



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B5

[REDACTED]

FILE:

EAC 05 243 52653

Office: NEBRASKA SERVICE CENTER

Date: JAN 04 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which 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. The petitioner seeks employment as a research scientist. 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 the classification sought 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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's decision.

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 petitioner submitted a letter from [REDACTED], Secretary of the University of Pennsylvania confirming that the petitioner received her Ph.D. on December 19, 2003. This letter does not constitute an official academic record of the petitioner's degree as required pursuant to 8 C.F.R. § 204.5(k)(3)(k)(A). Secondary evidence is only acceptable where the initial required evidence is documented as unavailable or non-existent. 8 C.F.R. § 103.2(b)(2). The record contains no evidence that official academic records are unavailable or do not exist at the University of Pennsylvania. Nevertheless, the director did not contest that the petitioner qualifies for the classification sought. 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 the phrase, “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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

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, 217-18 (Commr. 1998)(hereinafter “NYSDOT”), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

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. *Id.* at 219. 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. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, medical research, and that the proposed benefits of her work, improved and more individualized chemotherapy for cancer, 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. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. 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 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 she seeks. By seeking an extra benefit, the petitioner assumes an extra element 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 appears to have obtained her Ph.D. from the University of Pennsylvania in June 2003. The petitioner then worked for Orasure Technologies from September 2003 to September 2004. The petitioner then began working as a senior research scientist for Saladax Biomedical, Inc. where she remained as of the date of filing the petition.

The petitioner relies on letters from several colleagues and more independent members of the field. 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 (Commr. 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. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 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 her reputation and who have applied her work are the most persuasive. We note, however, that the petitioner must establish her eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Thus, letters attesting to the influence of research results disseminated to the public after the date of filing have little evidentiary value.

Dr. Bradford Wayland, the petitioner's thesis advisor at the University of Pennsylvania, discusses her research at that institution. Specifically, the petitioner designed and synthesized a series of water-soluble organometallic compounds that are used to prepare water-soluble polymers. [REDACTED] asserts that the petitioner "made a true research breakthrough in the understanding of the mechanism of Chain Transfer Radical Polymerization catalyzed by Cobalt Porphyrin Complexes." She was the first to report that macromonomers can be re-initiated in controlled radical polymerization. Any research, however, must be shown to be original and present some benefit if it is to receive funding and be acceptable for publication or graduation. We do not view the national interest waiver as a blanket waiver for every published researcher. Thus, the fact that the work is original is not necessarily sufficient to establish that a waiver of the alien employment certification is warranted in the national interest.

[REDACTED] notes that the petitioner had an article published in *Chemical Communications*, a prestigious journal. We will not presume, however, the influence of an individual article from the journal in which it appeared. Rather, it is the petitioner's burden to demonstrate the impact of the individual article.

[REDACTED] asserts that the article "describes a fundamental discovery that has important practical applications." As an example of the article's significance to the process of Chain Transfer Radical Polymerization, [REDACTED] asserts that the article "was immediately cited [sic] by several research groups in similar fields." In response to the director's request for additional evidence, [REDACTED] asserts that this article has "been cited by several publications and review *articles* from *many* research groups all over the world *including* laboratories in Japan, China and Canada." (Emphasis added.) The record, however, is not consistent with [REDACTED]'s strong implication that the petitioner is widely cited, including in multiple review articles and by teams including but not limited to Japan, China and Canada. Specifically, as of the date of [REDACTED]'s first letter (August 25, 2005), the petitioner's article in *Chemical Communications* had only been cited twice, once in an online "literature survey and review" and once by a Canadian team. A Chinese team had cited a different article by the petitioner. In 2006, prior to [REDACTED]'s second letter, a Japanese team cited the petitioner's article in *Chemical Communications*. While we do not question [REDACTED]'s sincerity and scientific expertise, we cannot ignore the large disparity between [REDACTED]'s characterization of the petitioner's citation record and the citation record actually documented. Similarly, as will be discussed in more detail below, [REDACTED] asserts that the petitioner has presented her work at "numerous" scientific meetings while the record documents only four. These disparities must be considered in evaluating the evidentiary weight to accord [REDACTED]'s overall assessment of the petitioner's contributions to her field. See *Matter of Caron International*, 19 I&N Dec. at 795.

Dr. Wayland opines that the petitioner's work "has made a profound contribution to the future optimization of catalyst systems and the synthesis of water soluble block copolymers which are widely used in forming nano-particles and in the Biomedical field for drug delivery systems and bioassay." [REDACTED] provides no examples of independent researchers in the nano-particles and

biomedical fields using the petitioner's methods. While he asserts in his second letter that he has received requests for reprints of the petitioner's articles, requests for reprints do not demonstrate that those requesting the work ultimately relied upon it, as would be demonstrated by citations.

Finally, as briefly mentioned above, [REDACTED] asserts that the petitioner's "recognition" in the field is apparent from the "numerous" national meetings at which she has presented her work between 2002 and 2005. The record does not support [REDACTED] characterization of the petitioner's conference record as including "numerous" presentations. The record contains four "preprints" authored by the petitioner published in *Polymer Preprints*. These "preprints" appear to represent conference presentations, although the record does not establish whether the petitioner orally presented her work or whether it was displayed as a poster presentation. The record also lacks evidence that "preprints" undergo the same type of rigorous peer-review process that full-length published articles undergo. The petitioner does not claim any additional presentations on her curriculum vitae. While a reference letter submitted in response to the director's request for additional evidence references another conference presentation, that presentation is not in the record and the record lacks evidence that it occurred prior to the date of filing, the date on which the petitioner must establish her eligibility. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49. In fact, the materials submitted on appeal appear to reference the same conference and confirm that it occurred in 2006, after the petition was filed.¹

[REDACTED], the petitioner's "unofficial mentor" at the University of Pennsylvania, asserts that the petitioner developed "novel polymers that have wide application in drug delivery systems, blood tests for a variety of diseases and transplantation materials." He notes that her work has been funded by the National Science Foundation and the Department of Energy. All research receives funding from somewhere and must be original and demonstrate the possibility of prospective benefit to receive that funding. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. In response to the director's request for additional evidence, [REDACTED] notes that the petitioner's work has served as the basis for new grant applications filed by his laboratory. The record includes the grant applications citing the petitioner's work. The petitioner has not demonstrated that it is noteworthy for a laboratory to continue to seek funding based on its own past work.

[REDACTED] asserts that "many laboratories," including his own, have requested reprints of the petitioner's work. We note that [REDACTED] is not independent of the petitioner, but was a colleague at the University of Pennsylvania. [REDACTED] concludes: "A number of independent research groups are conducting follow up work, thus demonstrating the widespread impact and recognition of her work." He does not identify a single independent research group that has either requested a reprint of the

¹ An abstract of the presentation, "A Library of Novel Monoclonal Antibodies for Determining Levels of 4-hydroxy Cyclophosphamide in Biological Fluids," is available on the website of the American Association of Clinical Research (AACR), www.aacrmeetingabstracts.org, and is dated 2006, after the date of filing in this matter.

petitioner's work or is conducting research that builds on her work. As noted above and by the director, the petitioner's work is not widely and frequently cited as would be expected if her work were truly serving as the foundation for the work of "a number of independent research groups." We acknowledge the submission of a letter from [REDACTED], Associate Director of the Cancer Institute of New Jersey, confirming that he requested a reprint of her work. While he praises the petitioner's work and discusses the importance of the proposed benefits of her work, he does not assert that his own work was ultimately influenced by the petitioner. More specifically, he does not identify a project in which he is utilizing the petitioner's techniques.

[REDACTED], formerly a senior research scientist at Orasure Technologies, asserts that the petitioner focused on developing optimized coatings for up-converting phosphor particles while at that company. According to [REDACTED] this process "can be used for developing biological assays for different kinds of diseases" although the 20-year old process had yet to be used in this way. Dr. [REDACTED] notes the challenge of producing an even coating. [REDACTED] explains that the petitioner "used novel surface polymerization initiation techniques in which initiator molecules are planted on the surface of phosphor particles and the polymerization reaction is carried out in a controlled manner." [REDACTED] concludes that through this technique, the petitioner was "able to obtain evenly coated bioactive phosphor particles within only a few months." [REDACTED] does not assert that this technique has led to the development of biological assays at Orasure Technologies or that it has contributed towards the development of such assays more than the constant technical progress inherent to the field. The record lacks evidence that Orasure Technologies has taken steps to patent this technique.

[REDACTED], Chairman and Chief Scientific Officer at Saladax, asserts that the petitioner was selected for the position at that company out of "over 100 applicants." [REDACTED] explains that the petitioner is now "leading three projects for individual chemotherapy drug monitoring to develop assays for use during chemotherapy treatment cycles." [REDACTED] further explains that the petitioner's combined experience with Polymer Synthesis, Organometallic Chemistry and Bioassay Development is important for the position. [REDACTED] does not explain why this knowledge or experience cannot be enumerated on an application for alien employment certification other than to assert that the alien employment certification process only "recruits ordinary researchers." Special or unusual knowledge or training, however, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *NYSDOT*, 22 I&N Dec. at 221. [REDACTED] continues:

As the Senior Scientist and Project Leader, [the petitioner] has successfully developed several immunological based assays. Based upon this work, we have submitted a provisional patent which is now being converted into a full utility patent (*Carboplatin Immunoassay*) and we are also in the process of submitting another provisional [patent application] (*Cisplatin Immunoassay*) lead by [the petitioner's] work. She is also responsible for the Cytosin Immunoassay development, which is the most widely used chemotherapy drug in the US and World. With the excellent progress

that has been made we will be able to start clinical trials in early 2006 and expect FDA submissions to occur at the end of 2006.

In response to the director's request for additional evidence, the petitioner submitted evidence that Saladax filed for a provisional patent for the Carboplatin Immunoassay in June 2005, prior to the date of filing. At that time, [REDACTED] asserted that while Carboplatin antibodies had never been reported in the literature, the petitioner "was able to design a series of novel compounds which were able to circumvent the stability issue and resulted in the first selective mouse monoclonal antibodies to this drug." On appeal, however, [REDACTED] concedes that Saladax has yet to seek a utility patent for the Carboplatin Immunoassay. He explains:

We made a decision to complete the work before submitting the patent application and this was unfortunately after the initial priority date of the provisional application. The work has been very challenging and antibodies for this drug have never been made before. It is especially challenging to develop antibodies for metal-compounds. The work is progressing nicely and we generated some antibodies but would like several others before we submit the full patent. We intend in submitting a utility patent publication in mid-2007. Much of the content in the provisional patent will be directly applied to the full utility patent as soon as the development of antibodies is complete. [The petitioner's] involvement in this work has been major and critical. There is no doubt that [the petitioner] is indispensable in this research project.

Dr. Salamone does not address whether the patent for the Cisplatin Immunoassay was filed in 2006 as planned or whether the clinical trials proceeded successfully, resulting in the FDA submissions he projected for the end of 2006. Ultimately, it appears that while the petitioner's work is progressing and is deemed promising by her employer, it has yet to produce the impact originally predicted. While this slower than expected progress at Saladax would not necessarily undermine the petitioner's eligibility for a national interest waiver of the job offer requirement if the record contained evidence of a prior track record of success with some degree of influence on the field as a whole, the record does not contain such evidence.

In a letter submitted in response to the director's request for additional evidence, Dr. Salamone asserts that the petitioner was promoted to project leader of the 5-Fluouracial assay development, Saladax's "most important project." As this promotion occurred after the date of filing, any accomplishments in this position cannot be considered. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

In addition, Dr. Haiying Wang, a senior scientist at VERIDEX who has coauthored articles with Dr. Salamone, asserts that he learned of the petitioner with the publication of her presentation at the AACR meeting. He confirms that he requested a reprint of this publication and has had a number of professional discussions with the petitioner. [REDACTED] does not profess to have been influenced by

the petitioner's work prior to the date of filing, the date as of which the petitioner must establish eligibility. *Id.*

On appeal, the petitioner submits additional letters. The letters reiterate the novel nature of the petitioner's work. [REDACTED], a professor at Columbia University, notes the petitioner's work presented at the 2006 AACR meeting and asserts that his laboratory "is very interested in investigating the structure and features of these novel antibodies for future applications." Dr. [REDACTED] does not indicate that he was already in the process of building upon the petitioner's research and appears to be referencing work presented after the date of filing. Similarly, [REDACTED] Wang, a research fellow at the National Institutes of Health, asserts that he requested a reprint of the petitioner's presentation at the 2006 AACR meeting and has "already started to adapt her methodology to our research area." At best, this letter suggests that the petition was filed prematurely, before the petitioner's work with the most potential to impact the field had been disseminated. The remaining letters are similar to those discussed above.

Finally, while counsel concedes on appeal that the petitioner is not well cited, he asserts that more significant than the number of citations is the context of the citation. Counsel notes that in discussing the petitioner's work, the online "Literature Surveys and Reviews" states: "It is remarkable that the macromonomers are actually not (co) polymerized, but reinitiated by H transfer from the cobalt hydride." While this sentence suggests that the petitioner's results may have been unexpected and novel, it does not establish that the petitioner's work had already influenced the field to any degree. Contrary to counsel's position, we find that multiple citations by other research teams relying on and applying the petitioner's results would be far more persuasive evidence of her influence than a single review article opining that the petitioner's results are "remarkable."

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

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.