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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

APR 18 2003

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

**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 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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification as an employment-based immigrant 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 director determined that the petitioner qualified 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.

On appeal, counsel asserted that the petitioner would be able to serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. On July 26, 2002, the AAO affirmed the director's decision, concluding that the evidence failed to establish that the petitioner's research work had already had a particularly significant influence over his field as a whole.

On motion, the petitioner submits additional evidence relating to these issues. This evidence will be discussed below.

At the outset, counsel submits several articles and documentation in order to demonstrate the importance of the new field of nanotechnology and the attention that it is receiving in the research community. As noted in the previous AAO decision, the intrinsic merit and potential national scope of this research was not in dispute; however, eligibility for a national interest waiver must rest with the alien's qualifications rather than with the position sought. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The 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 sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. The petitioner's past history of accomplishment must establish some degree of influence on the field as a whole. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215, 219 (Comm. 1998).

In its decision, the AAO reviewed several witness letters in support of the petition and concluded that while they attested that the petitioner had made some useful discoveries, the record did not show that the petitioner had established a significant influence over his field. On motion, counsel's submissions contain an additional letter from [REDACTED] an associate professor at Ohio State University (OSU), who has supervised the petitioner's work since 1995. Professor Rathman praises the petitioner's skills in the field of mesostructured materials and states:

Although [the petitioner's] work in my group at OSU has primarily focused on fundamental details of mesostructured materials, we are also actively pursuing the development of commercial application of this technology. As I know from my time in

industry, the time from discovery to commercial implementation of a new chemical technology is typically 10-15 years; given that the mesostructured materials studied in our group were discovered in the early 1990's, it is not surprising that the bulk of the research in this area (not only in our lab but around the world as well) has been more fundamental in nature to date.

* * *

Nanotechnology has been identified as a key area for next-generation technologies; in the U.S., federal and state governmental agencies, and diverse industries, have made considerable investments in nanotechnology. . . . It is important to note that mesostructured materials currently represent one of the more advanced areas of nanotechnology, since many applications are close to actual implementation.

* * *

We have recently begun a collaboration with Taitech, Inc. to develop applications of [the petitioner's] materials in the areas of electronics/photonics. The accompanying letter from Taitech clearly demonstrates the great commercial potential of our materials and also the fact that [the petitioner's] participation is seen as being essential to the successful development and implementation of these applications.

* * *

My group has recently initiated a collaboration with Professor [redacted] group, also in chemical engineering at OSU. . . . If successful, our materials will provide sorbents having surface areas at least 100 times greater than existing materials, thereby making a huge contribution to the design of the clean-burning coal-based power facilities.

* * *

In the past two years, Dr. [redacted] and I were invited to write the following chapter for a book summarizing the most important and exciting activities in this general area:

[redacted] in 'Reactions and Synthesis in Surfactant Solutions,' Texter, J., Ed.; Surfactant Science Series, Marcel Dekker, Inc., 2001, 779-96. *Synthesis of Mesoporous Films at Fluid/Fluid Interfaces.*

Counsel also submits a joint letter from [redacted] a senior research scientist at Taitech, Inc., and [redacted] the President and CEO of Taitech, Inc. They state:

In March 2002, our research staff became aware of [the petitioner's] unique skills and abilities to perform cutting-edge research on nanoporous materials with unique properties, and contacted Prof. [redacted] and [the petitioner]. The first collaborative efforts between Taitech and Dr. [redacted] group resulted in submission of two research

proposals to the Department of Defense. The proposal entitled 'Si-Compatible Nanostructured Waveguides for Integrated Optoelectronic and All-Optic Circuits via Self-Organized Colloidal Templates' was submitted to the U.S. Air Force, and the proposal entitled 'Molecular Templating of Micro-and Nanostructured 2-D and 3-D Photonic Band Gap Materials for Ultra-Fast Telecommunications Networks' was submitted to the Ballistic Missile Defense Organization.' We anticipate nationally important research results from these and related projects for our government customers in the years ahead.

We note that these two letters appear to be focused on future applications of mesoporous materials technology, generally describing the petitioner's research accomplishments rather than documenting his impact on the field with specificity. More importantly, Taitech's recognition and the petitioner's written collaboration with Professor Rathman appear to have taken place well after the petition's filing date of October 14, 1999. Aliens seeking employment-based immigrant classifications must possess the necessary qualifications as of the filing date of the visa petition. Events occurring subsequent to the filing date do not retroactively establish a petitioner's reputation so as to make him eligible for a national interest waiver. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Counsel submits copies of two e-mails from Dr. [REDACTED] an advanced research specialist for 3M Advanced Materials Technology Center, in which he affirms that he does not know the petitioner personally but praises the petitioner's expertise and states that the petitioner's work using calcium oxide for CO₂ separation from flue gas may increase the "separation efficiency of the mesoporous vs conventional calcium oxide," with implications for global warming research. While it is clear that Dr. [REDACTED] has a high regard for the petitioner's skills, his recognition that the petitioner's methodology has future implications does not establish that the petitioner's scientific work has already had any significant impact on the field.

As noted in the previous AAO decision, the record contained evidence showing that the petitioner has published several articles. When assessing the influence and impact that the petitioner's research work has had, the act of publication is not as reliable a measure as the citation history of the published works. It cannot be concluded that a published article is important or influential if there is little evidence that other independent researchers have relied upon the petitioner's findings. As noted by the AAO decision, the record contained three research articles that cited the petitioner's prior work. This does not demonstrate an unusual impact and influence on the field.

Counsel asserts on motion that the AAO misconstrued the standard for evaluating whether an alien has been influential in his field and cites the AAO director's statement: "Counsel does not indicate that any of the above projects have yielded practical results." Counsel contends that this erroneously means that only applied applications of research support a request for a national interest waiver rather than theoretical advancements. Counsel's interpretation of this statement is taken out of context. We note that the statement was made in conjunction with the observation that the petitioner's "postdoctoral projects would appear to have ceased when the petitioner left his postdoctoral position in 2000." The AAO decision subsequently considered the petitioner's published articles, submitted manuscripts and witness letters which were all part of the total evidence offered to support the request for waiver of the

labor certification process. Regardless of whether an alien's advancement to the field is applied or theoretical, it must show a measurable impact on the field as a whole as of the filing date of the petition.

Counsel submits additional evidence indicating that the petitioner resigned his position at Cognis Corporation in August 2001 and returned to work at Ohio State University as a post-doctoral researcher. The petitioner has also received an offer of employment from "Chemical Abstract Service;" however, he prefers a permanent faculty position where he can continue working in his area of research. Counsel states that the petitioner cannot go through the labor certification process because no university has offered him a faculty position in his research area, although he has been searching diligently. Counsel also indicates that the petitioner is constrained from performing important research because of the labor certification requirement.

The unavailability or inapplicability of a labor certification is not sufficient cause for a national interest waiver. *Matter of New York State Dept. of Transportation*, at 218, n. 5. Advanced degree professionals and aliens of exceptional ability are subject to the job offer/labor certification process. There is nothing in the legislative history that suggests that research scientists are exempt or 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." *Matter of New York State Dept. of Transportation*, at p. 223.

A review of the record does not establish that the petitioner's contributions have attracted any significant attention from the wider scientific community. 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. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(2) of the Act and the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of July 26, 2002 is affirmed. The petition is denied.