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U.S. Citizenship
and Immigration
Services

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FILE:

EAC 06 017 53880

Office: NEBRASKA SERVICE CENTER

Date: FEB 25 2008

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 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be 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. At the time he filed the petition, the petitioner was a postdoctoral research fellow at West Virginia University. He has since accepted employment as an engineer associate at the University of Kentucky. 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:

(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 the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] 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 (Commr. 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 also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner’s research concerns clean, alternative fuels. The director did not contest the intrinsic merit or national scope of such research. Rather, the director found that the petitioner’s individual qualifications were insufficient.

In a personal statement accompanying the initial filing, the petitioner stated:

My research interests basically focus on heterogeneous catalysis and development of ultra-clean fuels such as transportation fuel and hydrogen fuel from alternative energy resources, which generally refers to Fossil fuels including coal, natural gas, plastic and biomass. . . . A typical reaction, Fischer-Tropsch synthesis (FTS) reaction ,which uses a coal/natural gas derived gas-mixture of carbon monoxide and hydrogen (syngas) to synthesize . . . various kinds of hydrocarbon[] fuels, is a very important process to make ultra-clean liquid fuels. . . . I have been heavily engaged in the FTS reaction study in the past 10 years (1995-present).

For production of another ultra-clean energy i.e. hydrogen, the Water Gas Shift (WGS) reaction and Natural gas (methane) dry reforming (MDR) have been accounted for the effective processes. I have worked on the WGS and MDR reactions for totally 5 years. . . .

I have made many new and very important discoveries on the coal fuel-to-liquid fuel and coal/natural gas fuel to hydrogen fuel in the past 12 years.

The petitioner stated that he has “published 26 research papers” and that “the citation impact of my international publications is over 4 (4.3 citation[s] per paper [on] average), which is more than twice the international average (two). For example, one of my papers has been cited seven times to date.”

The petitioner submitted printouts from the Science Citation Index, showing that two of his articles were cited three times each, and a third was cited seven times, for an aggregate total of thirteen citations (eight of which appear to have been self-citations by the petitioner or his collaborators). The petitioner did not document any other citations. Over 26 published papers, thirteen citations yields an average citation rate of .5, not 4.3. Therefore, the petitioner appears to have derived the claimed average of 4.3 citations per paper by considering only his three cited articles; 13 divided by three is roughly equal to 4.3. It is, however, misleading to term this statistic “the citation impact of his international publications.” It would seem more accurate to state that the statistic shows the citation impact of his *cited* publications, setting aside the 23 out of 26 articles (88%) for which the petitioner had, at the time, offered no evidence of citation.

Furthermore, neither the petitioner nor counsel cited any source for the “international average” of two citations per paper. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Assuming *arguendo* the accuracy of that figure, the petitioner has not clarified whether this is the average for all papers *cited* in the specialty, or all papers *published* in the specialty. If the latter, then the petitioner’s citation rate is only one-fourth the “international average.” If the petitioner did, indeed, compare only his own *cited* work against all *published* work, this artificial inflation of his own “average” would at the very least border on dishonesty. Even if the petitioner properly used only *cited* papers in computing the average, it is not clear where “more than twice the international average” number of citations per paper resides on the statistical curve. The standard for the national interest waiver requires more than simply rating “above average” in one’s field of endeavor, because the statute plainly subjects aliens of exceptional ability to the job offer requirement. 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor.

The petitioner submitted documentation from the United States Patent and Trademark Office, showing that some of his work has been patented. This documentation establishes that the petitioner is an innovator in the field, but we note nevertheless that an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *Matter of New York State Dept. of Transportation* at 221, n.7.

Several witness letters accompanied the initial submission, mostly from individuals who have supervised, collaborated or otherwise worked closely with the petitioner. [REDACTED] of the University of Kentucky has interacted with the petitioner as both of their universities participate in the Consortium for Fossil Fuel Science (CFFS). Prof. Huggins stated:

The actual project on which [the petitioner] is working is entitled: "Development of alternative sources for transportation fuel." . . . Alternative sources for transportation fuels include coal, natural gas, and waste materials, such as used plastics and tires. [The petitioner] has made important contributions in this project, consistent with the high quality papers and patents he published while at Texas A&M University. . . .

Catalyst development is one of the most important technologies that can have significant impact on the success of the alternative fuels program. [The petitioner] has invented new formulations for both coal liquefaction and FT catalysts. . . . [The petitioner's] catalyst formulations produce just gas and liquid fuels . . . whereas commercial FT catalysts generally produce much polymerized solid materials that require more deep chemical treatment to yield liquid fuels. . . .

I am certain that [the petitioner's] contributions represent significant breakthroughs in the development of FT catalysts and carbon materials and will ensure him a strong academic reputation and much creativity for future work.

[REDACTED] of the University of Utah has "not worked with [the petitioner] as a colleague or as a supervisor." The University of Utah, like West Virginia University, is a CFFS member. [REDACTED] stated:

One critical aspect of the Consortium's research involves a more elegant use of Fischer-Tropsch synthesis to produce clean diesel fuels. . . . One of the shining lights in West Virginia's effort is [the petitioner]. . . .

[The petitioner] has developed effective and economic activated-carbon (AC) supported Mo-Fe-Cu-K-AC catalysts for production of ultra clean fuels by the Fischer-Tropsch synthesis reaction. . . .

[The petitioner's] breakthrough methodologies and great contributions to the development of catalysts for liquefaction of fossil fuels and his carbide material development have significantly furthered our area of science.

Other witnesses within CFFS offer comparable support. The only initial witness outside of CFFS who had no hand in the petitioner's prior training is [REDACTED], Vice President and Chief Technology Officer of Headwaters Technology Innovation Group, Inc., who does "not personally know [the petitioner] all that well" but who "spent quite a bit of time in reviewing publications on his research area" in preparation for the petitioner's visit to the company. [REDACTED] stated that the petitioner's "work led to an important finding that

macropores on activated carbon play an important role in the distribution of active metals than that from the micropores” (*sic*).

On September 20, 2006, the director issued a request for evidence, instructing the petitioner to “submit additional documentary evidence which will indicate that the petitioner had, as of the priority date [*i.e.*, filing date] of this petition, a degree of influence on his field which distinguishes him from other scientists with comparable academic or professional qualifications.”

In response, the petitioner submitted additional materials, including evidence that the number of citations of the petitioner’s work had more than tripled from 13 to 42, including citations of several of the petitioner’s previously uncited works. Of these 42 citations, 17 appear to be self-citations by the petitioner or his co-authors.

The petitioner submitted additional witness letters. [REDACTED], Associate Director of the Center for Applied Energy Research (CAER) at the University of Kentucky (where the petitioner began working after he filed the petition) credited the petitioner with “very significant contributions in the development of new process[es] and new catalytic materials for coal-to-liquid fuel technology and for hydrogen technology.” He asserted that the petitioner “has been a pioneer researcher for development of new porous FTS catalyst materials,” and listed several of the petitioner’s contributions, for instance:

[The petitioner] has developed a set of powerful detailed kinetic models of the FTS reaction. . . . His work was new and made a breakthrough for catalyst design towards optimal production of the desired ranged hydrocarbon fuels. His work opened a new direction of the FTS kinetic study since this important research has not been largely touched until [the petitioner] published his new achievements in a top-rank journal.

[REDACTED], Chair of the Department of Inorganic Chemistry at the University of the Witwatersrand, South Africa, credits the petitioner with “significant impact . . . on the coal liquefaction field in the world” and stated that his own laboratory relies on the petitioner’s published work.

Texas A&M University [REDACTED], a Foreign Associate of the United States National Academy of Engineering, stated:

Personally, I did not have frequent contacts with [the petitioner] before, even though both of us worked at the Department of Chemical Engineering, Texas A&M University between 2001 and 2003. Instead he became known to me through his publications. . . .

[The petitioner] made significant contributions on both FTS reaction and hydrogen production. His contributions are reflected in his completion of several major studies. . . .

[The petitioner] was among the first in the world to introduce the olefin re-adsorption mechanism, which has proven to be an important elementary step in the FTS reaction. . . . The kinetic model he developed is a breakthrough in predicting hundreds of FTS products

with non-ideal distribution features, which have not been successfully resolved in earlier FTS kinetic work. . . .

[The petitioner's] expertise in both catalyst preparation and knowledge of FTS, WGS and DRM reactions make him an outstanding candidate for further work on the development of alternative energy from fossil fuels.

Other witnesses similarly attest to the significance and influence of the petitioner's work.

The director denied the petition on January 26, 2007, acknowledging the petitioner's submissions but stating that "the petitioner has not yet received sole, principal, or primary credit in a patent" or "led his own research efforts." The director added that, while "the petitioner's record of publication appears quite solid," many of the citations of the petitioner's work appeared after the petition's filing date and therefore do not establish that the petitioner was eligible for the benefit sought at the time he filed the petition.

On appeal, counsel states: "The Director cites no regulation or cases to come to the conclusion that 'Petitioner has not led his own research efforts' and, thus, is not entitled to having his petition being approved." Counsel adds that postdoctoral researchers are routinely supervised, and that such supervision should not be seen as reflecting poorly on a given researcher's skills.

The AAO concurs with counsel on this point. Nothing in the statute, regulations, or *Matter of New York State Dept. of Transportation* indicates that an alien must have "sole, principal, or primary credit in a patent" or have "led his own research efforts" in order to qualify for the waiver. Contemporary scientific research is, by nature, typically a collaborative enterprise. Furthermore, leading a research team or receiving "sole, principal or primary credit in a patent" would not be presumptive evidence in favor of granting the waiver. More important, for our purposes, is the originality and innovation of the alien's own work. An alien whose own creativity results in significant advances in the field is better qualified for the waiver than an alien who simply follows the instructions of another researcher who, in turn, is the ultimate source of significant advances. Leading a research team places a researcher in a position of greater responsibility, but one need not lead the team to devise new ideas or methods that advance the field. Of greatest importance is what the alien has achieved, not the rank the alien held while achieving it.

With respect to the director's assertion that many of the citations to the petitioner's work appeared after the petition's filing date, the appropriate standard is the caliber of the petitioner's own work. While some of the citations appeared after the filing date, nearly all of the citations were in reference to work that the petitioner had already completed and published prior to the filing date. In this sense, citation of the petitioner's work after the filing date is not entirely new evidence so much as the continuation of a pattern already in place as of the filing date. While the petitioner has changed jobs since he filed the petition, he continues to work in the same general area of research, and there has been no claim that he earned the waiver as a result of work that he performed for his new employer (and which therefore had yet to begin as of the filing date).

The petitioner's reputation is not confined to his collaborators and superiors, and a number of independent witnesses have described the significance of the petitioner's work in detail rather than simply offering the

general and obvious observation that research into alternative fuels ought to be encouraged, or the vague assurance that the petitioner's work is "promising."

We agree with the director that the petitioner's initial submission had weaknesses which, if uncorrected, would have warranted denial of the petition. We find, however, that the petitioner substantially remedied these defects in his response to the director's request for evidence.

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 field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific 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.