

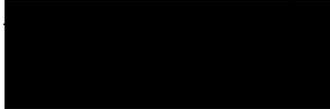


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U.S. Department of Justice
Immigration and Naturalization Service

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duration of personal privacy.

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



File: [Redacted] Office: Nebraska Service Center

Date: MAY 02 2002

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:



PHOTOCOPY

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. The petitioner seeks employment as a chemist. 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 background and the nature of his work:

The petitioner is a chemist... holding a Ph.D. in Physical/Inorganic Chemistry. The petitioner has published numerous scientific papers in prestigious international professional journals... His work has been cited by other scientists in at least eight major articles. Through his years of extensive testing and development in the field of environmental remediation, [the petitioner], through his employment at Aquachem, Inc., has developed a line of products and processes known as "Aquasil," which are currently being tested and used in a wide spectrum of industries to treat industrial and municipal wastewater, ground water, and other contaminated water sources... [The petitioner] is the founder, patent holder, and president of Aquachem.

In addition to documentation pertaining to his company, the petitioner submits several witness letters from his business associates and former instructors.

John McLean, Professor of Chemistry (Emeritus) at the University of Detroit Mercy, states:

I have examined and am familiar with the development plan of Aquachem and its products as they pertain to the treatment of industrial effluents and environmental remediation. [The petitioner] was one of my former graduate students. In my opinion, the Aquasil products developed by [the petitioner] and produced by Aquachem, are unique as they provide a new and highly desirable remedy for the treatment of industrial wastewater and hazardous waste. Aquasil products will

provide U.S. industries with the means for removing pollutants from their effluents and converting the generated hazardous waste into non-hazardous materials, all at a cost far below their present costs.

The use of Aquasil products by U.S. businesses (such as: stamping operations, electroplating services, metal processing, auto assembly plants, wood treatment and preservation, circuitboard manufacturing, mining operations, paint booth operations, tannery, surface coating, metal finishing, etc.) will enable them to eliminate the need to infuse large capitals in huge treatment equipment in their waste management. Furthermore, dangerous and toxic chemicals such as sulfuric acid, caustic lime slurry, ferric chloride, aluminum sulfate, polymers, sulfides or dithiocarbonates and others will no longer be needed for the treatment of waste streams or stabilization of hazardous wastes. In addition, all currently used chemical feed equipment such as pumps, feed lines, and tanks will be replaced by a feeder delivering a single non-hazardous product.

Waste generated in the treatment of wastewater is hazardous and as such requires a further treatment before it can be disposed of in a landfill. With Aquasil products, the sludge/waste generated U.S. industries will be stable without any further treatment, and will pass EPA Toxicity Characteristic Leaching Procedure (TCLP), as required by the Resource Conservation and Recovery Act (RCRA), which regulates the management and disposal of solid and hazardous wastes. Aquasil products generate waste that does not contaminate the groundwater nor cause environmental damage.

At this time, to my knowledge, there is no comparable product on the market which is available to U.S. businesses.

[REDACTED] of Chemistry at North Carolina State University, states:

[The petitioner] was associated with me as a Postdoctoral Research Associate here at North Carolina State University, Department of Chemistry, while holding a Visiting Assistant Professorship appointment. This work in my labs followed his Ph.D. dissertation completion at the University of Detroit with [REDACTED] who highly recommended [the petitioner] for his depth of learning, thoroughness of research, great knowledge of the field of transition metal-ligand chemistry, full reliability in professional and personal matters, and his communications and people skills. In fact, I found the above to be an accurate opinion of [the petitioner], and I add to it that he is also scientifically unusually versatile and productive, extremely dedicated to his work, makes it his business to rapidly learn new chemistry developments in correct depth, and stays enthused with chemistry seven days a week. [The petitioner] interacted with my lab's M.S., Ph.D. and undergraduates in ideal fashion, helping them in every way to get their research done. His efforts even helped UCLA [REDACTED] d his Ph.D.

student [REDACTED] in a project done in my labs, and which resulted in a co-authored [REDACTED] Soc. publication describing a new organometallic chemistry discovery.

[The petitioner's] range of chemistry proficiencies alone make him a unique scientist. He is expert in (i) chemical synthesis and chemical and physical purification research, (ii) quantitative chemical kinetics, (iii) quantitative chemical thermodynamics, (iv) instrumental analysis, (v) structural spectroscopic methods such as IR, uv-Visible, CD, electronic MCD, laser Raman scattering, and Nuclear Magnetic Resonance, and (vi) electrochemistry in aqueous and nonaqueous media of inorganic and organometallic analytes. In addition, [The petitioner] has the unique versatility of solving industrially pressing chemistry problems by the combination of such methods, i.e., while it is already a great asset to be able to apply a multi-methods attack on chemical problems with solutions of chemicals that contains one or two contaminants or other analytes, his ability to successfully deal with real-life many-component industrial chemical systems makes the petitioner's abilities even more outstanding.

Attempting to summarize with brevity, [the petitioner] is a uniquely excellent person to have in any workplace due to his unique professional scientific abilities as well as his people skills.

[REDACTED] letter fails to address the issue of how the petitioner will serve the national interest to a greater degree than other researchers. Pursuant to Matter of New York State Dept. of Transportation, it cannot suffice to simply state that the petitioner possesses useful skills, or a "unique background." Any objective qualifications that are necessary for the performance of the occupation can be articulated in an application for alien labor certification; the fact that the alien is qualified for the job does not warrant a waiver of the job offer/labor certification requirement. Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

The petitioner also submits letters from two company presidents allegedly "familiar with the environmental industry." We note that Longworth Plating Service, Controlled Maintenance, Inc., and the petitioner's company are all based in Michigan. The letters from [REDACTED] and Robert Welsh contain the following passages that are virtually identical in describing Aquachem's products:

These products have shown a significant advantage over current chemicals for the treatment of industrial effluents and environmental remediation. After testing these products and comparing performance and cost with existing treatment, we realized that there is a definite advantage in implementing this new treatment and replacing all liquid treatment chemicals with a single non-hazardous product. In addition, we are in compliance with the very tight discharge limits mandated by

the local community.

The introduction of the new products to the market represents a boon to the U.S. industries, the environment, and is protective of public health. There will be a significant decrease in the use of dangerous and toxic chemicals by treatment plants. Production of hazardous waste will be minimized, and, with time, may be completely eliminated.

While these company presidents, in signing their letters, are clearly supportive of the petitioner, it appears highly unlikely that they themselves independently chose the wording of their letters. Given the similarity among the letters and the companies' proximity to the petitioner's business, we disagree with counsel's conclusion that these letters demonstrate recognition of the petitioner's products throughout the environmental industry.

The petitioner submits additional letters from two individuals related to his efforts to market his products in Thailand. In his first letter, [REDACTED] of General Enterprises Marketing Ltd., states: "We are very interested [in being] a distributor for your product, Aquasil, in Thailand. The territory we would like to take responsibility for the time being is Thailand." [REDACTED] second letter describes Aquachem's products as "having shown great potential as simple, safe, and very economical means of wastewater treatment." We note that the record contains a Distributor and Confidentiality Agreement executed between [REDACTED] and the petitioner's company. A letter from a distributor employed by the petitioner's company is insufficient to establish that Aquasil is a significant contribution to the environmental industry as a whole. [REDACTED] of the Pharmaceuticals Department at Chulalongkorn University in Bangkok, Thailand, met the petitioner in 1996 when "[the petitioner] spoke in a series of seminars about emerging technologies and introduced the Aquasil process and products." Professor Pongsak Kanluan describes the petitioner's products as representing "a technological breakthrough in water treatment and disposal of hazardous materials." His letter is devoted to describing the potential benefits of Aquachem's products rather than actual results.

The petitioner's witnesses consist entirely of his research, academic and business acquaintances. The record reflects little formal recognition or awards for the petitioner's work in chemistry, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence that would have existed whether or not this petition was filed is more persuasive than the subjective statements of the petitioner's direct acquaintances.

Along with the witness letters, the petitioner provides proof of membership in the American Chemical Society and evidence of his authorship of two trade journal articles appearing in *Environmental Protection* and *Environmental Technology* in 1998. In a letter accompanying the initial petition, the petitioner notes that he co-authored twelve papers in scientific journals and that his published work was cited by other scientists in at least eight articles. The petitioner provides a listing of the twelve publications he co-authored between 1977 and 1987. The most

recent article citing the petitioner's published work is from 1987 and it refers to a paper he co-authored in 1985. The petitioner has not sufficiently established the relevance of these published materials to his development of water treatment systems.

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.

In support of the petition, the petitioner submits eight articles that contain citations of his articles, one of which is a self-citation by one of his co-authors. Self-citation is a normal, expected practice. Self-citation cannot, however, demonstrate the response of independent researchers. Seven independent citations since 1977 is insufficient to demonstrate that the petitioner's research has attracted significant attention in the chemistry field. Two citations, the most any single article had ever been cited, is extremely minimal. The number of independent citations over a period of more than twenty years simply does not rise to a level that would demonstrate that the petitioner has significantly impacted his field. The record contains no evidence that the presentation or publication of postdoctoral research is a rarity in the field of chemistry, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's work in their research.

Witness letters and counsel mention the overall importance of developing water remediation technologies. However, pursuant to published precedent, the overall importance of a given occupation is insufficient to demonstrate eligibility for the national interest waiver. While the Service recognizes the importance of improving water remediation technology and the associated benefits, 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. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting the petitioner's employment as a research chemist inherently serves the national interest, the witnesses for the petitioner essentially contend that the job offer

requirement should never be enforced for these occupations, and thus this section of the statute would have no meaningful effect.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted a statement from counsel and a letter from [REDACTED] written at the request of counsel.

Counsel argues persuasively that the petitioner's field possesses substantial intrinsic merit, and that, the petitioner's work, by nature, is national in scope because of the universal applicability of developing improved water treatment systems.

In regards to a waiver of the job offer requirement, counsel states: "The labor certificate process will take three years. The petitioner will not be in a position to spend more time and resources in the U.S.A. if he does not acquire permanent residency."

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. 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 special, added 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.

The director denied the petition, stating: "The alien petitioner hasn't established that the national interest would be adversely affected if a labor certification was required."

On appeal, counsel argues that "the supporting evidence strongly documents the petitioner's assertion that a national interest waiver is appropriate." Counsel refers to the petitioner's published articles and resubmits them on appeal. We have already offered a detailed discussion of the evidence provided. We will address counsel's remaining arguments and the new evidence submitted on appeal. The petitioner submits purchase orders from [REDACTED] dated December 7, 1998; April 1, 1999; and April 2, 1999. Also submitted are copies of two faxes from 1999 reflecting efforts by Enprotec, an Aquacem distributor, to develop prospective customers. The petitioner also submits a copy of a bid to construct a water bottling operation in Egypt dated June 12, 1999 and a proposal to Lemna International to develop a wastewater treatment system dated August 17, 1999. The documentation submitted reflects events that occurred subsequent to the petition's filing on September 21, 1998. A

petitioner must establish eligibility at the time of filing. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Even if these items were to be considered, they are insufficient to demonstrate the petitioner's impact on the field of chemistry or the water remediation industry. While the petitioner's product line has appeared to generate some initial interest from a few prospective customers, the evidence submitted fails to demonstrate a significant level of attention from the environmental industry. The documentation submitted on appeal is reflective of future projects that have not yet been completed or implemented with a proven track record of success in various markets.

The petitioner also provides a listing reflecting two additional articles "submitted for publication." A simple listing of the petitioner's publications offers no valuation of their overall significance to the field of chemistry. It can be expected that if the petitioner's work were truly significant, it would be more widely cited by independent researchers.

Counsel argues that the petitioner plays a critical role in revolutionizing environmental remediation across the United States. Counsel states that U.S. corporations utilizing Aquachem's Aquasil process will sustain a substantial economic detriment if the INS does not grant the petitioner permanent residency. However, counsel fails to support this assertion with statements from U.S. corporations utilizing the Aquasil process. 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 witness letters from U.S. corporations are limited to Michigan-based companies and the petitioner's distributor. They offer minimal evidence regarding the petitioner's specific contributions and are not representative of Aquasil's proven success throughout the industry.

All of the witnesses assert their confidence in the future significance of the petitioner's work; [REDACTED] for instance, states that the petitioner's process "can definitely be of great benefit to Thai industries." Other witnesses note there "will be a significant decrease in the production, transport and storage of dangerous toxic chemicals." The witnesses' use of phrases such as "such technology will allow..." and "Aquasil products will provide U.S. industries with the means..." fail to demonstrate a past record of significant achievements and contributions in the field of environmental remediation.

The testimonial letters submitted demonstrate that the petitioner's expertise as a chemist. The petitioner's skill and familiarity with different aspects of chemistry and water remediation techniques, while useful to his business, does not appear to represent a national interest issue. In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F).

While the Service recognizes the importance of improving methodologies for water remediation, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. The petitioner has not shown how his work has been of greater impact or

benefit than that of other chemists involved in the development of water remediation techniques. The petitioner has not submitted persuasive evidence demonstrating that his method is superior to existing water remediation methods as acknowledged by independent experts in the field of endeavor. The petitioner's witnesses are limited to his personal acquaintances, former instructors, and business associates. The statements from these witnesses fail to demonstrate a proven record of success for the petitioner's line of products in throughout the industry. The witnesses have couched their remarks not in terms of what the petitioner's products have already demonstrated, but what benefits they are likely to provide upon future implementation. While the petitioner certainly need not establish national fame as a chemist, the claim that his product is especially significant would benefit greatly from evidence that it has already attracted significant attention beyond individuals with direct ties to the petitioner or his business, or articles written by the petitioner himself.

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 sufficient evidence that the petitioner has been responsible for significant achievements in the field of chemistry/environmental remediation, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations for the petitioner's line of products may yet come to fruition, at this time the waiver application appears premature.

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.

ORDER: The appeal is dismissed.