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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 29 2009

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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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting 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. The petitioner seeks employment as an environmental engineer. 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.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted materials.

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 U.S. Citizenship and Immigration Services (USCIS)] 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.

In a statement accompanying the initial filing of the petition, the petitioner described his work:

> I am an expert in hydrolysis/acidogenesis and modeling in bio-energy, bio-products, and bio-fertilizer production from food wastes, crops and livestock organic solid wastes.
>
> I have published five technical papers . . . .
>
> I have *developed* one model – a spatially distributed model for hydrolysis/acidogenesis in two-phase anaerobic digestion of cattle manure. This model can be used as a general

> model for hydrolysis/acidogenesis of all crops and livestock organic solid waste. The model is useful in optimization of hydrolysis/acidogenesis in anaerobic digestion and maximization of bio-energy production.

(Emphasis in original.) The petitioner submitted copies of his scholarly writings, some in manuscript form. These documents establish that the petitioner has been a productive researcher, but they do not establish how the wider environmental engineering community has responded to the petitioner's research.

Several witness letters accompanied the initial filing of the petition. Most of these letters are short (two to three paragraphs in length) and amount to general recommendation letters. For example, [redacted] editor of *Environmental Engineering Science*, stated without elaboration: "It is important that [the petitioner] be allowed to continue his research in this important field through his educational alliances in the United States." Professor [redacted] of the University of Tennessee stated that the petitioner "is among a very small community of specialist[s] in this technology area," but did not indicate where the petitioner stands within that "small community." The petitioner's choice of specialty is not, by itself, grounds for a waiver. It is the position of USCIS to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dept. of Transportation* at 217.

The most detailed letters are from the petitioner's mentors, employers and collaborators. [redacted] who supervised the petitioner's graduate studies at New Mexico State University (NMSU), stated:

> [The petitioner] has impressed me as a very intelligent, hardworking, and dedicated student . . . . I believe he has the necessary expertise and skills to make meaningful contributions in the field of alternative energy . . . .
>
> For his PhD dissertation, he has developed a new process for anaerobic digestion of cattle manure to produce energy and recycle nutrients. As it is a new area of research for me, [the petitioner] initiated the study, formulated the research plan, and executed it mostly by himself . . . . His contribution to the body of knowledge in this area is valuable and practical. For example, the model that he has developed and validated using experimental data with cattle manure can be generalized for application to other animal wastes as well as food wastes. I find this a remarkable contribution to the animal production industries as well as to waste management and sustainable energy production. It is my belief that his work has great potential for immediate practical application and for further research.

[redacted], president of [redacted], Richland Center, Wisconsin, stated:

> [The petitioner] has been working on a research and demonstration project for the demonstration and commercialization of High Solids Two-Phase Anaerobic Digestion

> (HS2PAD) for Bio-Products Engineering Corporation since July 2005 as *Research Engineer Supervisor.*
>
> He has been promoted as *lead scientist* on the project in March of 2006. His *duties* include the controlling and monitoring of anaerobic digestion of organic solid wastes (i.e. food processing wastes, energy crops, livestock wastes, and organic solid wastes) to produce/recover bio-gas, bio-acids, and bio-fertilizers; civil, environmental, biotechnological engineering designs; calculation and autocad drawings; coordinating with mechanical and electrical engineering subcontractors to build and monitor the fabrication processes; quality control supervision of the steel structure and fabrication processes; evaluating alternative processes to reduce the fabrication, construction, and labor costs; construction, fabrication, and building of bioengineering parts, units, and processes; supervision of the environmental laboratory work.

(Emphasis in original.) We note that letter is dated April 5, 2006. The petitioner has stated that he worked for Bio-Products Engineering until May 2006, indicating that he left the company shortly after obtaining the above letter.

On June 13, 2007, the director issued a request for evidence, instructing the petitioner to establish "a degree of influence on [his] field that distinguishes [him] from other research engineers with comparable academic/professional qualifications." The director inquired as to whether other researchers have cited the petitioner's published articles. In response, the petitioner submitted copies of his own published articles, but no evidence of citation of those articles.

The petitioner also submitted copies of two articles about [redacted] research group at NMSU. Both articles appear to be from local publications. An article in the November 27, 2006 issue of the *Las Cruces* (New Mexico) *Sun-News* described efforts at NMSU to produce biofuel from agricultural waste. The article, part of the "NM State University Eye On Research" series, is credited to NMSU. An accompanying photograph shows the petitioner with two other researchers, but the petitioner's name does not appear in the text of the article. Likewise, an article from the Spring 2007 issue *Research & Resources* describes the research in [redacted]s laboratory but there is no mention of the petitioner. The omission of the petitioner's name from these materials does not lead to the conclusion that the petitioner has been a major contributor to the projects described in the articles. Even if the petitioner had figured significantly in the articles, we note that these articles appeared after the petition's July 21, 2006 filing date. The petitioner must establish eligibility as of the filing date; later developments cannot retroactively establish eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The director denied the petition on January 25, 2008, acknowledging the intrinsic merit and national scope of the petitioner's field of research, but finding that the petitioner had not shown that he stands out among researchers performing similar work. The director concluded that the record lacks evidence of the petitioner's influence in his field.

On appeal, counsel states that the director deviated from the guidelines of *Matter of New York State Dept. of Transportation* (NYSDOT):

> [T]he Service erroneously concluded that [the petitioner] did not meet the third element of the three part *NYSDOT* test . . . .
>
> Among other things, that case requires that aliens seeking a national interest waiver . . . demonstrate that the prospective benefit of their working in the United States will "serve the national interest to a *substantially greater degree* than would an available U.S. worker." *Id.* At 218. Instead of applying the well-settled standard announced in 1998 in *NYSDOT* to [the petitioner's] case, the Service applied its own more onerous standard which, as stated in its opinion, required [the petitioner] to demonstrate that his prospective employment should be permitted as a matter of national interest only if he could prove that his employment in the United States without going through the labor certification process "present[ed] a national benefit *so great as to outweigh the national interest inherent* in the labor certification process."

(Counsel's emphasis.) The assertion that the director imposed a "more onerous standard" is not persuasive. The language to which counsel objects was, in fact, taken verbatim from the *NYSDOT* precedent decision: "An alien seeking an exemption from [the labor certification] process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process." *Id.* at 218. That sentence immediately precedes the sentence containing the "substantially greater degree" language preferred by counsel.

Counsel also argues that the director did not give sufficient consideration to letters from witnesses who "unilaterally agree that [the petitioner's] past record and achievement justifies sufficient projection of future benefit to the U.S. national interest of establishing bio-fuel energy independence for the United States." Setting aside the observation that the petitioner can hardly be expected to submit unfavorable witness letters, the AAO has reviewed these letters and has found little in them to suggest that the petitioner has played a particularly significant role in the development of biofuels. Furthermore, while counsel claims that these letters must be considered in the larger context of the record as a whole, the remainder of the record is, likewise, devoid of persuasive evidence to show that the petitioner has had significant impact in biofuel research. The petitioner has published some journal articles, which is common in academia, but the petitioner has not established (through citations or otherwise) that his articles have significantly influenced the research of others in his field.

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.