U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

Public Copy

File: WAC 98 230 51586 Office: California Service Center Date: APR 13 2001

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:

[redacted]

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 which 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 which 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 which 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, Acting 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.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a postdoctoral fellow at Lawrence Berkeley National Laboratory. Counsel states:

> [The petitioner] is a recognized leader in physics with many outstanding research achievements in the areas of surface science, materials science, biophysics, and quantum optics. He enjoys particular acclaim for his development of practical applications for emerging experimental techniques such as Atomic Force Microscopy (AFM), Scanning Tunneling Microscopy (STM) and Scanning Polarization Force Microscopy (SPFM).

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.*

Counsel claims that the petitioner has won ten such awards. All of these awards are either student awards, often limited to students at one particular university, or else they are from local or provincial, rather than national, entities. For instance, the petitioner won the Special Presidential Award of the Chinese Academy of Sciences in 1995, but the record indicates that no is eligible for this award except doctoral students at the Chinese Academy of Sciences. Thus, the award excludes not only China's most experienced and accomplished researchers, but also doctoral students at every other Chinese university.

The petitioner has not shown that he has won any national awards as a practicing, professional physicist rather than as a graduate student; graduate study is not a field of endeavor, and an accomplishment which is significant for a student may be well within the abilities of most physicists with more experience. Counsel offers unsupported assertions about the significance of the awards, but the assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, as will be discussed below, the reliability of counsel's assertions is questionable.

> *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.*

Counsel states:

> [The petitioner] belongs to the *American Physical Society* (APS), the "major membership organization for physicists in the United States and a significant force in physics internationally." . . . It describes its members as "the physics leadership in academia, industry, and government laboratories." . . . Admission to APS requires the nominations by two active members.

The quotations in the above passage derive from a page on the APS web site, a copy of which the petitioner has submitted with the petition. This very same document, however, states "[m]embership in APS . . . is open to all those with an interest in and love for physics." Obviously, "an interest in and love for physics" is not an outstanding achievement, nor is sponsorship by active members. Another document in the record contains the following under the heading "Membership Requirements/Qualifications":

> Open to students, teachers and research workers in physics or in related fields, such as mathematics, astronomy, chemistry, engineering, and to others whose interest in physics is amply demonstrated.

Furthermore, the very size of the APS (over 40,000 members) indicates that it is not an exclusive organization limited to the elite within the field of physics. Assertions about the prestige of the APS and its journals are immaterial; the APS' own materials demonstrate beyond any rational dispute that the APS merely requires "interest in physics," rather than outstanding achievement, as a condition of membership.

Counsel asserts that the petitioner is also a member of the Materials Research Society ("MRS"), in which "[m]embership is limited to those who have demonstrated commitment and outstanding achievements in advanced materials research." The petitioner has submitted documents from the MRS web site which refer to the organization's constitution and bylaws, but the petitioner has not submitted the constitution or bylaws themselves, nor anything from any MRS source, to establish that outstanding achievement is necessary to qualify for membership in this 12,000-member organization.

The MRS constitution is available for public viewing via the Internet at www.mrs.org/membership/constitution, a page on the same website that counsel and the petitioner have referenced. Article II of the MRS constitution, headed "Membership," states, in pertinent part, "[r]egular membership in the Materials Research Society is open to all persons professionally involved in materials science and engineering."

Clearly, counsel's assertion that membership requires outstanding achievement is not only unsubstantiated, it is simply false, refuted by the MRS itself. This false assertion (whether intentional or not) necessarily raises questions about the overall reliability and credibility of counsel's assertions. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

> *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 submits evidence that other scientists have cited his research in their publications. Citation of the petitioner's work, however, does not establish that the articles containing the citations are "about" the petitioner or his work. These citations are better understood as a gauge of the field's reaction to the petitioner's own writings, covered by a separate criterion further below.

Counsel states that the petitioner's "work has been prominently featured by professional publications." Counsel cites a letter from one witness, who asserts that the petitioner's "work was highlighted in a special issue of the *Bulletin of the Materials Research Society*, which featured an SPFM image on its front cover." The record does not contain the published material itself, and therefore we cannot determine the extent to which the content of the journal was devoted specifically to the petitioner, rather than to the petitioner's general field. The regulation requires submission of "published material about the alien," not vague third-party references alluding to such material.

China Science Newspaper published an article entitled "Profiles of Winners of the 1995 Special Presidential Award of the Chinese Academy of Sciences." The article includes photographs and biographical sketches of the petitioner and at least 11 other winners of the award.

> *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 record shows that the petitioner has reviewed manuscripts submitted for publication in various journals. The record, however, offers no support for counsel's claim that "reviewing work for these journals requires the referee to have superior knowledge

and expertise in the field." For reasons already discussed, we cannot accept any claim that counsel makes unless the record offers specific evidence to support that claim. Some of the petitioner's work in this area appears to be manuscript review which was originally assigned to his superiors and then delegated to the petitioner. The petitioner has not shown that he receives an unusually high number of requests to review manuscripts.

The petitioner has not shown that peer review of scholarly manuscripts is a privilege reserved for top researchers, rather than a comparatively routine duty in the field. Simply being in a position to evaluate the work of others is not intrinsically evidence of national or international acclaim; the judging activity itself must be significant at a national or international level. To hold otherwise would lead to the absurd conclusion that teachers assistants who grade papers, and judges at local high school science competitions, satisfy this criterion. So low a standard would obviously be of no use in discerning the top members of the field from the vast majority of their peers.

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

The petitioner submits several witness letters to establish the importance of his research contributions.

Professor Y.R. Shen of the University of California, Berkeley, states:

> At Berkeley, [the petitioner] has been working on probing structures of liquid films on solid substrates using a newly developed Scanning Polarization Force Microscope (SPFM). This is a new area of research. The SPFM allows investigation of liquid structures with a resolution on the nanometer scale. . . . [The petitioner] has found, for example, the structure of water condensed and spread on a solid surface. The result is important for the understanding of wetting, painting, corrosion, etching, and others. Because water is the origin of life, his work has attracted much attention.

Dr. Miquel Salmeron, senior staff scientist and principal investigator at the Berkeley Lab, states:

> [The petitioner] has demonstrated the unique capabilities of the SPFM technique for industrial applications in the study of the nanometer scale distribution of lubricants on hard disks. . . . Thanks to his work, our laboratory clearly leads the world in this area of research.

Dr. Salmeron states that the petitioner "has an outstanding record as a researcher, comparable to the top 1% of the Ph.D./postdoctoral fellows in the U.S. and worldwide in his areas of expertise." The petitioner's field, however, is not limited to postdoctoral fellows and doctoral students; it includes the chair of the Physics Department at the Massachusetts Institute of Technology and the top researchers at CERN in Europe, and countless other respected physicists with decades of experience to their credit. The petitioner cannot place himself at the top of his field by artificially restricting comparison to others who, like himself, have not yet completed their postdoctoral training.

Other witnesses offer similar endorsements of the petitioner's skill and his past and present accomplishments. For the most part, these witnesses are the petitioner's professors, supervisors, and collaborators. Most of the witnesses describe the petitioner's current work in the context of its potential application in the manufacture of hard disk drives. The witnesses do not indicate whether this potential has been realized, nor have any manufacturers of hard disk drives attested to the importance of the petitioner's work or expressed their intention of implementing his findings.

Many of the petitioner's witnesses claim professional accomplishments which dwarf those of the petitioner. For instance, in order to establish the reputation of several of his witnesses, the petitioner submits their biographical entries from American Men & Women of Science, subtitled "A Biographical Dictionary of Today's Leaders in Physical, Biological and Related Sciences." This work is clearly one of massive scale, having at least seven volumes of dense text. Volume 6, covering names beginning with Q-S, has well over 1100 pages, with a dozen or so entries per page. Assuming this volume is typical of the other volumes in the series, and that only one further volume covers names beginning with T-Z, we can estimate that the complete work contains between 75,000 and 100,000 biographical entries. Despite the word "American" in the title, the volume lists researchers born and working overseas (such as a professor born in Shanghai and teaching in Hong Kong, and another born in Poland and teaching in Canada); the only requirement appears to be some connection, past or present, with American research institutions. Nevertheless, there is no evidence that the petitioner himself has an entry in this comprehensive directory. Certainly, inclusion in this book is no guarantee of eligibility; but questions necessarily arise as to why a researcher at the top of his field would be excluded from a list of tens of thousands of "leaders" in the sciences.

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

The petitioner has written several published articles, many published before 1995 while the petitioner was still a graduate student. Printouts from a citation index show multiple citations of the petitioner's articles, and witnesses assert that the petitioner is exceptionally prolific. The petitioner therefore appears to have satisfied this criterion.

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

Counsel states that the petitioner "has been playing a leading and critical role for Berkeley Lab . . . [through his scientific leadership and integral contributions in bringing the Lab's infant SPFM technology to maturity and practicality." Counsel cites letters which refer to the petitioner as "a key member of Dr. Salmeron's research group." Dr. Salmeron's research group is not, itself, an organization or establishment with a distinguished reputation, and the petitioner has not shown that he has played a major role for the Berkeley Lab as a whole rather than for one of countless research groups within the laboratory.

Documents in the record show that the Berkeley Lab employs 3,500 full time workers as well as "nearly 2,000 guest researchers" during any given year. The petitioner only recently completed his Ph.D. (in 1995), and works at the Berkeley Lab as a postdoctoral researcher. Postdoctoral positions are, by nature, temporary and generally low-paying training positions. The petitioner bears the burden of establishing that he, as a junior researcher in a staff of thousands, is a leading or key member of the laboratory's staff. The director denied the petition, stating that the record does not establish that the petitioner's work has had any major impact or influence outside of his immediate circle of superiors and collaborators. On appeal, the petitioner argues that his "achievements have been recognized internationally." Counsel does not appear to have been involved in preparing the appeal.

The petitioner submits additional evidence on appeal, including copies of articles which were published after the petition's filing date. In Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New evidence of this kind which did not exist as of the filing date cannot retroactively establish that the petitioner was already eligible when he filed the petition.

Ten letters accompany the appeal, four of which are from researchers associated with the Berkeley Lab or the adjacent University of California at Berkeley ("UCB"). The petitioner notes that one of these witnesses, UCB Professor Gabor Somorjai, won the

Wolf Prize which, according to the petitioner, is second only to the Nobel Prize in prestige and importance. Professor Somorjai is also a member of the National Academy of Sciences, which unlike the APS or the MRS is an association which truly does require outstanding achievements of its members. The reputation of the petitioner's witnesses does not infer the petitioner's own reputation and acclaim; indeed, while Prof. Somorjai appears to be an expert at the top of his field, it does not follow that his subordinates and collaborators, by virtue of their very proximity to him, are at the top as well. If anything, Prof. Somorjai's own accomplishments highlight the gulf between him and the petitioner.

Prof. Somorjai characterizes the petitioner as "a talented young scientist . . . [with] an extraordinarily strong background in theoretical and experimental studies of physics." Prof. Somorjai credits the petitioner with "significant achievements" but does not indicate that the petitioner is his equal in the field, or otherwise one of the top figures in contemporary physics.

Professor Nicholas D. Spencer of the Swiss Federal Institute of Technology states that the petitioner "is one of the most impressive young researchers in the field of scanning probe microscopy and surface science today," limiting his comparison to a narrow specialty and further narrowing the comparison to "young researchers."

These witnesses, and others on appeal, express admiration for the petitioner's professional achievements, and indicate that the petitioner's work has attracted some notice in the international research community. It remains, however, that many of these individuals appear to be discernibly more prominent in the field than the petitioner himself, and they couch his contributions in terms of its "potential" rather than its already-demonstrated impact, and their comparisons are often limited to "young researchers" or postdoctoral researchers at the beginning of their careers, or else the petitioner's "field" is a subspecialty defined so narrowly as to exclude almost all other physicists.

The regulations, by demanding objective criteria of evidence, call for verifiable documentation rather than personal opinions from witnesses selected by the petitioner. These regulations are in keeping with the statutory call for "extensive documentation" of sustained national or international acclaim.

The petitioner is responsible for advances in his field of research, and the value of his work is evident from the outside citation of several of his published articles. That being said, however, we cannot conclude that the petitioner has shown that he has earned sustained acclaim at the national or international level; the overall picture presented by the evidence does not place him on a par with top figures in the field, and the petitioner has

not demonstrated that his achievements are beyond the abilities of almost every other physicist. While the petitioner may well be at the threshold of a promising career, this extremely restrictive visa classification is limited to those who are already at the top of the field, not those who, their mentors assert, will one day reach the top.

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

Review of the record, however, does not establish that the petitioner has distinguished himself as a 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 indicates that the petitioner shows talent as a physicist, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field (as opposed to all "young scientists" or postdoctoral researchers). 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.