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U.S. Citizenship
and Immigration
Services

Handwritten initials

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUL 02 2004

IN RE:

Petitioner
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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann
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 a member of the professions holding an advanced degree. At the time of filing, the petitioner was working as a "Visiting Post Doctoral Fellow Chemist" in the Environmental Energy Technologies Division at the University of California, Lawrence Berkeley National Laboratory. 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) Subject to clause (ii), 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 petitioner holds a Ph.D. in Chemistry from Arizona State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. 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 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 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.

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

Along with copies of her published work, the petitioner submitted four witness letters.

Senior Staff Scientist, Organometallic Chemistry Group, Lawrence Berkeley National Laboratory (LBNL), states:

[The petitioner] has been a Visiting Postdoctoral Fellow in my LBNL Organometallic Chemistry Laboratory, since March 1997, working on several important projects. Namely, Metal-Ion Templated Polymers and, more recently, Co-Factor NAD⁺ Regeneration; i.e. NAD⁺ to 1,4-NADH. These studies are very critical to United States scientific success in that both for environmental and basic biocatalysis reasons. [The petitioner's] results will have a profound effect on furthering the above-mentioned fields. In particular, efficient and regioselective regeneration of the Co-factor 1,4-NADH is a very important problem in the application of NADH-dependent redox enzymes in biocatalyzed organic reactions, which, if successful, will have a dramatic impact on; for example, the enzymatic synthesis of chiral drugs.

[The petitioner] is a very able and conscientious co-worker, with a very special talent of total dedication to find methods to push the frontiers of science towards her project goals. She is a key researcher in my laboratory; her presence in my lab and in her future career objectives will directly and substantially benefit United States scientific goals with regards to environmental pollution and advanced biotechnology. [The petitioner] has published her first significant studies on the NAD+ regeneration project in *Angew. Chem. Int. Ed. Engl.*, one of the most prestigious journals in the global chemical society. In addition, a paper was submitted to *Chemical Communications* on a novel mercury imprinted polymer technique to selectively remove toxic mercury ions from aqueous solution; a new, environmental remediation process for toxic metal ions could be developed using this unique technology.

In my opinion, [the petitioner] has developed into a first-class scientist in her field. She has demonstrated her scientific competence, both in my lab and in [REDACTED]

[REDACTED] letter discusses what may, might, or could one day result from the petitioner's work, rather than how the petitioner's past efforts have already had a discernable impact beyond that of other researchers in her field.

[REDACTED] Staff Scientist, LBNL, states:

[The petitioner] has been employed at Lawrence Berkeley National Laboratory since March, 1997 to perform advanced research on a project for which I am the Principal Investigator and which involves the synthesis and testing of catalytic, biomimetic membranes for use in sensors and especially, in advanced catalysis for environmentally compatible manufacturing processes on Novel & Energy Efficient Regeneration of Co-factor NADH. She reports indirectly to me in her capacity as a Post-doctoral Fellow and directly to my colleague, [REDACTED]. The project is funded by the Advanced Energy Projects Division, Office of Energy Research, U.S. Department of Energy (DOE).

The project on which [the petitioner] is a key researcher is a cutting edge project with major impacts on the nation's energy needs as well as important economic and environmental effects. The programs are of central importance to the Nation's strategy for reduction of Greenhouse Gas Emissions as it provides a potential route to accelerate the processing of renewable biomass feedstocks for fuels and chemicals. DOE and the National Laboratories have been very active during the last year in developing this strategy which is of major importance to the U.S. position on Global Warming. I have been active in attending workshops and planning meetings for DOE and the Green Chemistry Institute during the last year. I may observe that the kind of research that [the petitioner] carries out is vital to the provision of the new catalysts that will be necessary to provide new sources of chemical feedstocks and renewable fuels. People with the skills that [the petitioner] possesses will be in great demand in future years to help implement this strategy.

I have been very satisfied with the way that [the petitioner] has performed during her time at the Laboratory. She has made extremely important contributions to the experimental work and, more importantly, she has provided vital insight into the mechanisms of catalyst operation which bodes well for her ability to analyze and design experiments in future. Recently, the work that [the petitioner]

accomplished has been accepted for publication in a prestigious international journal, *Angew. Chem. Int. Ed. Engl.*. Consequently, her excellent accomplishments have the potential to lead to significant improvements in energy consumption and environmental concerns.

She has thus demonstrated the important qualities required to make critically important contributions to the development of this field and become a very valuable Scientist. [The petitioner] has the potential to be an outstanding scientist in the field of organometallic chemistry and to make significant and substantial contributions. This is in the U.S. national interest in general and, in particular her work may contribute to the nation's efforts to reduce Greenhouse Gas Emissions, thereby alleviating the disastrous effects of Global Warming.

We generally do not accept the argument that a given field of research is so important that any alien qualified to work in that field must also qualify for a national interest waiver. [redacted] observation that the petitioner is involved in a "project with major impacts on the nation's energy needs as well as important economic and environmental effects" may establish the intrinsic merit and national scope of the petitioner's work, but such general comments are not adequate to show that her individual accomplishments are of such an unusual significance that she qualifies for a waiver of the job offer requirement. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule.

[redacted] states that the petitioner's "accomplishments have the potential to lead to significant improvements in energy consumption" and that she "has the potential to be an outstanding scientist in the field of organometallic chemistry and to make significant and substantial contributions." Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for a national interest waiver. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Immigration and Naturalization Service (legacy INS) held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. In order to qualify for a national interest waiver, the petitioner must submit evidence demonstrating that her work has already significantly influenced her field to a substantially greater degree than that of other qualified researchers in her field.

[redacted] mentions that the organometallic chemistry "skills that [the petitioner] possesses will be in great demand in future years." Objective qualifications, however, are amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation, supra*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

[redacted] Assistant Professor of Chemistry, San Diego State University, states:

I have known [the petitioner] since August 1990, when she...started in the Ph.D. program in the Department of Chemistry at Arizona State University. I was [the petitioner's] thesis advisor as she worked in my laboratory until October, 1996.

[The petitioner] was the pioneer on two completely new research projects in my lab, involving carbene and ketene complexes. Compounds of these two classes are used to make valuable organic compounds, in some cases for pharmaceutical or medicinal reasons. One severe drawback to existing chemistry is that environmentally objectionable chromium carbene and ketene complexes are used. Therefore, [the petitioner's] research had several major goals: (1) find alternative metals of lower toxicity, perhaps by creating catalytic chemistry; (2) gain a understanding into the fundamental bonding and reactivity of carbene and ketene complexes.

[The petitioner] discovered that the correct combination of transition metal (iridium) and phosphine ligand produced unique ketene complexes, which are stable enough to be isolated and stored, yet reactive enough to demonstrate some fundamental properties of ketene complexes. Her findings were ground-breaking work which so far has led to two communications in *Journal of the American Chemical Society*, the most widely read and influential chemistry journal in the world, and a third communication in *Organometallics*, the premier journal of the rapidly growing field of chemistry by the same name. (Communications are short papers presenting work of special urgency and significance to the field. Especially in the *Journal of the American Chemical Society*, communications are published only if the reviewers and editors agree that the work is of interest and importance to a broad variety of chemists.) As my graduate students and postdoctoral associates continue to follow up on [the petitioner's] pioneering work, several more papers with her name on them will appear. At the same time that [the petitioner] achieved these results, she discovered a new way to make carbene complexes which did not require toxic, carcinogenic compounds like methyl triflate. This work appeared as a communication in *Organometallics* in 1995.

To put [the petitioner's] achievements in perspective, since 1990, I have published 20 papers in refereed journals describing research conducted in my lab. On 14 of the 15 papers which came from my lab exclusively, my name appears first. On the one exception (the 1997 communication to the *Journal of the American Chemical Society*), [the petitioner's] name appears first --- an honor --- because she was the one to identify the reactions and the compounds appearing in that paper. For example, without direction from me, it was [the petitioner] who learned the sophisticated nuclear magnetic resonance (NMR) techniques needed to reach her conclusions.

* * *

[The petitioner's] productivity as evidenced by her publication record makes her a leader in the field of metals and ketene and carbene chemistry, subfields of organometallic chemistry.

We do not find that publication of an alien's work in a respected journal in her field is presumptive evidence of eligibility for the national interest waiver. On March 31, 1998, the Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, 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," rather than a mark of distinction, among postdoctoral researchers. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work.

The documentation accompanying the petition included seven citations of articles that the petitioner coauthored with [REDACTED] (while under his supervision at Arizona State University). While the articles presented demonstrate some degree of interest in the petitioner's published work, she has not shown that an aggregate total of seven citations during a research career spanning more than a decade adequately distinguishes her from other capable researchers in the organometallic chemistry field.

[REDACTED] University, states:

I have known [the petitioner] for six years during the time she was a graduate student in our department. She joined our graduate program in 1990 and received her Ph.D. in 1996.

[The petitioner] took a core course in Physical Organic Chemistry from me in her first year in graduate school and was without doubt the best student in the class. She carried out her graduate research under the advisement of [REDACTED] and he should be able to give more detailed information about her laboratory work. However, I followed quite closely her progress through her years in graduate school. I was present in several presentations of her results at departmental seminars, poster sessions and scientific meetings. My general impression was that the projects proceeded quite successfully due to the very strong dedication and skilled work carried out by [the petitioner].

* * *

In summary, [the petitioner] is genuinely interested in science and will continue to make significant contributions in the field of organometallic chemistry. Her performance in graduate school was exceptionally strong and her contribution in the field of organometallic chemistry is continuing successfully in her present postdoctoral work.

We accept that the petitioner has contributed to the overall pool of knowledge in her field; however, the witnesses have not explained how the petitioner's work is of greater benefit than that of other scientists in the organometallic chemistry field.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found 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.

On appeal, counsel states:

[The petitioner] has published critical discoveries which will lead to the reductions of pollutants that cause the "Greenhouse Effect" and Global Warming.... There is simply no better method for convincingly demonstrating whether a researcher will "have a significant impact on her area of expertise on a national level" and that the work will "substantially benefit the United States to a greater degree than the work of others in her field" than through publication of the researcher's results in prestigious peer-reviewed research journals.

Publication, by itself, is not a strong indication of impact in one's field, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner herself has cited sources in her own articles. Numerous independent citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research.

On appeal, the petitioner submits an article authored by [redacted] and five others (not including the petitioner) entitled "Controlled, Reversible Conversion of a Ketene Ligand to Carbene and CO Ligands on a Single Metal Center." This article, published in the *Journal of the American Chemical Society* in 2000, was the subject of a brief news blurb appearing on page 52 of the May 29, 2000 issue of *Chemical and Engineering News*. The petitioner's name does not appear in the *Chemical and Engineering News* piece, nor does that piece specifically identify any of her prior work as a significant breakthrough. Rather, the article discusses the work of [redacted] and his research team. Counsel states that [redacted] article in the *Journal of the American Chemical Society* "bases its findings on no less than three seminal publications authored by [the petitioner]." It is noted that [redacted] was the petitioner's coauthor for all three of these publications and that he was simply citing his findings from their earlier work.¹ Self-citation is a normal, expected practice among researchers in the scientific community. Self-citation cannot, however, demonstrate the response of independent researchers. While the petitioner has coauthored some published articles over the past decade, we find that an aggregate total of ten citations of the petitioner's published work (three of which were [redacted]) is not adequate to demonstrate that the petitioner's work has significantly influenced the greater organometallic chemistry field.

¹ On appeal, the petitioner submits a copy of "Controlled, Reversible Conversion of a Ketene Ligand to Carbene and CO Ligands on a Single Metal Center" which, among its thirty references, lists three articles coauthored by the petitioner and [redacted] 1995, 1996, and 1997.

Also submitted on appeal was a "Disclosure and Record of Invention" dated March 24, 2000 indicating that LBNL intends to seek a patent for the petitioner's work entitled "A New Paradigm for Co-Factor Regeneration, Enzyme Recognition and Chiral Synthesis." This evidence, however, came into existence subsequent to the petition's filing date. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. *See Matter of Katigbak, supra.* We note here that anyone may file a patent application, regardless of whether the invention constitutes a significant contribution. The record contains no evidence showing that the petitioner holds a patent approved by the U.S. Patent and Trademark Office (USPTO) as of the petition's filing date or that her invention has received significant attention from throughout the chemistry field. Even if the petitioner were to provide evidence of an approved patent as of the petition's filing date, it would carry little weight in this matter. Of far greater relevance in this proceeding is the importance to the greater field of the petitioner's innovation. The granting of a patent documents that an innovation is original, but not every patented invention constitutes a significant contribution to one's field. According to statistics released by the USPTO, which are available on its website at www.uspto.gov, that office has approved over one hundred thousand patents per year since 1991. In 2001, for example, it received 345,732 applications and granted 183,975 patents. The record contains no substantive evidence showing that any of the petitioner's inventions have been successfully utilized on a national scale.

In this case, the scientists offering letters of support consist entirely of individuals who have taught or collaborated with the petitioner. These individuals became aware of the petitioner's work because of their association with her; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are unusually significant. While the petitioner may have benefited projects undertaken in the laboratories where she has worked, her ability to significantly impact the field beyond these projects has not been demonstrated.

For the reasons set forth above, the petitioner has not established that her past accomplishments set her significantly above her peers such that a national interest waiver would be warranted. While the petitioner has plainly earned the respect and admiration of her four witnesses, it appears premature to conclude that her work has had and will continue to have a nationally significant impact. The petitioner's work has added to the overall body of knowledge in her field, but this is the goal of all such research; the assertion that her findings may eventually have practical applications does not persuasively distinguish her from other competent researchers. In sum, the available evidence does not establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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 project or area of research, 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.

ORDER: The appeal is dismissed.