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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JAN 28 2008**
SRC 06 116 51371

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition for abandonment, subsequently reopened the matter to consider a timely response to the director's request for additional evidence, and denied the petition a second time. 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. According to Part 6 of the petition, the petitioner seeks employment as a postdoctoral research fellow. 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 did not contest that the petitioner qualifies for the classification sought, but concluded 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 asserts that the characterizations of the petitioner's work as "pioneering," cutting-edge and original in reference letters prepared in support of the petition were sufficient to establish the petitioner's eligibility for a waiver of the alien employment certification process. While we withdraw the director's conclusion that the petitioner has not established that the proposed benefits of his work would be national in scope, we uphold the director's ultimate decision for the reasons discussed below.

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 holds a Ph.D. in Physics from Michigan Technical University (MTU). 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 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, physics. The director then concluded that the petitioner had not demonstrated that nanotechnology will benefit the United States on a national level. We withdraw this conclusion. At issue for this factor is whether the *proposed* benefits will be national in scope. The record amply demonstrates that the proposed benefits of the petitioner’s work include the safer storage of nuclear waste. We are persuaded that this proposed benefit is sufficiently 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 he 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.

On appeal, counsel's main assertion is that the positive assessments of the petitioner's work in the reference letters were sufficient to meet the petitioner's burden of proof in this matter. 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 general praise and speculation as to the potential applications of the alien's work are less persuasive than letters that provide specific examples of how the alien has already 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 far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

The petitioner received his first Masters degree in Optics from Shandong University in China in 1999. As stated above, in 2004, the petitioner received his Ph.D. in Physics from MTU. Finally, in 2005, the petitioner received a second Masters degree in Computer Science from MTU. In February 2005, the petitioner began a postgraduate research fellowship at the University of Texas, Arlington,

where he remained as of the date of filing. The petitioner is currently working as a research associate at Idaho National Laboratory.

The petitioner must establish 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). As of that date, the petitioner had authored seven published articles, only three of which were published in the five years preceding the filing of the petition. The only article to receive more than a single citation is the petitioner's 2000 article in *Acta Optica Sinica*, which had been cited eight times as of the date of filing. The petitioner also submitted evidence that he received an academic fellowship at MTU, that he has served as a peer-reviewer of manuscripts submitted for publication and that he was elected to full membership in Sigma Xi.

Several references attest to the distinguished nature of the publications that have carried the petitioner's articles. We will not presume the significance of an individual article from the journal in which it appeared. Rather, the petitioner must demonstrate the significance and impact of the individual article. The petitioner's citation record is minimal; the petitioner's Chinese articles have only been minimally cited and the petitioner's doctoral and postdoctoral work had, as of the date of filing, not been cited at all. In response to the director's request for additional evidence, the petitioner submitted evidence that the petitioner's article in *Applied Physical Letters* had been cited a single time and evidence that an article published after the date of filing had been downloaded 18 times. **The petitioner must establish his 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, we will not consider evidence relating to the petitioner's impact in the field after that date.

The petitioner's academic fellowship is not persuasive, as it appears based on academic achievements. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. *NYSDOT*, 22 I&N Dec. at 219 n.6. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.*

Regarding the petitioner's manuscript review responsibilities, the petitioner has not established that these duties are indicative of an influence in the field. We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review appears routine in the field.

Finally, the petitioner has not demonstrated that his membership in Sigma Xi is indicative of his influence in the field. Full membership in Sigma Xi requires a "noteworthy achievement as an original investigator." According to the Internet materials submitted, however, a "noteworthy achievement" can be evidenced through a publication, patent, written report or thesis or dissertation. Significantly, Sigma Xi has 65,000 members and initiates 5,000 members a year. Moreover, the request to review the National Science Board's "2020 Vision for the National Science Foundation" draft appears to have

been sent to all Sigma Xi members and, thus, is not indicative of the petitioner's individual influence in the field.

The remaining evidence consists of reference letters. [REDACTED], a professor at Shandong University, indicates that he collaborated with the petitioner at that institution. [REDACTED] praises the petitioner's article in the *Journal of Applied Optics* relating to Q-switching lasers. [REDACTED] does not explain the significance of this article other than to assert that it has been cited in a review article, which is contained in the record. The record contains no other citations of this article. While [REDACTED] asserts that two other articles by the petitioner "have been frequently cited," the record establishes only that two of the petitioner's articles have been cited once each and that a third article has been cited eight times. [REDACTED] provides no examples of the petitioner's work being applied at other laboratories or in industry or other examples of the petitioner's influence in the field.

The petitioner also submitted a letter from [REDACTED], an associate professor at MTU, asserting that he supervised the petitioner's doctoral work. As explained by [REDACTED] while at MTU, the petitioner gained extensive experience in the statistical methods of Monte Carlo simulation to model thermodynamic and kinetic properties of surfaces. [REDACTED] notes that this work was published in *Physical Review B*. [REDACTED] further explains that the petitioner also worked on a "kinetic model of a novel mechanism for the spatial arrangement of quantum dots on a surface." As noted by [REDACTED], this work was published in prestigious journals and presented at a conference. [REDACTED] explains that the petitioner's work is "of relevance to continuing advances in nanotechnology applications in which, for example, crucial fabrication processes take place at surfaces and interfaces." [REDACTED] does not provide any specific examples of how the petitioner's work has influenced the field, such as examples of other laboratories or industries applying the petitioner's work.

[REDACTED], Chair of the Physics Department at MTU, discusses the petitioner's work at that institution and concludes that it was "seminal and original," garnering the petitioner "national recognition." [REDACTED] notes that the petitioner's work has been published in top journals, but fails to provide examples of the petitioner's work being applied in the industries to which [REDACTED] asserts it is applicable.

[REDACTED], a professor at the University of Michigan, asserts that he has never worked with the petitioner but does not explain how he came to know of the petitioner's work. He chronicles the petitioner's scientific accomplishments and states that he is "thinking to apply" the petitioner's model and simulation method to solve his own research puzzles. He does not suggest that he has already successfully applied the petitioner's model to solve his own research puzzle.

[REDACTED], a senior staff scientist and principal investigator at Lawrence Berkeley National Laboratory, asserts that he became aware of the petitioner through his article on Monte Carlo simulations, which [REDACTED] characterizes as "of great importance in understanding the changes in surface phase as well as alterations in solid materials." [REDACTED] does not claim to have applied this work or provide examples of independent laboratories that have done so. [REDACTED] further asserts that

the petitioner's work on quantum dot self-assembly has many important applications for nanotechnology, such as data storage devices, laser devices, laser guided weapons and computer chips. [REDACTED] does not, however, provide any examples of nanotechnology developers utilizing the petitioner's work.

[REDACTED] an associate professor at Miami University, asserts that he met the petitioner at a 2003 conference. We note that, according to his curriculum vitae, submitted into the record, Dr. [REDACTED] has coauthored an article with [REDACTED]. [REDACTED] asserts that one of the petitioner's 2005 articles "answered the question of how the special morphology found in natural graphite crystals is formed." [REDACTED] asserts that his own research work was influenced by this work and that he applied this work to "a collaborative project on the fundamental mechanisms of graphite growth in metamorphic rocks. The record does not contain an article by [REDACTED] citing the petitioner's work. As an example of how the petitioner's work on graphic crystals has attracted the attention of other scientists, [REDACTED] notes that it was selected for publication in the weekly journal, the *Virtual Journal of Nanoscale Science and Technology*. The record contains an electronic-mail notice from this journal advising the petitioner's coauthor of the selection. The electronic-mail notice advises that the journal is "an edited compilation of links to articles from participating publishers, covering a focused area of frontier research." The record does not establish how many articles are selected from each participating journal or how those selections are made.

[REDACTED], an associate professor at the University of Texas, Arlington, asserts that the petitioner is currently focusing on actinides.¹ [REDACTED] explains the importance of this field due to the amount of plutonium and other actinides that exist in the United States as nuclear fuel and weapons, which must be managed. According to [REDACTED], the petitioner "successfully developed a critical method and model for the study of interactions between americium bulk properties in the double hexagonal closed packed (dhcp) phase and the face centered cubic (fcc) crystal structure phase." Dr. [REDACTED] further states that the petitioner found that "the most stable state of americium bulk is anti-ferromagnetic." While [REDACTED] asserts that the petitioner has been a positive influence on other scientists, [REDACTED] provides no specific examples of the application of the petitioner's work beyond the petitioner's own circle of collaborators.

[REDACTED] a staff scientist at the Lawrence Livermore National Laboratory, asserts that the petitioner developed "a new americium surface model for the effective study of the interactions among americium surfaces and their environments, in which there could be oxygen, water, plutonium, uranium and their compounds." [REDACTED] further asserts that the petitioner's discovery of when americium is in its most stable state is useful to the U.S. government's goal of safely storing nuclear materials longer. [REDACTED] does not assert that the Lawrence Livermore National Laboratory is applying the petitioner's work or provide examples of the U.S. government using the petitioner's results to design long-term safe storage facilities for nuclear materials.

¹ According to the Columbia Encyclopedia, 2001-05, actinides are a series of radioactive metallic elements in group IIIb of the periodic table. See <http://www.bartleby.com/65/ac/actinide.html>.

Finally, the petitioner submitted a letter from [REDACTED] Director of the Center for Advanced Modeling and Simulation, Idaho National Laboratory, discussing why he decided to hire the petitioner for a position at the laboratory out of a pool of 60 candidates. While [REDACTED] praises the petitioner's various projects, he does not explain how this work is already impacting the field. For example, he asserts that the petitioner's Monte Carlo simulations "may lead to commercial and scientific applications."

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 alien employment certification 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.