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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



Public Copy

File: [Redacted] Office: Nebraska Service Center Date: 29 NOV 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

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. Wiemahn, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

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

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director acknowledged that the petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit"

[required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work at Marquette University under the direction of Professor James Kincaid:

The [petitioner's] work involves the search for a photocatalytic property that initiates the chemical reaction that causes water to split into its hydrogen and oxygen components, thereby producing energy. Once a more efficient, less degradable catalyst is created, chemical energy can be safely and efficiently produced from renewable solar energy. With an estimated life expectancy of five billion years, once harnessed, renewable energy technology based on solar power will be the most durable and environmentally-friendly source of energy presently known to man.

Along with documentation pertaining to his fields of research, the petitioner submits several witness letters. Professor James Kincaid of Marquette University states:

[The petitioner] has been an important contributor to our program. His previous experience as a doctoral student in Poland and as a postdoctoral researcher in Kansas and Texas prepared him well to carry out various synthetic aspects of our program. During these past 2-1/2 years he has increasingly gained expertise in the techniques necessary to characterize the structure and photophysics of such systems. Thus far, his efforts here have resulted in the submission of two manuscripts, one of which has recently been accepted for publication. I expect that several other manuscripts will be completed during these last six months of his contract here at Marquette.

Professor Daryle Busch, the petitioner's former "postdoctoral mentor and employer" at the University of Kansas, states:

I employed him as an organic chemist to develop new compounds for a drug discovery program supported by the Monsanto Company. He demonstrated strong ability in synthetic chemistry, producing a number of new compounds. His work focused on the developing of several new iron and manganese complexes as mimics of the enzyme superoxide dismutase, substances of potential value for the treatment of such disorders as cancer and inflammatory diseases. The results of his studies were published in prestigious, refereed scientific journals, including Inorganic Chemistry and the Journal of Physical Chemistry. Further, representatives of the Monsanto Company acknowledged the significance of his research on a number of occasions.

Richard Warburton, a former co-author and research colleague of the petitioner at the University of Kansas, states:

[The petitioner] is very knowledgeable of his subject area, a careful and precise worker and a very good scientist. In particular, he is one of the best researchers for combined electrochemical and spectroscopic techniques, so called spectro-electrochemistry, which combines the strengths of both spectroscopy (UV-visible, IR, ESR etc.) and electrochemistry.

Naidong Ye, another former colleague of the petitioner at the University of Kansas, states:

[The petitioner] demonstrated extraordinary ability in the areas of synthetic chemistry, spectroscopy and electrochemistry. He designed and synthesized several very interesting molecules (macrocyclic complexes) that have the potential to become pharmaceuticals for the treatment of several diseases, including cancer. Results of his work were published in several eminent American scientific journals, such as Inorganic Chemistry and Journal of Physical Chemistry, and presented in the most prestigious national meetings for chemists- the American Chemical Society National meetings in 1992 and 1993.

Dennis Strommen, Professor of Chemistry at Idaho State University, states:

I have known the petitioner for over two years through my collaboration with Dr. James Kincaid. [The petitioner's] expertise lies in the area of Raman Spectroscopy as it is applied to Solar Energy Photophysics. His efforts have been essential to my own research here in Idaho. [The petitioner] is privy to instruments who's operation I do not fully understand and takes measurements of potential chemical photosynthesizers that I am incapable of.

* * *

[The petitioner] is creative and a steady lab researcher. Repetition of experiments to verify their veracity is the standard for him. His English is excellent- as a person who lived in a foreign country for some time, I know that the test of language skills is the telephone conversation. Almost all of our discussions are by telephone and the rest by e-mail.

Catherine Chiou of Unilever Research describes assistance she received from the petitioner:

I contacted [the petitioner] and requested one of his samples for bleach evaluation. [The petitioner] showed great interest in my request and was willing to spend extra time at his new position to prepare the material for our tests. He was delighted to know that there might be some potential applications for his molecule in the American laundry industry and he did not ask for reimbursement for his material. Even though the results of his compound applied under wash conditions was not promising, we learned a great deal about how this type of compound behaves under wash conditions.

The petitioner submits various other letters, primarily from faculty members and researchers at universities with whom the petitioner has studied or worked. Many of these individuals say little apart from briefly describing the petitioner's work and asserting the petitioner is a skilled researcher. A number of witnesses assert their confidence in the future significance of the petitioner's work; Dr. Mieczyslaw Lapkowski, former adjunct professor at the Silesian Polytechnical University, for instance, states: "[The petitioner] has the potential to conduct excellent research on renewable energy sources which is one of the most important economic and industrial problems for the future of all countries." Letters from Professor Jan Zawadiak and Bronislaw Czech briefly mention the petitioner's academic career and research at Silesian Technical University in Poland.

The testimonial letters submitted demonstrate that the petitioner's expertise makes him a valuable asset to the team at Marquette University, but the record does not indicate that he is responsible for especially significant progress in the quest for renewable energy resources. The petitioner has not established that his research, to date, has consistently attracted significant attention outside of the universities where he has conducted research. The witnesses provided by the petitioner are former professors, fellow alumni, co-workers, or collaborators on the petitioner's research projects or from universities attended by the petitioner. The petitioner's skills and familiarity with different aspects of physical chemistry, while useful to his research institutions, does not appear to represent a national interest issue.

Along with the witness letters, the petitioner provides a list of twenty-one research papers and presentations which he wrote or co-authored since 1981. Eighteen of these articles appeared in publications such as Inorganic Chemistry, Inorg. Chim. Acta, Journal of Electroanalytical Chemistry, and the Journal of Physical Chemistry. The Association of American Universities'

Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the petitioner's work.

The petitioner provides three independent citations of his article entitled "A Spectroelectrochemical and Spectrophotocatalytic Investigation of Photoinduced Electron Transfer Between Mg(II) Porphyrin and Viologen," four independent citations of an article co-authored with Warburton and Busch entitled "Reactivity of Superoxide Towards Iron (II) Complexes with Pentadentate and Hexadentate Ligands Derived from Cyclononane," three independent citations of a second article co-authored with Warburton and Busch entitled "Synthesis and Properties of the Fe(II) Complex of a Pentadene Ligand Derived from Diazaoxacyclononane," one independent citation of an article co-authored with Lapkowski entitled "Metalloporphyrins Obtained in Aqueous Solution Based on the 5, 10, 15, 20-Tetra-p-(N,N-dimethyl) Anilinoporphyrin," two independent citations of an article co-authored with Strojek entitled "Photoinduced Reduction of Water Sensitized by Tin(IV) and Ruthenium(II) Porphyrins," and two independent citations of a second article with Strojek entitled "Electrochemical and Photochemical Properties of Water-Soluble Tin(IV) meso-Tetraanilinoporphyrin."

While the petitioner's work has been cited over the past twenty years, independent researchers have not cited it on a scale that would demonstrate the petitioner has garnered significant attention from other researchers in his field. Four citations, being the most any of the individual articles has been cited, is an extremely small number of citations from the research community. Considering the number of times each of the articles was cited and the time frame involved, the petitioner has not appeared to significantly distinguish himself from other researchers in the field. Further, based on the limited information provided, it is not known whether the beneficiary's work was cited favorably. It can be expected that if the petitioner's work was truly significant, it would be more widely cited.

The petitioner also provides documentation reflecting several renewable energy research projects underway in the United States, an "Economic Impact of Renewables" report from the American Solar Energy Society, and a National Critical Technologies Report from the Department of Commerce citing the importance of renewable energy technologies. While the Service recognizes the importance of developing renewable energy technologies, eligibility for the

waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver.

In addition, the petitioner submits a letter thanking him for refereeing a manuscript, various academic achievement awards, proof of memberships in chemistry-related associations, and evidence that he participated as one of many presenters at the American Chemical Society's regional meetings. It should be noted that the record contains no evidence to suggest the presentation or publication of one's work is a rarity in chemistry research, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's work in their research.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, counsel submits a memorandum dated November 30, 1998, asserting that the precedent decision "is misguided and founded on an incorrect evidentiary standard."

By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

Counsel argues persuasively that the petitioner's field of physical chemistry possesses substantial intrinsic merit, and that, the petitioner's work is, by nature, national in scope because of the universal applicability of the petitioner's research results.

Counsel contends that the petitioner "should not be subjected to labor certification because he possesses special qualities that the labor certification is not designed to measure." Counsel faults the labor certification process as lacking subjectivity and basing qualifications on minimum requirements, thereby sacrificing an individual petitioner's creativity and vision. Counsel argues as to why obtaining labor certification would be inappropriate in this matter. Counsel states: "The labor certification preclusion against self-employment jeopardizes the United States standing as a critical technologies leader." Counsel adds that "...if the petitioner cannot remain in the United States to pursue research in physical chemistry here, he will simply take his highly developed skills, his talents, and his inventive ideas to another country."

¹Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. Congress plainly intended that, as a matter of course, advanced degree professionals should be subject to the job offer/labor certification requirement. The national interest waiver is not merely an option to be exercised at the discretion of the alien or his employer. Rather, it is a separate benefit that necessarily carries with it the additional burden of demonstrating that the alien's admission will serve the national interest of the United States. It cannot suffice for the petitioner to simply enumerate the potential benefits of his work. To hold otherwise would eliminate the job offer requirement altogether, except for advanced-degree professionals whose work was of no demonstrable benefit to anyone.

It should be noted that the petitioner's continued participation in investigating renewable energy technologies is already covered by his nonimmigrant H-1B visa which is available to postdoctoral researchers. Therefore, his continued participation in his current project is obviously not contingent upon his obtaining permanent resident status.

The director denied the petition, stating: "While it is clear from the evidence submitted that the alien is an experienced and productive researcher, his contributions do not so exceed those of his peers so as to substantially serve the national interest."

On appeal, counsel argues that the Service "abused its discretion" in denying the petition. Counsel states that the Service has created an "impossible" standard for national interest waivers through Matter of New York State Dept. of Transportation. Counsel adds that this standard negates the directive of Congress that labor certifications may be exempted for employment-based immigrants whose activities are in the national interest. Counsel asserts that denial of the petitioner's case is "arbitrary, capricious and not supported by the record of proceeding." Counsel's argues at length in support of the claim that the Service "does not understand clearly the purpose, nature and mechanics of labor certification." Counsel contends that the petitioner's "accomplishments confirm that he will neither compete with nor adversely affect the domestic labor pool because he functions at a level much higher than that of an average chemist on the American labor continuum." 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).

The record does not support counsel's conclusions. On appeal, counsel expresses disagreement with the precedent, but fails to identify specifically any erroneous statement of fact or to offer any additional evidence related to the petitioner. As previously noted, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress nor any other competent authority has overturned Matter of New York State Dept. of Transportation, and counsel's disagreement with that decision does not invalidate or overturn it. Reliance on relevant, published, binding precedent does not constitute Service error.

While the Service recognizes the importance of developing renewable energy technologies, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. We do not dispute that the petitioner's work has yielded original results at Marquette University and the University of Kansas, but a doctoral candidate is expected to conduct original research work.

The issue in this case is not whether advances in the field of physical chemistry are in the national interest, but rather whether this particular petitioner, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role. There is no indication that researchers outside of the petitioner's universities and employers regard his work to be of greater significance than that of other researchers. Rather, many key witnesses have couched their remarks not in terms of what the petitioner has done, but what he is likely to achieve at some unspecified future point. While the petitioner certainly need not establish national fame as a researcher, the claim that his research is especially significant would benefit greatly from evidence that it has attracted significant attention outside of his research group.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in the field of physical chemistry, we must find that the petitioner's assertion of prospective national benefit is speculative at best.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.