U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

[redacted]

JUL 08 2003

File: [redacted] LIN 02 248 50383 Office: NEBRASKA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office 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, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition approved.

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 postdoctoral research scientist. At the time he filed the petition, the petitioner was a postdoctoral fellow at the University of Illinois at Urbana-Champaign. 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 dispute that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded 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. --
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> (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.
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> (B) Waiver of Job Offer.
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>> (i) Subject to clause (ii), the Attorney General may, when the Attorney General 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 petitioner obtained a master's degree in coal geology and exploration in 1989 from the University of Science and Technology, China. He also holds a Ph.D. from the University of Illinois at Urbana-Champaign. The petitioner thus 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 pertinent 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 the 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 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 United States worker having the same minimum qualifications.

The petitioner's work at the University of Illinois involves geochemical research to investigate mineral/fluid reactions using spectroscopy, diffraction and various chemical and engineering tests. Improved methodologies in this field have varied environmental and medical applications. The director did not contest that the petitioner's work has intrinsic merit and that the benefits of his services could be national in scope. The remaining issue is whether the petitioner will serve the national interest to a substantially greater degree than would an available United States 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.

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, n.6.

The record contains evidence that the petitioner received a second prize "science and technology progress award" in 1991 from the Chinese Ministry of Education and that his biography was solicited for initial review for the 2002-2003 edition of "America's Registry of Outstanding Professionals." While such evidence might conceivably represent some degree of recognition for achievements and significant contributions to his field, that is simply one criterion for exceptional ability found at 8 C.F.R. § 204.5(k)(3)(ii)(F), a classification that normally requires a labor certification.

The record also indicates that the petitioner belongs to several associations such as the Mineralogical Society of America, the Geochemical Society, The Clay Minerals Society, the American Association for the Advancement of Science, the Geological Society, and the New York Academy of Sciences. The record is lacking any supporting documentation, other than generalized statements by some of the petitioner's witnesses, that membership in these organizations represents an exceptional achievement as set forth in 8 C.F.R. § 204.5(k)(3)(ii)(E) which designates "memberships in professional associations" as another criterion to establish exceptional ability. Regardless, we cannot conclude that satisfying one, or even the requisite three criteria for a classification that normally requires a labor certification warrants a waiver of the labor certification requirement in the national interest. As set forth in *Matter of New York State Dept. of Transportation*:

> Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her 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). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Id. at 218-219.

In support of his claim, the petitioner submits several witness letters [redacted] a professor of geology and an executive associate dean at the University of Illinois at Urbana-Champaign, considers the labor certification process inappropriate because the petitioner is "nearly impossible to replace" and delays in his research would do "substantial damage." Although the need for the petitioner is ongoing, Professor [redacted] states that his position is technically not a permanent one because his research is subject to federal funding. He continues:

> [The petitioner] was the primary motivator and researcher of an important project to investigate the molecular scale structural, dynamical and chemical binding behavior of the interactions anionic chemical species and minerals.

* * *

> [The petitioner] undertook and successfully completed a comprehensive and systematic study of the interaction of these anionic species with important materials known as layered double hydroxides, using a suite of advanced experimental techniques not previously brought together to understand fluid-mineral interaction. His work has resulted in essential and fundamental information that provides both scientific insight and predictive capability concerning these chemical behaviors. Because of his work, we now understand how the chemical properties of the anions in solution and the chemical structural properties of the crystalline mineral affect such central molecular scale issues as the strength of the binding, the structural orientation of these species on the surface and exchanged into the nanospaces of the interlayers, how rapidly the species undergo dynamic motion, and how stable the system remains with changing relative humidity and temperature.
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> * * *
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> [The petitioner] is currently using advanced spectroscopic and microscopic techniques to advance molecular-scale understanding of the highly deleterious alkali-silica gel that occurs in many concretes. . . . [The petitioner's] research is providing important and novel results concerning the nano-scale structure of these gels, the mechanisms by which water enters them to cause expansion, and the complex interaction of calcium (a key component of cement and concrete) with the gels. . . . Moreover, understanding the reaction and expansion mechanisms will provide guidance in selecting better chemical admixtures for concretes to prevent degradation reactions.

Professor [redacted] second letter, submitted on appeal, summarizes the petitioner's credentials and emphasizes that the petitioner's accomplishments exceed other postdoctoral researchers. He contends that the national interest would be served if the labor certification process were waived.

We note that while the petitioner may not yet be at the stage in his career where he qualifies for a permanent job offer, it does not follow that it is in the national interest to waive the labor certification requirements, when those requirements apply to fully trained aliens with more experience in the same field.

Leslie J. Struble, an associate professor in the civil engineering department at the University of Illinois at Urbana-Champaign also offers two similar endorsements of the petitioner's abilities, and expresses confidence that the petitioner will continue to make significant contributions.

[redacted] a technical staff member and team leader at the Los Alamos National Laboratory, worked with the petitioner at the X-ray diffraction laboratory at Los Alamos. Dr [redacted] submits two separate letters in support of the petition and characterizes the petitioner as having a significantly greater influence on his field than the vast majority of postdoctoral researchers.

[redacted] a principal materials and geochemical researcher at the Sandia National Laboratories, has previously worked with the petitioner and the other researchers at the University of Illinois. He asserts that the petitioner is among the "most talented" researchers in his field and is at the

forefront of new scientific methods to use NMR research and computer simulations to understand materials behavior.

Although these endorsements express the authors' high regard for the petitioner's research skills, they come from the petitioner's past and present mentors and colleagues. While such individuals are often in the best position to provide specific details about the petitioner's work, their statements generally do not show, first-hand, that the petitioner's work has already impacted the wider research community.

In this case, along with these and other letters from those who have collaborated with the petitioner, the record contains testimonials from third parties who appear to have no direct ties to the petitioner. Considerable weight is given to the two letters offered by an elected member of the National Academy of Science. [redacted] Professor [redacted] is also a staff member of the Geophysical Laboratory at the Carnegie Institution of Washington and a visiting professor at the University of Chicago. He claims that although he is not personally acquainted with the petitioner, he is familiar with the petitioner's research through conference presentations and professional literature. Professor [redacted] states:

> [The petitioner's] work reveals how strong such interactions are, how such species are orientated on the surface and in the interlayers, and how stable the system remains with changing relative humidity, temperature and dynamic motion.
>
> Through these efforts, [the petitioner] identified the properties of toxic species absorbed on the external surface of nanoporous particles. He was the first scientist in the field to develop a mechanistic classification of inorganic intercalated layered double hydroxides based on the accessibility of water an anionic species to the interlayer. This work has significantly advanced our understanding of the dynamics of such toxic species, enabling the incorporation of layered double hydroxides into technologies aimed at selectively removing toxicants from the environment and nuclear waste sites.

[redacted] a professor and head of the Institute of Inorganic Chemistry at Kiel University, disclaims personal acquaintance with the petitioner. Dr [redacted] states that he is very familiar with the petitioner's professional publications and believes that they represent "outstanding contributions" to material science. He considers that the "quality and significance of [the petitioner's] work has made his research findings of enormous importance to advancing work of others across the field, including myself." Professor [redacted] states:

> Of particular relevance to my own work, [the petitioner] has initiated several groundbreaking studies on layered double hydroxides. . . . Systematic studies on the interaction of various anionic species with layered double hydroxides reveals how species are orientated on material surfaces and in the interlayer spaces, how fast the species undergo dynamic motion, and how stable the system is with changing relative humidity and temperature.

[redacted] is the Director of Research at the "Laboratoire et Mineralurgie" in Nancy, France. He is not personally acquainted with the petitioner, but states that his work has been influential in advancing his own research and has cited the petitioner's papers in his own publications. Dr [redacted] characterizes the petitioner's research in the behavior of layered double hydroxides as "truly novel" and describes his written work in this area as "one of the best I have had the opportunity to read in the past few years and will definitely be of great help for the future development of my own research."

[redacted] is the Head of Research at the Institute of Solid State Chemistry and Mechanochemistry at the Siberian division of the Russian Academy of Sciences. Dr [redacted] states that he does not know the petitioner personally, but became aware of his talents when he read one of the petitioner's publications. He asserts that the petitioner's investigations and additional discovered information related to molecular motion have advanced other scientists' work, including his own research group.

The petitioner also includes evidence of eight published articles in which the he was the lead author and three articles that he co-authored. We note that copies of other articles contained in the file either do not indicate where or if they were published at the time of filing the petition. Eligibility must be established at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). The record also contains evidence that the petitioner has attended numerous conferences in his field. There is no evidence in the file to indicate that publishing or presenting one's work is uncommon in the petitioner's field. We further note that 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 supports the Bureau's position that publication of scholarly articles does not by itself evidence an alien's degree of influence on the field. On appeal, counsel submits an e-mail by [redacted] an executive vice-president of the Association of American Universities, indicating that he believes that it is unusual for a postdoctoral researcher to have the magnitude of publications that the petitioner in this case has. The file also contains another e-mail by [redacted] a professor of chemistry at the University of California and former Committee Member of the Association of American Universities, indicating that the nature of the field may affect the volume of papers that a postdoctoral researcher produces.

We note that the volume of published articles produced is not the central issue. Merely publishing a given quantity of articles does not compel anyone to read them or utilize the findings presented. The scientific community's reaction to the published articles is often manifested by the citation of a petitioner's published work by other researchers. We disagree with the director's finding that citations to a published work by other researchers do not indicate that a petitioner has demonstrated influence

on his field. Heavy citation by other independent scientists can demonstrate that a petitioner has influenced the field as a whole.

On appeal, counsel contends that the petitioner's research has been cited in more than one hundred articles. We have carefully reviewed the citation indices that the petitioner has included with the initial evidence and re-submitted on appeal. Not counting self-citations by the petitioner or his colleagues, the petitioner's work has been cited nineteen times by other independent researchers. Although certainly not the overwhelming quantity asserted by counsel, it does indicate that the petitioner has influenced his field to some degree. When considered together with the endorsements provided by independent references that attest to the petitioner's impact on their own research, the petitioner has established eligibility for a national interest waiver.

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 field of research, rather than on the merits of the individual alien. The evidence of record establishes that the 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. Therefore, on the basis of the evidence submitted, the petitioner has 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, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.