

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

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B5

PUBLIC COPY



FILE: LIN 05 126 50194 Office: NEBRASKA SERVICE CENTER Date: JUN 07 2007

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:



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.

Maura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) 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 or a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment 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. Thus, on September 28, 2005, the director denied the petition accordingly.

On November 1, 2005, the petitioner filed an appeal of the director's decision, requesting 30 days in which to supplement the appeal. As the appeal was filed untimely, the director elected to treat the appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), implying that the I-290B Notice of Appeal met the requirements of a motion to reopen or reconsider.¹ On January 5, 2006, the director advised the petitioner that the untimely appeal would be treated as a motion and afforded the petitioner 30 days to supplement the appeal. The director cited no legal authority that allows a petitioner to supplement a motion.² In response, counsel submitted a brief asserting that the director misapplied a precedent decision relating to the classification sought. On March 30, 2006, the director reaffirmed the initial denial in an ambiguous decision. Specifically, while the director implies that the appeal did not meet the requirements of a motion, he reaffirms the director's previous decision based on a review of the record including the new submissions. On May 1, 2006, the petitioner timely filed the instant appeal, asserting that the director's initial decision was in error.

The AAO reviews appeals on a *de novo* basis. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). As noted above, the director treated the appeal as a motion and ultimately reaffirmed his initial decision rather than dismissing the motion for failing to meet the requirements of a motion. Thus, we will adjudicate the appeal before us by addressing the merits of the director's initial decision, reaffirmed on motion without further discussion. For the reasons discussed below, we uphold the director's initial finding that a waiver of the alien employment certification process in this matter is not warranted in the national interest. Specifically, we find that the petition was filed before the petitioner had had any meaningful opportunity to influence the field as a whole.

¹ The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) only requires the director to consider an untimely appeal as a motion if it "meets the requirements" of a motion to reopen or reconsider.

² The regulation addressing motions to reopen and reconsider, 8 C.F.R. § 103.5, does not expressly allow a petitioner to supplement a motion. *Cf.* 8 C.F.R. § 103.3(a)(2)(vii) expressly permitting requests for additional time to supplement an appeal.

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 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 holds a Ph.D. in Chemical Engineering from the Colorado School of Mines. 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 an alien employment 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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, molecular simulation, and that the proposed benefits of his work, carbon sequestration, 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. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

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. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received his Ph.D. in Chemical Engineering from the Colorado School of Mines in 2003. His thesis advisor was [REDACTED]. In 2004, the petitioner joined the laboratory of [REDACTED] at the University of Notre Dame in Indiana. As of the date of filing, the petitioner had authored only a single published article based on his Ph.D. research. His remaining four manuscripts were in preparation to be submitted. Thus, the vast majority of the

petitioner's research had yet to be widely disseminated in the field as of the date of filing, the date on which the petitioner must establish eligibility. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petitioner relies on several reference letters. On appeal, counsel cites several non-precedent decisions for the proposition that letters from independent experts are persuasive evidence. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of potential applications and a positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation *and who have applied his work* are the most persuasive.

█ asserts that the petitioner was able to produce results applicable to industry while a Ph.D. student because he had previously worked in industry before pursuing his Ph.D. Specifically, the petitioner developed experimental force field values and a model to use in simulation. This work is the subject of the petitioner's only published article. The record lacks evidence that this article has been cited by independent research teams or, in fact, at all.

█, an associate professor at the Colorado School of Mines, asserts:

Although [the petitioner's] force field cannot yet be used for polymer systems, the method (and math model) to optimize the force field can be applied to my polymer simulations. This is the reason that I am particularly interested in [the petitioner's] work. From his work, I can ensure that my methodology will work for small molecules (such as alkanes, alcohols, etc.). I also believe that with minor modifications, the methodology is ready for complex molecules.

While these statements suggest that the petitioner's work has applications beyond his own research, it does not show that his work has already influenced the field beyond the Colorado School of Mines, where the petitioner received his Ph.D.

██████████, a professor at Brigham Young University, asserts that he met the petitioner at a 2003 symposium in Colorado. ██████████ praises the petitioner's Ph.D. research and notes that it was published in a top peer-reviewed journal. We will not presume the significance of an article from the journal in which it appeared. Rather, it is the petitioner's burden to demonstrate the influence of the individual article. ██████████ does not identify other research teams using the petitioner's values and models and does not suggest that he himself is doing so.

██████████, a Technical Manager and Chemistry Modeling Specialist at BP Chemicals, asserts that the petitioner's force field research will allow researchers "to predict viscosity more accurately than was available beforehand." He does not assert that researchers are now doing so or that BP is adopting the petitioner's values and models. The record contains no other letters from independent researchers or industry scientists applying the petitioner's force field values and models.

██████████ further asserts that the petitioner determined that the force field for transport properties is transferable among molecules, a previously unknown phenomenon. Finally, ██████████ asserts that it is standard in the industry to use commercial software, but that the petitioner created his own software, which allowed him "to do much more detailed simulation work than would have been possible using the commercial software packages."

The record contains no evidence that the petitioner has licensed his software to other research teams. ██████████ speculates that the petitioner's software "will be used not only in the scientific setting, but also will be applied in the industrial field." ██████████ does not suggest that BP or any other independent research team has any plans to license or otherwise utilize the petitioner's software.

██████████ asserts that he was impressed with the petitioner's accurate simulations on thermal conductivity, an area often overlooked due to its complex nature. While ██████████ asserts that this work is "broadly applicable," he does not provide examples of other teams applying this work. Finally, ██████████ affirms his "understanding" that the petitioner has written his own software but does not profess to use the software himself.

██████████ notes that the petitioner's current work is sponsored by the Department of Energy, "which demonstrates that is recognized as important to our country." We have already acknowledged the intrinsic merit and national scope of the petitioner's area of research. The petitioner cannot secure a waiver of the alien employment certification process simply by working with a government grant. ██████████

██████████ explains that the petitioner works with ionic liquids, which cannot escape into the atmosphere and, thus, are good candidates for carbon sequestration. The petitioner's goal is to determine which ionic liquids would best sequester carbon. ██████████ asserts that the petitioner "has already made great strides on this work." Specifically, he completed the *ab initio* quantum mechanical calculations of different ionic liquids, "an extremely complicated procedure." This work is necessary before designing and developing an absorbent. ██████████ then discusses the petitioner's future research proposals. ██████████, another professor at the University of Notre Dame, provides similar information. ██████████, an associate professor at the University of Notre Dame, asserts that

the petitioner has an extensive understanding of molecular simulation and speculates that the petitioner's innovative work "will" improve this area of research.

In a second letter, [REDACTED] explains that the petitioner's position is not "permanent" due to the year-to-year funding of his project. Thus, [REDACTED] cannot pursue the labor certification process in the petitioner's behalf. On appeal, counsel notes that the director incorrectly stated that no reason was presented why the alien employment certification process could not be utilized. That said, while the inapplicability of the alien employment certification process will be given due consideration in appropriate cases, it cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218, n. 5. Thus, he must still demonstrate his track record of success with some degree of influence on the field as a whole.

As stated above, none of the petitioner's work in [REDACTED]'s laboratory had been published as of the date of filing. In fact, the petitioner had not even presented this work beyond the University of Notre Dame as of the date of filing. The record contains no letters from industry affirming their use of the petitioner's results or even their interest in his work.

[REDACTED], a research associate professor at the University of Tennessee, asserts that he met the petitioner at a conference and has followed the petitioner's work since that time. He expresses his understanding that the petitioner's current research "is extremely promising" and "may lead to the development of chemical engineering processes that will allow coal to be burned much more efficiently and cleanly throughout the United States." He does not explain how the petitioner's work has already influenced the field.

[REDACTED], a professor at the University of Buffalo, asserts that he knows of the petitioner through discussions with the petitioner's collaborators and his "publications," although the petitioner had only authored a single publication as of that date. In answering how the petitioner's research "will" impact the field or [REDACTED]'s own research, [REDACTED] responds by discussing the petitioner's rare understanding of molecular simulation. [REDACTED] concludes that the "vast potential offered by molecular simulation will remain untapped without researchers who understand molecular simulation and molecular modeling with sufficient depth to improve its capabilities." These statements do not explain how the petitioner had already influenced the field.

Finally, subsequent to filing the petition, the petitioner has submitted evidence that [REDACTED] his own Ph.D. advisor, has requested his assistance in reviewing a manuscript for publication and that the petitioner has been invited to a conference. This evidence relates to events after the date of filing and cannot be considered. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding,

must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant or contributing to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

Moreover, the petitioner's use of his own software and his previous industry experience are insufficient without evidence that these skills have already influenced the field. Simple training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 221. In addition, as stated above, simple innovation is insufficient without evidence that the innovation has already had an influence on the field. *Id.* at 221, n.7. Furthermore, with regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/alien employment certification requirement, arguments hinging on the petitioner's experience, while relevant, are not dispositive to the matter at hand. *Id.* at 222.

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 alien employment 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 an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.