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U.S. Citizenship
and Immigration
Services

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 29 2004

IN RE: Petitioner: [redacted]
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:

[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.

Elizabeth O'Brien
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and 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 a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Electrical Engineering from the [redacted] in France. The director found 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 regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

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

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above

> that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

Along with documentation pertaining to his field of research, the petitioner submitted several letters of support.

rofessor, Department of Biomedical Engineering, Boston University, states:

> [The petitioner] has been conducting research and teaching in the U.S. under an H-1 visa since July of 1999. During the first two years, in collaboration with myself and other senior scientific staff members, he conducted research at the Los Alamos National Laboratory in New Mexico. In February of 2001 I moved to Boston University.... In July of 2001 [the petitioner] joined Boston University as a Senior Research Associate. At Boston University [the petitioner] has continued to collaborate with me in various research projects, and to assist in the training of both graduate and undergraduate engineering students. He has been instrumental in setting up the new laboratories and getting the research programs off the ground.

* * *

> Prior to coming to the U.S., [the petitioner's] research in France, on fluorescence spectroscopy for cancer diagnosis paralleled some of our endeavors in the U.S., and we were very gratified that he was able to join our research group at Los Alamos. He has continued to publish a number of refereed papers on both the basic optical technologies for tissue diagnosis and also on the clinical testing. These document his unique breadth of expertise, critical to the field of Biomedical Optics, and he therefore qualifies as an alien of distinguished merit and ability.

We acknowledge that the petitioner has published the results of his work in various scientific journals. We do not find, however, that publication of one's work is presumptive evidence of eligibility for the national interest waiver. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The petitioner, however, has provided no evidence showing that his published work has been heavily cited.

[redacted] further states:

> [The petitioner] has a rare set of skills, combining expertise in optical technologies and optical spectroscopy with human physiology and clinical/medical applications. Usually we find researchers with only the first set of capabilities, and then spend a couple of years training them in the other set. I built a vibrant research program at Los Alamos: applying novel optical technologies to medical applications in minimally-invasive diagnostics and therapeutics. I am now building such a research program at Boston University. However, it continues to be difficult to recruit researchers with the desired range of capabilities. In short, [the petitioner's] proven combined expertise is rare...

In the same manner as [redacted] Associate Professor, Department of Biomedical Engineering, Boston University, states that "people with expertise in [the petitioner's] field are very rare." Pursuant to *Matter of New York State Dept. of Transportation*, however, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

[redacted] states that "in recognition of [the petitioner's] excellent accomplishments in his doctoral research, he was awarded the 1997 Young Researcher Prize by th[redacted]" The petitioner's appellate submission includes documentation printed from the internet showing that three to five students are recognized by this society each year for "original research work or clinical application of lasers." Such an award offers no meaningful comparison between the petitioner and experienced professionals who have long since completed their Ph.D. training. Also included in the record were a certificate of appreciation from the Electronic Industrial Mentoring Network for Women in Engineering and Science (thanking the petitioner for volunteering as a mentor) and evidence of the petitioner's membership in the Optical Society of America. Recognition and professional memberships, however, are criteria for classification as an alien of exceptional

ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for this classification warrants a waiver of the labor certification requirement in the national interest.

states:

> [The petitioner] has conducted research using light scattering in novel non-invasive technologies for use in medical applications, particularly for early cancers diagnosis and treatment. This work, when combined with Photodynamic therapy is of proven medical benefit. [The petitioner] is an expert in an interdisciplinary area of Biomedical research, combining electronics, optics and biology.
>
> The development of highly sensitive new diagnostic methods for cancer, and pathogens causing infectious diseases remains a top priority for the biotechnology industry in this country. Newly emerging fields (nanotechnology, laser optics and biotechnology) are ones in which the United States has a great national interest in maintaining leadership. In my opinion, outstanding young researchers like [the petitioner] will help this country maintain this lead role...

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

Resource Manager, Bioscience Division, Los Alamos National Laboratory, states:

> [The petitioner] worked in my group as Postdoctoral Research Associate, under the direction of Dr. Irving Bigio, from June 1999 through June 2001. [The petitioner] has conducted cutting edge research in novel non-invasive technologies for use in medical applications, particularly for early cancers diagnosis and treatment, and imaging neural activities. [The petitioner] has an unusual combination of expertise in electronics, optics and biology.

letter then provides a detailed summary of the petitioner's educational background. We note, however, that objective qualifications (such as expertise in non-invasive medical technologies and the completion of academic degrees) are amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation,* an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

technical staff member in the Biosciences Division at Los Alamos National Laboratory and former research collaborator of states that she has known the petitioner since 1999 when he began working at Los Alamos. further states:

> [The petitioner's] work has been in the area of biomedical optics. It is also an important field for it can and is leading to new diagnostics and treatments for several medical conditions. Biomedical optics is also a very difficult field for it requires expertise in both optics and biology. [The petitioner] has experience and expertise in both of these areas. He has published several papers on the difficult problem of determining the concentrations of cancer treatment drugs. This work demonstrates his ability to combine and implement his knowledge in biology and physiology with spectroscopy expertise. Experience in both biological systems and spectroscopy is an unusual combination. Therefore, [the petitioner] will be able to make an unusual and substantial contribution to scientific research in the U.S.

As stated previously, objective qualifications, such as expertise in optics and biology, are amenable to the labor certification process letter describes the petitioner's research qualifications, but it does not explain how the petitioner's work is of greater benefit than that of others in his field with the same minimum qualifications.

states:

> I had the pleasure to supervise the Ph.D. research work of [the petitioner]. The aim of his work was to develop a spectroscopic apparatus for the detection of tissue autofluorescence and induced fluorescence. The non-invasive fluorescence measurement is presently a promising approach for the diagnosis of early cancer undetectable by the conventional methods, as well as for the analysis of pharmacokinetics of photosensitizers employed in photodynamic therapy.
>
> [The petitioner] developed a spectroscopic system coupled to an optical multifiber probe permitting the acquisition and the standardization of tissue fluorescence spectra. He analyzed the different elements of the optical arrangement and made a good choice of components, which ultimately allowed to adapt the system to both physical characteristics of tissue fluorescence and clinical conditions of measurements.
>
> [The petitioner] validated this system in phantoms, animals and in clinical applications. He developed a gaussian model for autofluorescence spectra reconstruction. This model permitted the identification of the endogenous fluorophores of tissue as well as the analysis of the influence of fluorescence reabsorption by the hemoglobin. The gaussian model was further applied for the determination of distinction criteria between normal and pathological tissues.
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> * * *
>
> [The petitioner] is a highly motivated and inventive young researcher. He was able to master three fundamental aspects of a research: setting up of the experiments, critical analysis of the results and theoretical analysis permitting to support the interpretation of the results. He has drawn clear

> conclusions from his work concerning the possibility of application of tissular spectroscopy for photodiagnostics and photodynamic therapy.

In the same manner as additional witnesses, such as (who also state that they supervised the petitioner's Ph.D. work), credit the petitioner with "the development of a medical instrument dedicated for the detection of early cancers." The record, however, contains no evidence of an approved patent for the petitioner's medical device. Nor is there evidence indicating that the petitioner's spectroscopic apparatus was developed for national use (rather than remaining in the petitioner's former laboratory in Nancy, France). The record contains a 1997 newsletter article written by from the "Office of Naval Research – European Office of Biophysics," detailing "three…site visits to French laboratories" active in bioengineering. notes in his article that "[s]econd-generation photosensitizers are now being developed and tested" at the University of Nancy laboratory (where the petitioner previously worked). However, the petitioner's name does not appear among the many scientists mentioned in article, nor is there information indicating that the petitioner's device is widely utilized outside of his former laboratory in Nancy, France.

In addition to 1997 newsletter article, the petitioner submitted evidence reflecting his inclusion in Marquis' *Who's Who in the World.* The documentation presented reflects that a brief biographical sketch of the petitioner appeared "among more than 55,000" other biographies included in this publication. It has not been explained how inclusion in this vast directory of professionals would establish the petitioner's influence throughout the biomedical optics field.

A letter from France, mostly repeats the assertions of adds that the petitioner "presented his results during national and international meetings" and "published several papers in international peer-reviewed journals." The record, however, contains no evidence showing that publication or presentation of one's work is unusual in the petitioner's field or that independent researchers have heavily cited his work.

More persuasive is a letter from Assistant Professor of Radiology, states:

> I am very familiar with [the petitioner's] research as I have followed his publications over the last several years and have had the occasion to converse with him at several conferences. [The petitioner] is making important contributions to the field of biomedical optical diagnostics, an area of research that has grown rapidly over the last 10 years as more and more clinical applications are being identified and pursued. In this field, [the petitioner] has been extremely active, and made key contributions towards the development of new tools for non-invasive tissue diagnostics and photodynamic therapy of cancers. In particular:
>
> - correction of fluorescence spectra using data from elastic scattering spectroscopy and a modified Beer's law (demonstrated at the international conference Optical Society of America Biomedical Topical Meeting)

- determination of endogenous porphyrins and the maximal HpD tumor/normal skin ratio in SKH-1 hairless mice by light induced fluorescence spectroscopy, (paper in *Artificial Cells Blood Substitutes and Immobilization Biotechnology*)
- parameters affecting photodynamic activity of Foscan® or meta-tetra (hydroxyphenyl) chlorin (mTHPC) *in vitro* and *in vivo* (*Lasers in Medical Science*)
- determination of the maximal tumor/normal skin ratio after HpD or m-THPC administration in hairless mouse (Skh-l) by fluorescence spectroscopy, a non-invasive method (paper in *Anti-Cancer Drugs*).

[The petitioner] will continue to make important contributions to the field of biomedical optics that will have important implications for health care and the supporting industry.

The weight of etter is somewhat diminished by the lack of direct evidence that the above papers have measurably influenced the greater field. Witness' statements to the effect that the petitioner's published findings represent key contributions in his field are not adequate to establish such influence, when the petitioner provides no evidence from citation indices to support these claims. While heavy citation of the petitioner's past articles would carry considerable weight, the petitioner has not presented such citations here.

Also submitted were four brief letters verifying the petitioner's employment at Boston University, Los Alamos National Laboratory, and . None of these letters addresses the petitioner's national interest waiver claim.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. The petitioner responded by providing copies of documentation previously submitted and a statement from the petitioner. The petitioner states:

> In educational and research institutions, scientists work usually on research programs that are funded by U.S. government agencies. These programs are usually funded over 1 to 3 years. In respect to institution rules, the job offer cannot exceed the time frame of the research program. Therefore, recruiters are not allowed to extend a permanent job offer. In my case, a waiver of the job offer would facilitate my legal residency in the United States and consequently allow me to permanently participate in these short/mid-term research programs.

Pursuant to *Matter of New York State Dept. of Transportation,* the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in his field. Furthermore, a review of the legislative history reveals nothing to suggest that the national interest waiver was intended simply as a means for self-petitioning aliens or employers to avoid the inconvenience of the labor certification process.

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

own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director noted the absence of evidence from "independent sources" regarding the significance of the petitioner's research achievements.

On appeal, counsel states:

> [The petitioner] provided a list of scientific material he has written or contributed to, and the total is a staggering 28 scientific papers – all of which show that the wider scientific community has received [the petitioner's] published papers. It is important to take into account that 20 papers were published between 1995 and 1999, before [the petitioner] started working in the United States.

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

Counsel's appellate brief cites the various witness letters provided in support of the petition. Additional evidence presented on appeal shows that several of the individuals who offered letters of support are experts in their respective fields. The statements from these witnesses have already been addressed above. Aside from the witnesses consist entirely of individuals from institutions where the petitioner has studied or worked. These individuals became aware of the petitioner's work because of their close association with him; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are unusually significant. While the petitioner may have contributed to research projects undertaken at Boston University, Los Alamos National Laboratory, Al- and Nancy University, his ability to significantly impact the field beyond these projects has not been adequately demonstrated.

Counsel's appellate brief also cites findings from a 1999 unpublished AAO decision. Unpublished appellate decisions have no force as precedent and thus are not binding with regard to unrelated proceedings. *See* 8 C.F.R. § 103.3(c), which indicates that only designated precedent decisions are binding on Citizenship and Immigration Services' officers. Therefore, counsel's attempt to apply findings from a non-precedential decision to the current case is flawed.

The petitioner's appellate submission includes an e-mail (dated October 28, 2003) from an editor of *IEEE Transactions on Biomedical Engineering* to the petitioner requesting that he review a manuscript submitted to that journal for publication. This evidence, however, came into existence subsequent to the petition's filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Immigration and Naturalization Service (legacy INS) held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. In regard to the petitioner's participation in the peer review process, it is apparent that peer review of manuscripts is a routine element of the process by which articles are selected for publication in scholarly journals or presentation at a scientific conference. Participation in peer review of this kind does not adequately distinguish the petitioner from other capable researchers.

Clearly, the petitioner's current and former colleagues have a high opinion of the petitioner and his work, as does Dr. Boas, who knows the petitioner from encounters at professional conferences. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential medical applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical medical applications does not persuasively distinguish the petitioner from other competent researchers.

For the reasons set forth above, the petitioner has not established that his past accomplishments set him significantly above his peers such that a national interest waiver would be warranted. While the petitioner has plainly earned the respect and admiration of his witnesses, it appears premature to conclude that the petitioner's work has had and will continue to have a nationally significant impact. In sum, the available evidence does not establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on the national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given project or area of research, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.