

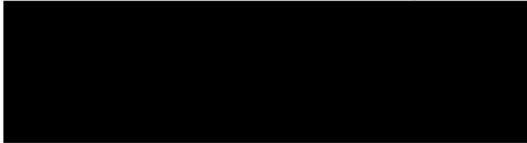


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC-00-266-54164 Office: Vermont Service Center

Date: JAN 06 2003

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]

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

Elizabeth Heyman
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference immigrant visa petition was denied by the Director, Vermont Service Center and is now before the Associate Commissioner for Examinations on appeal. The case will be remanded for further consideration.

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 did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but indicated 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 did not contest that the petitioner qualifies as a member of the professions holding an advanced degree. The basis of the director's denial is that the petitioner had not established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. For the reasons discussed below, while we do not find counsel's arguments on appeal to be persuasive, we find that the new evidence submitted on appeal overcomes the director's concerns.

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, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors that 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.

We concur with the director that the petitioner works in an area of intrinsic merit, environmental engineering, and that the proposed benefits of his work, improved hazardous waste remediation, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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. 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. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, note 6.

On appeal, counsel accuses the director of ignoring most of the petitioner’s reference letters. We do not agree that the director must address each and every letter when the information in the letters is similar and can be generalized. Nevertheless, we will review all the letters on appeal.

Initially, the petitioner submitted ten reference letters, most of which provide broad assertions of the petitioner’s national and even worldwide reputation without specific examples of how the

petitioner's research has been influential. While the director concluded that four of the letters were from collaborators, we find that number to be higher.

██████████ the director of the Environmental Research Institute at the University of Connecticut where the petitioner pursued his Ph.D. and is currently employed, asserts that the petitioner is one of the most productive research scientists and is "very skillful at making important breakthroughs." ██████████ concludes that the petitioner's position, assistant professor in residency, is "reserved for the top research scientists in the world."

██████████ an associate professor at the University of Connecticut, asserts that while the petitioner is not the inventor of in-situ permanganate oxidation, he has made the greatest contribution to this technology, which is increasingly used to remediate many TCE and PCE contaminated sites.

██████████ the former head of the Department of Civil and Environmental Engineering at the University of Connecticut during the petitioner's time as a student, discusses the petitioner's current research and concludes that it is "likely to lead to cleaner and less polluted aquifers as well as less surface water contamination." ██████████ finally notes that the position of assistant professor in residency is primarily a research position with some teaching responsibilities and that it is "more significant than that of a typical post doc," demanding a higher level of accomplishment and ability.

██████████ a senior consulting scientist at United Technologies in Connecticut who was a member of the petitioner's Ph.D. advisory committee and now collaborates with the petitioner, asserts that the petitioner "has contributed significantly to the understanding of chemical oxidation of hazardous material."

██████████ a professor at the University of Massachusetts, Lowell, where the petitioner pursued a Master's degree, asserts that the "in[-]situ chemical oxidation technology is currently being used at remediation sites, and [the petitioner's] work has enabled us to use the technology more effectively and far more cheaply." ██████████ does not indicate that the petitioner's innovations have been adopted at the sites where in-situ chemical oxidation is in use.

██████████ another professor at the University of Massachusetts, simply recounts the petitioner's educational history and asserts that "his publications and presentations demonstrate his skills and outstanding capability." He further concludes that the petitioner can contribute and has contributed significantly to his field of science.

As counsel notes on appeal, the record does contain letters from members of the field who appear independent of the petitioner. ██████████ a research assistant professor at the University of Waterloo in Ontario, Canada, asserts that she came to know of the petitioner's work since she works in a similar area. She asserts that the petitioner is considered by his peers to be "exceptionally well qualified." Specifically, she asserts that the petitioner's kinetics and

mechanism study of oxidation of chlorinated ethenes by permanganate and his pilot scale studies of in-situ chemical oxidation of trichloroethane with permanganate oxide is promising as a viable technology for hazardous waste remediation. While [REDACTED] asserts that this technology is being used at remediation sites and that the petitioner has shown how this technology can be more effective and cheap, she does not indicate that these potential improvements have already been realized at any remediation sites.

[REDACTED] president of Envirox, LLC in Colorado, asserts that the petitioner's work on in-situ chemical oxidation is directly responsible for the recent commercialization of the technology. While [REDACTED] asserts that he is "indebted" to the petitioner, he does not state that his company has licensed the petitioner's innovations or otherwise utilized or marketed them.

[REDACTED] a principal hydrogeologist at ELM Consulting, LLC in Kansas, provides somewhat more detail regarding the significance of the petitioner's work and its purported influence. [REDACTED] states that the petitioner's research has been extremely important to ELM. Specifically, [REDACTED] provides:

[The petitioner's] work with pilot scale studies of In-Situ Chemical Oxidation of Trichloroethane with Permanganate Oxide has been a monumental benefit to remediation technology, and has ensured [the petitioner's] reputation as one of the top people in this field. By using [the petitioner's] innovations, field personnel are able to remediate toxic waste sites more efficiently and at considerably less expense. His most recent and continuing work applying oxidation technology to MTBE contamination appears to be the single most important breakthrough developed to remedy this major nation wide problem.

[REDACTED] an associate professor at the National Kaohsiung Institute of Marine Technology in Taiwan, provides similar information to that discussed above but fails to explain how he came to know of the petitioner's work.

In response to the director's request for additional documentation, the petitioner submitted three additional letters. [REDACTED] of the U.S. Geological Survey, Water Resources Division of the U.S. Department of the Interior, asserts that the petitioner has solved many important site remediation engineering issues. [REDACTED] continues that the petitioner's work has facilitated optimization of remediation design and made it possible to model the treatment progress. Mr. [REDACTED] however, does not provide his own title at the Department of the Interior, and it is not clear that his opinion represents the official opinion of the department.

The most specific example of the petitioner's influence is included in a letter from [REDACTED] the vice president of Xpert Design and Diagnostics, LLC (XDD). [REDACTED] asserts that XDD has applied in-situ permanganate flushing technology at several sites across the United States and that the company has relied on "both general information from [the petitioner's]

research and his services at the University of Connecticut laboratory to test the feasibility of the technology at specific sites to assist in the application of this innovative technology.”

In addition, [REDACTED] senior researcher at the University of Sheffield in the United Kingdom, asserts that she is performing a review on behalf of the UK Environment Agency on source treatment for dense non-aqueous phase liquids and that she gives “the highest credit to [the petitioner] for his contributions to the application and improvement of the permanganate oxidation technologies in site remediation.”

The director concluded that the letters established that the in-situ remediation technology had been around for several years and that the petitioner was not the inventor of this technology. While the director acknowledged that the witnesses asserted that the petitioner had made significant improvements to this technology, the director concluded that these assertions were not supported by corroborating evidence.

On appeal, counsel argues that the letters came from experts in the field and should not have been disregarded. The source of the letter is not determinative. We must look at the contents of the letters. As discussed above with regard to each individual letter, the reference letters submitted prior to the appeal generally provide broad assertions with few specific examples of the petitioner’s influence in his field. As will be discussed below, the petitioner’s publication history does not support the references’ broad assertions of the petitioner’s influence. Finally, while counsel relies on the petitioner’s alleged patent, the record contains no evidence that the petitioner has patented one of his innovations. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, as stated in *Matter of New York State Dept. of Transportation, supra*, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, note 7. The record contains no evidence that the petitioner’s innovation, in addition to allegedly being patented, has been licensed or otherwise utilized. Thus, the director’s conclusions were not unfounded.

Beyond the reference letters, the petitioner submitted his article published in *Environmental Engineering Science*, four full-length articles published in the proceedings of various conferences, and additional manuscripts not yet published. The director noted that there are numerous researchers publishing articles and presenting their work at conferences. The director further noted that the petitioner had not provided evidence that his work had been cited or otherwise widely adopted. Thus, the director concluded that the petitioner had not established that his published research was more influential than that of other researchers in the field, including those referenced in the report prepared by the Environmental Protection Agency (EPA) discussed below.

On appeal, counsel states that “any individual who ‘publishes papers in prestigious journals, and who is invited to give presentations at national and international conferences’ does in fact,

deserve the National Interest Waiver.” Counsel goes on to assert that *Matter of New York State Dept. of Transportation, supra*, incorrectly raises the standard for the waiver from exceptional to extraordinary.

We do not find counsel’s arguments persuasive. 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.” This report reinforces the Service’s position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community’s reaction to those articles.

As noted by the director, the record contains no evidence that the petitioner’s articles have been widely cited. The petitioner does not submit citation evidence on appeal. Counsel’s additional argument that the director should have considered the petitioner’s articles in preparation for publication is equally unpersuasive. We do not find that a petitioner can demonstrate influence in his field with articles that have yet to be published. Peer review by editors and referees is not indicative that the research has already influenced the field as a whole.

In addition, we do not find that *Matter of New York State Dept. of Transportation* requires an alien to demonstrate that he has extraordinary ability or is an outstanding professor or researcher as defined at 8 C.F.R. 204.5(h) and (i). Nevertheless, as noted in *Matter of New York State Dept. of Transportation*, by statute, aliens of exceptional ability are normally required to obtain a labor certification. Only when it is deemed in the national interest can an alien of exceptional ability obtain a waiver of the labor certification requirement. As such, it is clear that Congress did intend for the national interest waiver to require more than a showing of exceptional ability.

Finally, the petitioner submitted materials about in-situ chemical oxidation for remediation of hazardous waste sites. One of these publications is a report by the EPA, office of Solid Waste and Emergency Response, Technology Innovation Office. This publication refers to four in-situ pilot studies. The first study was conducted in Hanover, New Hampshire by the U.S. Army Cold Regions Research and Engineering Laboratory (CRREL). The point of contact for that study is [REDACTED] of CRREL. The second study took place at a Canadian Forces Base in Ontario, Canada. The contact person for that study is [REDACTED] of the Department of Civil Engineering at the University of Waterloo. The third study took place in Kansas City, Missouri. The points of contact for that study are [REDACTED] of the Oak Ridge National Laboratory and [REDACTED] of Allied Signal. The final study took place in Piketon, Ohio. The points of contact for that study are [REDACTED] of the Colorado School of Mines and [REDACTED] of the Oak Ridge National Laboratory.

As stated above, the director noted these studies as evidence that the petitioner was not the sole researcher contributing to this area of research. On appeal, the petitioner submits letters from Dr. [REDACTED]. It is clear from the EPA report that these researchers are pioneering the studies in the petitioner's area of research. Thus, their opinions will be carefully considered, although, as with all letters, the content of the letters is as important as the source.

[REDACTED] asserts that the petitioner's findings are significant, applicable to [REDACTED] work, and have "solved numerous critical issues on this technology and provided data to improve the effectiveness of this technology." [REDACTED] states that the petitioner's research has "provided the foundation for environmental engineers to apply permanganate oxidation in the field more effectively." [REDACTED] provides:

[The petitioner's] most notable contributions have been the kinetic and mechanistic studies of oxidation of chlorinated ethenes such as trichloroethene (TCE) and tetrachloroethene (PCE) with permanganate. [The petitioner] has determined the kinetics, mechanism and reaction models of oxidation of chlorinated ethenes with permanganate. He has proven through his research that complete reactions (i.e., oxidatively transform contaminants such as TCE and PCE into harmless compounds) can be achieved. He has provided data on how environmental factors (e.g., pH, temperature, ionic strength and oxidant concentration) may influence the degradation of chlorinated ethenes by permanganate oxidation. [The petitioner's] findings have significantly improved and promoted the application of permanganate use[d] to remediate TCE and PCE contaminated soil and groundwater.

While many works are merely treatment concept demonstrations, [the petitioner's] research has provided solid understanding that has advanced the remediation of hazardous waste contaminated sites through the effective application of permanganate oxidation technologies.

We find that the letters submitted on appeal indicate that the petitioner has influenced his field as a whole insofar as his work is recognized and is being applied by the pioneering scientists in his area of research.¹ These letters overcome the director's valid concerns in his decision.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the

¹ The fact that we find that the waiver might be warranted despite the fact that the record clearly establishes that these pioneers have achieved a higher level of notoriety than the petitioner demonstrates that, contrary to counsel's assertions on appeal, *Matter of New York State Dept. of Transportation* does not require a finding of extraordinary ability as defined in 8 C.F.R. 204.5(h).

community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process.

Nevertheless, the director's specific finding that the petitioner "qualifies as a member of the professions holding an advanced degree," is not supported by the record. On the Form ETA-750B, the petitioner indicated that he received his Master's degree in environmental engineering from the University of Massachusetts, Lowell, in 1996 and that he was presently pursuing his Ph.D. at the University of Connecticut. Under part 14, the petitioner indicated that he was attaching "copies of diplomas." The petitioner signed the form July 7, 2000. In his initial brief, counsel asserts that the petitioner obtained his Ph.D. in 1999. The assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra*.

8 C.F.R. 204.5(k)(3)(i) provides that in order to demonstrate that an alien is an advanced degree professional, the petitioner must submit:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Counsel's list of appendices does not include an official academic record and the record does not contain the petitioner's academic record. In fact, the petitioner did not even submit any diplomas. In the absence of an official academic record demonstrating that the petitioner was awarded a post-baccalaureate degree prior to the date of filing, August 31, 2000, the record does not reflect that the petitioner qualifies as an advanced degree professional on the date of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director did not make a determination regarding whether the petitioner might be an alien of exceptional ability and we will not make such a determination on first impression.

As discussed above, the letters submitted on appeal overcome the director's concerns regarding the breadth of the petitioner's influence in his field. In light of the above, however, the matter is remanded to the director for the purposes of determining whether the petitioner qualifies for the classification sought, either as an advanced degree professional or an alien of exceptional ability.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing. In the event that a new decision is rendered which is adverse to the petitioner, the decision is to be certified to the Associate Commissioner for Examinations for review.