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

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



JUN 12 2003

File: WAC 01 230 52143 Office: CALIFORNIA SERVICE CENTER

Date:

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)

ON BEHALF OF PETITIONER:



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 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 to classify the beneficiary 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 researcher in the field of organic polymer chemistry. At the time of filing, the petitioner was a doctoral student at the University of California, Irvine (UCI). The petitioner later completed his Ph.D. and accepted a postdoctoral position at the IBM Almaden Research Center for Polymer Interfaces and Macromolecular Assemblies. 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.

(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.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. 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 a statement submitted with the initial filing, the petitioner describes his work:

Currently I am pursuing two projects independently. The first project is developing new polymerization reaction[s] that utilize nontraditional monomers as the carbon source to synthesize commercial polymers such as polyethylene, which is one of the most important material[s] in contemporary society. Novel strategies can provide access to new topologies, architectures and copolymers of these important materials. In addition it can serve as an entry to completely new substances. My second project is development of artificial/synthetic membranes, which rival biological membranes in selectivity, and chemical sensor for industrial diagnostics, environmental analysis, food analysis and production monitoring, as well as the detection of illicit drugs, genotoxicity, and chemical warfare agents.

The petitioner notes that the findings reported in one of his published papers were the subject of coverage in *Chemical & Engineering News*. The two-paragraph article states that the petitioner and his collaborators were able to make an ethylene-propylene copolymer molecule “by building the carbon backbone one atom at a time.” The article states “[t]his capability, the researchers say, opens the door to ‘designer’ polymers not obtainable through conventional polymerization of

olefin monomers.” We duly note that the petitioner’s work was mentioned, albeit briefly, in this news piece in a significant trade publication. Subsequent submissions show that the information in the article in *Chemical & Engineering News* derives from a UCI press release. The record reflects no independent media attention to the petitioner’s work, nor does it show any further attention following the initial publication. While the early article shows that the petitioner’s work was seen as having significant potential, there is no further comparable coverage to indicate that this potential has since been realized.

The petitioner submits several letters from witnesses in Irvine, mostly at UCI. Professor Kenneth J. Shea, who has supervised the petitioner’s doctoral research, credits the petitioner with “seminal contributions to our research programs in molecular imprinting and in polymer synthesis. His accomplishments include the development of a new polymerization reaction for the synthesis of substituted carbon backbone polymers. This work was followed up by the development of a general approach for synthesizing copolymers polymethylene (ethylene).” Dr. David L. Van Vranken, an associate professor at UCI, states that the petitioner’s method for synthesizing the new copolymers is “wildly different from techniques used in the previous century.” Dr. Y.T. Chou, adjunct professor at UCI, calls the new synthesis process revolutionary. . . . [The petitioner’s] achievement in this field is truly outstanding.” The record does not establish the extent to which these opinions, regarding the petitioner’s work at the time of filing, were shared outside of Irvine. For instance, while some witnesses stress that the petitioner’s work has appeared in important journals, the record does not show citation of the petitioner’s published work.

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 evidence, including background materials, documentation regarding his published work, and new witness letters. The letters and documents are largely devoted to projects that the petitioner did not undertake until after the petition’s filing date. One article is submitted in proof form, indicating that it was still unpublished, even months after the filing date. Aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). Subsequent developments cannot overcome a finding that the petitioner was ineligible at the time of filing. In addition, much of the material submitted in response to the director’s notice concerns the potential, rather than existing, impact of the petitioner’s work.

The petitioner submits additional articles describing his work with the single-atom carbon polymer backbone. All of these articles date from late 2000, and appear to rely largely on information from the aforementioned UCI press release. Although these articles appeared nearly two years before the petitioner submitted them, there is no evidence of any follow-up.

The director subsequently denied the petition. In denying the petition, the director cited *Matter of New York State Dept. of Transportation* and stated “[a]lthough the self-petitioner appears to be a competent and qualified Organic Polymer Chemistry Research Assistant, there is little evidence to persuade the

Service that granting a waiver of the job offer requirement would be in the national interest in this case.”

On appeal, counsel states “[i]n responding to the additional information request, this office went to great length to address each and every issue of the third prong set forth in NYSDOT. . . . [We] submitted a 28-page brief, in which **22 pages** dealt specifically with the third prong of the test.” Most of this discussion consisted of lengthy passages quoted from witness letters, either discussing work the petitioner had not yet begun at the time of filing, or showing that the petitioner’s own former professors consider the petitioner to be a skilled scientist and excellent student with a promising future.

Counsel asserts that the director “had the burden to prove why the petitioner was not qualified” for the waiver. The burden of proof, however, rests and remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner does not shift the burden of proof to the Bureau by submitting evidence, or by declaring that he has established his eligibility. While the director must set forth the grounds for denial in writing, it does not follow that the petitioner is presumed to be eligible until the director proves otherwise.

The petitioner is at the beginning of a promising career, and he has made novel discoveries which, at least briefly, attracted some notice outside of his circle of colleagues and collaborators. These findings, however, appear to be tentative and preliminary rather than having had a demonstrated impact on the field. The application for a national interest waiver in this instance appears to have been premature at best.

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.

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.