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



U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 14 2008

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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.

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 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. At the time she filed the petition, the petitioner was a medicinal chemist at Solanan, Inc., Dallas, Texas. 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 has 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 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 (CIS)] 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 initial submission includes copies of nine articles that contain citations of the petitioner's work. The AAO acknowledges that the citing authors are based around the world, but the small number of citations gives little support to the petitioner's waiver application. The petitioner did not demonstrate that this volume of citations set her apart from others in her specialty.

Several witness letters accompanied the initial filing of the petition. We shall consider examples of those letters here. [redacted] Associate Professor at the University of Texas at Austin, described the petitioner's doctoral work:

> [The petitioner] joined my group in 2001, and she completed her PhD in Medicinal Chemistry . . . under my supervision in 2005. . . . For her doctoral research [the petitioner] studied aza-enediynes and their rearrangements with an emphasis on characterizing the kinetics and reactive intermediates involved, particularly their potential as DNA-damaging

> agents. Aza-enediynes are novel variants of enediyne antibiotics, highly effective anticancer agents. They have a unique mechanism of action that targets the DNA of cells. Enediynes, however, are extremely cytotoxic and have serious side effects that limit their use. Our lab has been studying aza-enediynes and their rearrangements for several years with intent to developing drugs that can selectively target cancer cells and reduce the side effects of chemotherapy. In the course of these studies, [the petitioner] has made a number of important findings that have had a major impact on our ultimate goal of designing aza-enidiyne-based DNA cleavage warheads for cancer cell-selective cytotoxic agents. I believe that [the petitioner] is now considered to be a major player in this area.

[redacted], President of [redacted]., described the petitioner's work at that company:

> [The petitioner] was assigned to synthesize and characterize a number of pirfenidone derivatives at Solanan Inc. I am proud of her ability to successfully complete the synthesis of one such compound having 4 to 10 times as much pharmacological activity as the parent compound. This newly synthesized compound is now being evaluated in various animal models of human diseases. We are very optimistic regarding its potential therapeutic uses for a number of devastating diseases of autoimmune origin. This level of success would not have been possible without the enduring efforts of [the petitioner].

Four of the letters are described as "independent advisory opinions." We note that the author of one of these letters is [redacted], a Consultant Veterinarian for [redacted]. Another author is [redacted] of Jackson State University, whose awareness of the petitioner's work stems in part from a "personal connection with the University of Texas, College of Pharmacy," where was a postdoctoral researcher.

[redacted] of the University of Minnesota stated: "While I have not met [the petitioner] in person, I am aware of her significant contributions from her high quality research papers published in the field of aza-enediyne chemistry. . . . [The petitioner] has designed and synthesized a series of new class [*sic*] of enediynes – aza-enediynes and aza-enyne allenes – as potential potent anticancer agents with cancer cell targeting properties." The other witnesses similarly focused on the petitioner's work with aza-enediyne chemistry. They did not discuss her work at Solanan, nor did the witnesses from Solanan indicate that the petitioner has continued to work with aza-enediynes. Many witnesses thus focused on the petitioner's doctoral work rather than establish that the petitioner has shown a sustained pattern of achievement.

On May 30, 2007, the director issued a request for evidence, instructing the petitioner to "submit any available additional documentary evidence" to establish the petitioner's "influence on medicinal chemistry." In response, the petitioner submitted copies of three articles containing citations of the petitioner's work. One of these articles was already included in the petitioner's initial submission, so only two of the articles are new to the record.

The petitioner submitted two additional witness letters, as well as a copy of an AAO decision from 2003 in which the AAO found that independent witness letters can be strong evidence of eligibility. The AAO, in the

cited decision (which has never been published as a binding precedent), did not state that all independent witness letters carry equal weight or that a petition including such letters must invariably be approved. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Associate Professor at Northern Kentucky University, discusses aza-enediynes and states that the petitioner "has successfully re-designed the enediyne core structure and synthesized a series of aza-enediynes as potential potent anticancer agents with can[c]er cell targeting properties." Passages in Dr. letter closely match portions of letter, submitted previously.

[redacted] of the Indian Institute of Technology states that the petitioner's "papers contain several elegantly designed experiments that provided not only results that contributed to a broadening of knowledge in the field, but also gave other researchers more tools to study similar molecules. Speaking from my professional expertise, I can assert that these results have had a significant impact in the field of aza-enediyne research." Prof. offers little indication as to what that impact was, as the letter contains more information about own research than that of the petitioner. As with the earlier group of letters, the new letters focus on the petitioner's student work with aza-enediynes rather than her later work at Solanan which, as described by own officials, appears to involve neither aza-enediynes specifically nor cancer drugs in general. The petitioner did not submit or identify any further articles by the petitioner, either published or in preparation, based on work the petitioner performed after she completed her doctorate.

The director denied the petition on January 24, 2008. In the denial notice, the director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the evidence submitted did not support the claim that the petitioner has been responsible for significant, influential breakthroughs in her field of research.

On appeal, the petitioner submits a new witness letter from , Associate Professor at the University of Georgia, states that the petitioner's "research provides a wealth of information and insight that significantly enhances our understanding of the kinetics of the aza-Bergman reaction." Dr. asserts: "It is most uncommon for a comparably experienced researcher in the same field to have made such a major impact like that generated by" the petitioner. does not discuss the petitioner's continued impact, if any, in the more than two years since the petitioner completed her doctorate and, to all appearances, ceased working with aza-enediynes.

Counsel, on appeal, claims that the petitioner "created a newly synthesized class of enediynes called aza-enediynes and aza-enyne allenes." The evidence of record, including *curriculum vitae* and the petitioner's own published articles, shows that was publishing articles about aza-enediynes before the petitioner joined his research group in 2001. While the petitioner has worked with various processes to synthesize aza-enediynes, it is simply false to claim that she "created" that class of compounds. The record is similarly devoid of evidence to show that the petitioner is the creator of aza-enyne allenes. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel adds: "While [the petitioner's] contributions relating to enediynes should be enough to establish her qualifications for a national interest waiver, she has also made significant advances in the synthesis of Pirfenidone derivatives." The only exhibits to which counsel cites in support of this claim are letters from individuals who worked with the petitioner at [redacted]. There is no indication that this work has had any impact outside the company that employed her.

We note that the Form I-290B appeal notice gives a California address for the petitioner, which indicates that the petitioner no longer works for [redacted] in Texas. Counsel does not mention the beneficiary's relocation or describe the petitioner's activities since leaving [redacted]. At the time the appeal was filed, the petitioner was the beneficiary of a Form I-129 nonimmigrant visa petition (receipt number WAC 08 081 50715) filed by [redacted], Torrance, California. That petition was approved in April 2008, after the present appeal was filed, but four months later another employer, [redacted] Irvine, California, filed a new nonimmigrant visa petition (receipt number WAC 08 232 50917) on her behalf.

Counsel states that the director failed to take into account witness letters showing that other researchers have benefited from the petitioner's work. The director did not deny or overlook those materials. Rather, the director found that the petitioner had not established the significance of her contributions. Because no scientist works in isolation, it is expected that researchers will build on one another's work. It cannot suffice for the petitioner simply to show that others are aware of her work. The issue is the extent of the petitioner's influence, rather than whether the petitioner has had any influence at all.

The record does not show a sustained pattern of impact on the field to a degree that qualifies the petitioner for a national interest waiver. At best, the record shows that the petitioner attracted positive attention with research she conducted while a doctoral student at the University of Texas. The record does not show that the petitioner has continued such research, or that her subsequent work has attracted comparable notice.

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 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.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.