics Department of Queens College.” Professor Lisiansky further explains that “the progress of the work being conducted here would be imperiled if [the petitioner] were to be replaced by a lesser talent.” Yet Professor Lisiansky wrote his letter over a year after the petitioner had left his laboratory to work at Northwestern. Professor Lisiansky does not state that he was unable to find a qualified replacement for the petitioner or that the progress of his team’s research has been otherwise obstructed by the petitioner’s departure. In addition, the record contains no evidence to establish the distinguished reputation of Queens College or its Physics Department.

In her second letter submitted with the RFE response, Professor Cao states that the petitioner’s “contributions to the publications by our group is crucial,” but only references articles published after the petition was filed. Professor Cao also discusses the “critical” contribution that the petitioner made to the group’s NSF grant proposal and his resultant promotion to “Research Associate,” but Professor Cao clearly states that these events

occurred after the petition was filed. Accordingly, we cannot consider Professor Cao's second letter. The petitioner must establish eligibility at the time of filing. *Id.* In addition, the record contains no evidence regarding the reputation of the Department of Physics and Astronomy at Northwestern. Accordingly, the petitioner does not meet this criterion.

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

In her RFE response, counsel claims the petitioner meets this criterion because his salary and total benefits package for 2003 was \$49,850, which "significantly exceeds the average wage and benefit package offered a typical non-faculty PhD research appointment in the United States which can be as low as under \$30,000 with no benefits." The record contains no evidence to corroborate this statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted a copy of a letter offering the petitioner a postdoctoral position at the University of Iowa with a salary of \$38,000, but this letter provides no evidence that the petitioner's salary or remuneration at Northwestern at the time of filing was significantly higher than other physicists in his field or comparable to physicists at the very top of his field. Accordingly, he does not meet this criterion.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. In this case, the record does not establish that the petitioner had achieved sustained national or international acclaim as a physicist placing him at the very top of his field at the time of filing. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his petition may not be approved.

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

ORDER: The appeal is dismissed.