B5

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal

[redacted]

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

File: [redacted] Office: Nebraska Service Center Date: 26 JUL 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of 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 that 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, 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. At the time of filing, the petitioner was a postdoctoral associate at the Ohio State University. Documents submitted on appeal indicate that the petitioner has since begun working as a colloid physical chemist at Cognis Corporation. 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 has 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 did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention 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"

[redacted]

[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 and his work:

> [The petitioner] is a nationally recognized research scientist in Korea who has made significant contributions to the field of chemistry and chemical engineering. As a Post-Doctoral Researcher in the United States, [the petitioner] continues to make significant findings to promote research in the areas of environmental science as well as other areas of applied science. . . .
>
> [The petitioner] seeks to work as a Research Scientist in the area of mesoporous materials and surfactant chemistry. Mesoporous materials were discovered in 1991. Since discovery, mesoporous materials have been the focus of numerous research projects due to their potential applicabilities in such fields as chemical manufacturing, pharmaceutical, and environmental remediation. . . .
>
> [M]esoporous materials have the potential to be the most effective material in removing toxic materials from soil and water. . . . [T]hey have large inner pore size, or stated another way, large inner surface area. Such properties allow the mesoporous materials to adsorb certain chemicals. And once adsorbed, the adsorbed chemicals are not readily released. . . .
>
> [In another project, the petitioner studied] different water states in beverages whose major component is water. His findings showed that it may be possible to manipulate . . . what is actually adsorbed into our bodies. . . .
>
> This technique is more cost-effective than synthesizing currently available sugar substitutes, and it poses no long-term health threats that current sugar substitutes may. Based on his findings, at least one beverage company is already conducting

[redacted]

> research in this area. [Counsel asserts that the unnamed beverage company has declined to provide confirmation or evidence on the petitioner's behalf because its product is still in the research and development stage.] . . .
>
> [The petitioner also] seeks to develop materials possessing great strength but less weight. He already has developed and/or discovered certain methods to manipulate the inner structure of mesoporous materials to make them stronger, as compared to non-structured materials, while carrying the same weight.

Counsel does not indicate that any of the above projects have yielded practical results. The above postdoctoral projects would appear to have ceased when the petitioner left his postdoctoral position in 2000.

The director has not contested the intrinsic merit or national scope of the petitioner's research. At issue is only the third prong of the national interest test set forth in Matter of New York State Dept. of Transportation. Counsel asserts that the petitioner's "research approach is unique and fundamentally different in many aspects as compared to those approaches taken by other researchers in the field of mesoporous compound synthesis."

The petitioner has written several research articles. Counsel states that these "articles can be found in the most prestigious research journals in the world," and lists four journals: *Langmuir*, *Nature*, the *Journal of the American Chemical Society*, and the *Journal of the Colloid Interface Society*. The most prestigious of these journals appears to be *Nature*. Contrary to counsel's assertion that an unspecified number of the petitioner's articles "can be found" in *Nature*, the record does not show that any of the petitioner's work has actually appeared in that journal. Rather, the record shows that the petitioner has submitted one manuscript to the publisher of *Nature* for consideration. There is no documentation from the publisher of *Nature* to indicate that the journal had, as of the petition's filing date, accepted the article and thus agreed to publish it. It is, at best, misleading to assert that an as-yet-unpublished manuscript, apparently not yet accepted by the publisher, "can be found" in the journal. At the time counsel made this statement, the article could not be found in any existing issue of *Nature*. On appeal, the petitioner submits an updated *curriculum vitae* in which he continues to list the manuscript as being "in preparation for *Nature*."

The petitioner submits copies of three research articles that cite the petitioner's prior work. In each instance, the citation refers to a 1996 *Langmuir* article of which the petitioner was the first of three credited authors. The petitioner has not shown that three independent citations represent an unusual level of impact and influence on the field.

Along with documentation pertaining to his field of research and copies of his research articles, the petitioner submits several witness letters. Most of the letters are from individuals who have worked with the petitioner in some capacity, but counsel states that two of the witnesses have had no prior contact with the petitioner. We discuss, below, examples of the letters submitted with the petition.

Dr. James F. Rathman, associate professor at the Ohio State University, has supervised the petitioner's work since 1995. He states:

[redacted]

I recruited [the petitioner] to work in my group specifically because his background in surfactant chemistry and experimental expertise in numerous areas were exactly what I needed for initiating a major research project in the use of surfactant aggregates as templates for the synthesis of nanostructured materials. . . .

Although mesoporous silicas were discovered only fairly recently (1991), the research activity world-wide in this area is remarkable. . . . Their potential impact is enormous and will no doubt affect chemical manufacturing, pharmaceuticals, environmental remediation, and novel separation processes.

One unique aspect of our approach is that we focus on the role of surfactants in the synthesis of mesoporous materials, in contrast to the vast majority of other research efforts currently underway in this area, which generally focus on the inorganic (silicate) chemistry and address surfactant issues only superficially. This basic difference in approach has allowed us to make a number of important, interesting, and useful contributions to the field. Specific individual accomplishments of [the petitioner] include the following:

1. **Systematic study of compositional effects**. . . . Light scattering is an excellent technique for this type of analysis. [The petitioner] was responsible for designing and performing dynamic light scattering measurements for various systems. . . .and generated an impressive amount of high-quality data in a short time.
2. **Discovery of two new mesoporous materials**. [The petitioner] has shown that product properties (such as pore size, shape) can be selectively controlled by addition of certain organic additives which are incorporated into the surfactant micelles, altering their shape and thereby also affecting the structure of the mesoporous material produced by reaction at the micelle surface. [The petitioner] has achieved a number of exciting results, the foremost being the discovery of two new crystalline structures. One of these was predicted by another researcher, but [the petitioner] was the first to successfully synthesize it. The other was truly unique in that the structure obtained has no liquid-crystal analog and so had not been predicted as being a possible structure.
3. **Demonstration of shear flow as a method of controlling mesostructure**. . . . [The petitioner] showed how performing the reaction under constant shear flow can significantly alter product properties. . . . [The petitioner's] work suggests that it may be possible to actually exploit these effects to control certain product properties.
4. **Synthesis of mesoporous films at liquid/liquid interfaces**. . . . Mesoporous films will provide novel ways of coating solid surfaces. . . . [The petitioner] has recently obtained some very exciting results in synthesizing mesoporous silica films at water/benzene interfaces. There are at present no reports in the literature of performing this reaction at a liquid/liquid interface, and so his work is truly novel. More importantly, though, is the fact that this method provides a number of distinct advantages over conventional methods in which

the film is produced at a liquid/air or liquid/solid interface. . . . The potential importance of this result is tremendous, since it removes what currently is a major obstacle in film synthesis. For example, no one has yet reported successfully preparing cubic structured mesoporous films on hydrophilic structures such as glass; however, [the petitioner] has done exactly that and we have been invited to write a chapter in an upcoming book to describe our results in this area.

5. **Formulation of stable silicate gels**. The general procedure for making the films described above involves first preparing a gel-like solution containing surfactant and reactive inorganic species. The gel is then delivered to a desired surface where the polymerization occurs, forming a mesostructured film. A common problem in this method is the initial gel solution is not stable. . . . [The petitioner] has successfully formulated a precursor gel solution that exhibits remarkable long-term physical and chemical stability – once prepared, this gel can be stored for months without degradation. This represents a significant advance in mesoporous film synthesis.

Several other witnesses, who have supervised or collaborated with the petitioner in the United States, describe the petitioner's work in varying degrees of detail. We note that the petitioner's work as described by Prof. Rathman does not appear to involve many of the projects specified by counsel in what was represented as a description of the petitioner's current work.

Counsel asserts that Dr. Mark T. Anderson, senior research chemist at 3M Company's Advanced Materials Technology Center – Ceramics Group, is one of the two witnesses who, according to counsel, has had no prior contact with the petitioner. Dr. Anderson himself says nothing in his letter to indicate whether or not he has met or worked with the petitioner. Dr. Anderson states:

> I have been aware of [the petitioner's] research in the area of mesoporous materials since 1996. Since this time [he] has done outstanding work in the field, publishing several important articles on the fundamentals of mesoporous material synthesis. . . . The two main contributions of his research have been (1) several clever methods including shear flow alignment and micellar solubilization of organic molecules to control structure of mesophases and (2) fundamental studies of how these phases form and what parameters control their formation. . . .
>
> [A]s work on mesoporous materials moves from an embryonic to an emerging technology . . . [the petitioner's] work on structure control and novel processing approaches is particularly important as it provides a suite of options on the types and preparation methods of mesoporous materials.

The other witness to whom counsel refers, Professor George A. Olah of the University of Southern California, does state that he does not personally know the petitioner, but is nevertheless "familiar with his field of research." Prof. Olah states:

> [The petitioner] clearly is a talented researcher and scholar. He has done some very interesting and pioneering work in mesoporous materials which are of great practical significance for a multitude of industrial applications.

[redacted]

> Having reviewed [the petitioner's] background and work I can state that he has unique experience and knowledge in his field which is of substantial national interest and benefit to the US.

As a Nobel laureate, Prof. Olah is indisputably one of the top experts in the field of chemistry. Still, we cannot ignore the general nature of his letter, which, like other letters, appears to focus on possible future applications of mesoporous materials rather than specific uses that have already (thanks to the petitioner's efforts) come into use.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner has not explained "why the labor certification process is inappropriate in this case." The director stated that innovation and publication are to be expected from productive researchers, and that the petitioner has not demonstrated that his "contributions have influenced the field to a substantially greater extent than those of other qualified researchers."

On appeal, counsel discusses awards that the petitioner has received, such as the Outstanding Post-Doctoral Award for Research Excellence, presented to the petitioner by the Chemical Engineering Department at the Ohio State University. These awards constitute recognition for contributions, which, pursuant to 8 C.F.R. 204.5(k)(3)(ii)(F), can form part but not all of a claim of exceptional ability. Exceptional ability, by law, does not automatically exempt an alien from the labor certification requirement. We cannot find, therefore, that the petitioner's awards are *prima facie* evidence of eligibility for the waiver.

Counsel describes the petitioner's current work at Cognis Corporation:

> Cognis is the world leading oleochemical manufacturer. Oleochemical is the raw chemical needed to make almost all personal care products such as shampoo, soap, fragrance, lotion, and tooth paste, and household products such as detergents, candles, and bleach. . . .
>
> The alien's job at Cognis is to develop the next generation of oleochemical materials. Specifically, his object is to develop environmentally benign oleochemicals.

Counsel cites a letter from a Cognis official, stating that, because qualified U.S. workers applied for the job at Cognis, the company would not have been able to obtain a labor certification for the petitioner. The petitioner submits documentation regarding the position at Cognis. One of the job requirements is "[m]inimum 3 years of industrial experience." The petitioner's Form ETA-750B Statement of Qualifications indicates that the petitioner was a student from 1982 to 1994, and a postdoctoral researcher at the Ohio State University from 1995 to 2000, at which time Cognis hired him. Given that all of the petitioner's claimed research experience is academic, it is not clear where, when, or if he obtained three years of industrial experience. The job offer contains no definition of "industrial." The listed job description makes no specific mention of mesoporous structures.

While the petitioner is clearly Cognis' first choice for the position, the record shows that the company was able to locate other qualified workers for the position. The burden is on the petitioner to show that the United States (rather than just the petitioner and/or Cognis) would see significantly greater benefit if the petitioner took the position instead of another qualified worker.

The petitioner submits a new letter on appeal, from Professor Eric W. Kaler of the University of Delaware, who states:

> I do not know [the petitioner] personally, but I am familiar with his work through the scientific literature, to which he has made substantial contributions. His work has centered on the synthesis of mesoporous materials, which play a key role in a variety of applications. . . . [The petitioner's] training makes him uniquely able to make contributions to this important area. Most researchers in this area do not have expertise in all of the required fields, and thus can make only limited progress. [The petitioner] is a strong exception to this model, and I view his work as important to our national interests.

Prof. Kaler concurs with others that the petitioner's training exceeds that of others in the field, and that the petitioner has made useful discoveries in his field. The record, however, does not show how the petitioner's work has had particularly significant influence in that field. Witnesses have observed that the field is "emerging," pertaining to an only very recently discovered class of materials, and that a significant number of researchers are pursuing studies in this area. In the absence of specific evidence of the petitioner's impact (rather than general statements or assurances that the petitioner's impact will become manifest at some future point), we are unable to conclude that it is in the national interest to ensure that a given position goes to the petitioner rather than to a qualified U.S. worker. While we do not dispute the petitioner's talent, the waiver request appears to be somewhat premature 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.