

PUBLIC COPY

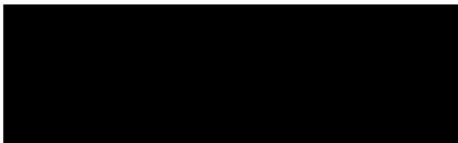
U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B5

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



File: WAC 02 078 50077 Office: CALIFORNIA SERVICE CENTER

Date: JUN 03 2003

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:



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, California Service Center, and is now before the Administrative Appeals Office 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 an alien of exceptional ability. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As of the time of filing, the petitioner is a post-doctoral researcher at the Scripps Institute of Oceanography at the University of California, San Diego. The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. Counsel asserts that the petitioner qualifies as an alien of exceptional ability. Because he qualifies as an advanced-degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now the Bureau] 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 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.

In setting forth introductory arguments, counsel does not cite or even mention *Matter of New York State Dept. of Transportation*, which was published over three years prior to the filing of the instant petition. Instead, counsel cites an unpublished appellate decision from 1992 that has never had force as a binding precedent. The guidelines suggested in that decision cannot supersede or replace the guidelines discussed in *Matter of New York State Dept. of Transportation*, which is a published, binding precedent decision.

Counsel describes the petitioner’s work:

Currently, [the petitioner] is with the Center for Clouds, Chemistry and Climate (C-4), at Scripps Institution of Oceanography researching the most urgent issues of atmospheric and environmental pollution. [The petitioner’s] extraordinary talents have made him one of the most sought after researchers in the field of atmospheric pollution around the world. His talents have been used by some of the most prestigious research institutions in Europe and Asia. In virtually every specific area of his research [the petitioner] has developed ground-breaking methodology that has significantly advanced the fight against environmental contamination. . . .

[At] the Meteorological Research Institute of the Japan Research and Development Corporation . . . [the petitioner] created a new aerosol model for coastal regions. Immediately following his ground-breaking work in Japan . . . [the petitioner] made significant findings in research projects on alpine aerosol models [at the Paul Scherrer Institute of Switzerland]. . . .

During his time with the Scripps Institution of Oceanography, [the petitioner] made many significant research findings in relation to atmospheric aerosol remote sensing with satellite data. . . .

[The petitioner's] work using data from ground based instruments has been pioneering. Previous to [the petitioner's] creative methodology, ground-based instruments were not used to any great extent to measure pollution in the atmosphere. [The petitioner] developed new techniques whereby large networks of meteorological stations could take measurements of solar-radiation and through novel analytical manipulation accurately track atmospheric pollutants in remote areas. . . .

After developing ground-breaking procedures for analyzing data from ground-based instruments, [the petitioner] came to the United States and switched his focus to make contributions using remote sensing from satellites, another very important method of studying atmospheric pollution. At Washington University Center for Air Pollution Impact and Trend Analysis [CAPITA] . . . [the petitioner] developed an algorithm method to retrieve data on atmospheric aerosols from satellite scanning data. . . .

Most recently . . . he has made significant contributions to understanding the distribution of air particle pollution patterns. [The petitioner] has provided outstanding scientific advances in retrieving aerosol-optical depth (AOD) data from sophisticated satellite technologies. Specifically, [the petitioner] has advanced the science through creation of new algorithm retrieval methods relating to 1) addition of water-leaving radiation; 2) thin cirrus correction; 3) introducing a season-dependent phase function; and 4) merging the latest calibration coefficients.

Counsel states that the petitioner's "published scientific papers have been cited . . . numerous times by researchers from different countries." The petitioner shows that eight of his papers have been cited an aggregate total of 16 times; of these, the most heavily cited paper has five citations. Out of the 16 citations, eleven are self-citations by the petitioner or by his co-authors, including three of the five citations of the most-cited paper. Only two of the petitioner's papers have been cited independently, three and two times respectively. While self-citation is a common and accepted practice in scholarly research, it is plainly not evidence of wide impact or influence in the field; it shows only that a researcher or team has continued in the direction established by earlier papers.

A divider in the record refers to the above citation list as “selective international citations.” Although this phrase vaguely implies the existence of other citations, there is no evidence thereof. If any of the petitioner’s articles have been independently cited more than three times, the petitioner has for some reason chosen to withhold evidence regarding his most heavily-cited work. The petitioner’s use of the word “selective” does not obligate us to presume or construe that other citations exist beyond the ones documented in the record.

Along with copies of the petitioner’s published research and evidence intended to establish exceptional ability, the petitioner submits several witness letters. All of the seven initial witnesses have supervised or advised the petitioner and/or co-authored articles with him. Dr. [REDACTED] a senior research scientist at the Pacific Northwest National Laboratory, and the petitioner are among the 29 co-authors of a 1998 journal article. Dr. [REDACTED] states that the petitioner’s “research in [ground-based remote sensing of atmospheric pollution] has been substantial.” Dr. [REDACTED] praises the petitioner’s “outstanding achievements,” asserts that the petitioner’s “findings have received international attention [through] publication in the *Journal of Geophysical Research*, one of the top international journals,” and that “the proof of his success is documented by his peer-reviewed papers.” Dr. [REDACTED] who collaborated with the petitioner at CAPITA, states that the petitioner “has made important contributions to our understanding of air quality and climate change.” Other witnesses discuss the petitioner’s work and offer similar evaluations of his accomplishments, but these letters do not show that similar opinions are shared outside the petitioner’s circle of mentors and collaborators.

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 additional witness letters, background information, and arguments from counsel. The background information discusses climate, air pollution, and the health effects thereof. This documentation establishes the intrinsic merit and national scope of the petitioner’s work but it does not establish that the petitioner’s work in the field is generally acknowledged as being especially important in relation to that of other specialists in the same field.

The newly submitted letters are from individuals who had already provided letters submitted with the initial petition. Dr. [REDACTED] an assistant research professor at Washington University, states that the labor certification process would delay the petitioner’s ability to continue working at Scripps. This assertion is not persuasive, however, given that an alien is generally allowed to work in H-1 status while an application for labor certification is pending on the alien’s behalf. Similarly, the assertion that few individuals possess the petitioner’s specialized talents is not persuasive if those skills are minimum requirements for the position in question.

Evidence regarding the petitioner’s participation at conferences and review of manuscripts (after the petition’s filing date) show that the petitioner is active and considered knowledgeable in his field, but the materials presented do not show on their face that the petitioner’s work is more important than that of others in the specialty.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director's decision contains several references to criteria set forth at 8 C.F.R. § 204.5(h)(3). These criteria apply to a different visa classification, for aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. This analysis was in error. Nevertheless, the director's decision does not rely on these criteria to the complete exclusion of more appropriate criteria relating to the national interest waiver. For instance, the director states on page 10 of the decision:

In order to qualify for a waiver of the job offer requirement in the national interest, the petitioner must present a benefit to the United States which, although not necessarily at the level of sustained national acclaim, nevertheless exceeds the benefit which one could expect from any qualified member of the alien's profession. The self-petitioner need not place him or herself at the very top of the field of endeavor, but the self-petitioner should significantly exceed the average or median level of impact.

The director found that the petitioner's claim relies largely on general assertions about the importance of his occupation, and letters from individuals with close ties to the petitioner. On appeal, the petitioner submits a brief from counsel, new witness letters, and additional published articles. Counsel states that the petitioner's "numerous publications in highly recognized scientific journals" provide "a sound indication of his widespread acclaim and recognition in the field." Given the minimal citation record amassed by the petitioner's articles, we cannot concur with the assertion that those articles, by their very existence, demonstrate the importance or significance of the petitioner's work.

The director, in denying the petition, minimized the importance of citations, calling them "routine." While it is true that scholarly articles routinely include dozens of citations of earlier articles, a given article that is repeatedly cited by others is judged to have had greater impact than an article that is rarely or never cited by others. Indeed, the "impact factor" of a scholarly journal is calculated based on the citation rate of its constituent articles. Therefore, when examining citation evidence, it is important to consider both the quantity of citations and the variety of the researchers making those citations.

Counsel recognizes the significance of citations, stating on appeal that "eight (8) of [the petitioner's] research papers were cited twenty-seven (27) times by other research scientists." Counsel, however, cites no evidence to support this claim. As noted above, the petitioner's initial submission established 16 citations, only five of which were independent rather than self-citations. One of those five independent citations was by a researcher who has collaborated with one of the petitioner's co-authors. The appeal submission does not include documentation of any new citations, let alone 22 independent citations (self-citations are not citations "by other research scientists").

Responding to the director's observation that the petitioner's witnesses are all supervisors and collaborators, counsel rhetorically asks "imagine how [the petitioner] can get access to a stranger from the ocean of researchers and scientists in the field for a reference letter." The names of potential witnesses are readily available to the petitioner. For instance, the petitioner has documented the names of other researchers who have cited his work. There are also the names of

individuals whom the petitioner himself has cited. It remains that the petitioner has claimed significant impact on the international research community in his field, and the burden is on the petitioner to substantiate this claim. That his close associates believe him to have had such an impact does not demonstrate, first-hand, that this belief is shared outside of the groups that have trained or collaborated with the petitioner.

Counsel states that the appeal submission includes a “[m]edia report of [the petitioner’s] research.” This “media report” is in fact a press release issued by the Kodak subsidiary that owns technology used by the petitioner in one of his projects. There is no evidence to show how many, if any, media outlets picked up and published the press release.

The witness letters on appeal, like the earlier letters, attest that the petitioner is internationally known for his work but, again, offer no evidence for this except for the existence of published articles by him. Clearly these witnesses are sincere in their praise of the petitioner and in their opinions of his work, and there is no question that the petitioner’s findings have been original and useful. Nevertheless, the record contains insufficient independent evidence to show that the petitioner’s work has, as of the petition’s filing date, had a measurable impact beyond the groups where he has trained.

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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.