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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 17 2009
SRC 07 800 23249

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.

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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 is a postdoctoral research associate at Texas A&M University, College Station. 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.

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] 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.

When considering witness statements about the petitioner's level of ability, we 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 filed the petition on July 26, 2007. In an introductory statement, counsel described the petitioner's work:

> [The petitioner] is working in the prestigious atmospheric group led by . . . concerning aerosol formation in the atmosphere. . . . Petitioner/Beneficiary has already made groundbreaking contributions to research concerning ozone formation mechanism by developing the state-of-[the-]art instrumentations and techniques to

> measure trace gases that are responsible for ozone and particulate formation in the atmosphere. His past research contributions and his present work are helping scientists in this country understand the initiation steps in aerosol formation, and provide clues to devising a strategy to control ozone concentrations in the urban atmosphere. . . . His findings have been utilized by the Texas Commission on Environmental Quality (TCEQ) to construct [a] state implementation plan to prevent high ozone episode[s] from occurring.

The petitioner described his own work:

> I have extensive experience in the field of instrumentation developments and field measurements of trace gaseous air pollutants in the troposphere. From 1998 to 2005, I was a research assistant at Stony Brook University collaborating with scientists from Brookhaven National Laboratory ("BNL"). I conducted in-depth research in the area of ozone formation mechanism in the urban environment. . . . My research was designed to explore the finer details in the ozone production processes and find effective and practical ozone control strategies that had the minimum side effects on the economy. During my research, I and scientists from BNL developed a novel instrument to detect hydroperoxyl radicals (HO_2) in the atmosphere. I build the first prototype HO_2 instrument. . . .
>
> Since 2005, I have been working as a research scientist at the Texas A&M University. The research project I have been involved in is . . . led by [redacted] who is an established expert in the field of atmospheric chemistry and recently has found a connection between Asian air pollutions and the intensified Pacific storm activities. . . . The final goal of the research is to develop instrumentations for the measurements of highly reactive volatile organic compounds (HRVOC) and nitrogen-containing compounds . . . and investigate how HRVOC and nitrogen-containing compounds affect ozone production in the Houston metropolitan area.
>
> . . . I also participated in the MILAGRO (Megacity Initiative: Local and Global Research Observations) Campaign, an unprecedented international effort to observe and quantify the fate of anthropogenic pollutants emitting from the world's second largest city (Mexico City, Mexico), especially their influence on air quality in the southwest U.S. region. Besides instrumentation, I performed quality control and quality assurance procedures on the data we collected during the field experiments and conducted further data analysis to reveal the cause of severe ozone episodes encountered in the Houston metropolitan area.

Several letters accompanied the initial filing of the petition. [redacted], the petitioner's doctoral thesis advisor at the State University of New York, Stony Brook (also known as Stony Brook University), stated:

During his Ph.D. study at Stony Brook University, [the petitioner] established a record of achievement far above those I have ever encountered in his field. . . . He focused on a research to study the cause of rapid ozone formation in the troposphere especially in the populated urban area. Ozone is known to cause many health harms. . . . The key to solve this problem is to understand the mechanisms that control the ozone production rate and establish effective ozone precursors emission regulation accordingly. [The petitioner] developed a state-of-the-art instrument system to measure . . . the key intermediate products during ozone photochemical production. . . .

[The petitioner] has published his findings in scientific journals and helped government agencies . . . to construct regulations to prevent high ozone episode[s] from occurring. Thus, [the petitioner] has directly contributed to our national efforts in the research field.

[redacted] of the State University of New York College at Old Westbury stated:

I have held a research appointment at Brookhaven National Laboratory, in Upton, NY, since my postdoctoral appointment there in 1975. . . .

[The petitioner] worked at Brookhaven National Laboratory to develop instrumentation for determining atmospheric trace gases. . . . Early in his career, he re-engineered the liquid and air flow systems in these instruments to improve performance. . . .

[The petitioner's] doctoral thesis studies focused on a new technique for analysis of gas-phase HO_2 radicals. . . . He built a prototype instrument for this work, as well as a gas-phase calibration apparatus.

[redacted], Head of the Atmospheric Sciences Division (ASD) at BNL, stated:

[The petitioner] was a graduate student of the State University of New York at Stony Brook when he started his Ph.D. research at the ASD-BNL in 1999 under the direction of [redacted]. His research focused on issues regarding air quality in the United States by acquiring comprehensive understanding of the impact and fate of trace pollutants. At the ASD-BNL, [the petitioner] was trained by, and worked with some of the best atmospheric chemists in the U.S. . . . [The petitioner] used an enzyme mediated fluorescence technique onboard the G-1 Gulfstream research aircraft to measure hydroperoxides during the Texas 2000 Air Quality Study (TexAQS 2000). . . . [The petitioner] successfully completed 14 research flights and collected high quality data. . . . [The petitioner's] hydroperoxide data provided one of the valuable clues to devising a strategy to control ozone concentrations along the heavily polluted Gulf Coast of Texas. His work was crucial to the governmental decision making process in deciding what emissions to control and by how much. . . .

> [The petitioner] also developed a new, highly precise chemiluminescence technique that can be used to measure hydroperoxyl radicals (HO_2). . . . Real time HO_2 measurements can provide an opportunity to inter-compare model simulations results with real measurements to verify and improve our understanding of the ozone formation mechanism. . . .
>
> I am confident he is rapidly becoming a leading researcher in his field.

[redacted], Associate Director of the Atmospheric Science & Global Change Division at Pacific Northwest National Laboratory, Richland, Washington, stated:

> I was fortunate enough to work with [the petitioner] during the Texas 2006 Air Quality Study. . . . [The petitioner], his colleagues at A&M, and several of my staff set up a monitoring network that encompassed the greater Houston area. In this capacity, I interacted with [the petitioner] several times a week, and had the benefit of learning much from his extensive experience in measuring trace-gas compounds in the polluted atmosphere that are related to health issues and also critical to understanding the formation of ozone and other secondary pollutants that form in urban atmospheres.

[redacted] of the University of Houston stated:

> [The petitioner's] expertise lies in the PTR-MS [Proton Transfer Reaction Mass Spectrometry] technique . . . [which] is a unique instrumentation for fast-response and sensitive measurements of selected VOCs [volatile organic compounds] in the atmosphere. . . . During summer 2006, he deployed a PTR-MS at our ground based supersite on campus of the University of Houston for a couple of weeks and afterwards at a site of the local air quality network. . . . [The petitioner's] work is indispensable in the process to solve the O_3 [ozone] issue that affects not only the Houston-Galveston area but also many other metropolitan area[s] in the U.S., such as Los Angeles and New York.

Only one initial witness was not one of the petitioner's instructors or collaborators. Associate Professor [redacted] of Portland (Oregon) State University stated:

> Because I am not [the petitioner's] colleague, collaborator, or personal friend, I can offer my professional opinions as an independent expert. I met [the petitioner] briefly in Houston during Texas Air Quality Study II in August of 2006. I was impressed by his expertise in ozone photochemistry and analytical techniques, especially mass spectrometry. [The petitioner] and [redacted] co-developed a state-of-the-art instrument called ion-drift mass spectrometry (ID-CIMS) for measuring nitric acid (HNO_3) in the atmosphere. HNO_3 can increase the acidity of rainwater and serves as a reservoir species for the active nitrogen compounds (NO_x), which together with reactive

> hydrocarbons are the major cause of high ozone episodes encountered in Houston and other major metropolitan areas. . . .
>
> [The petitioner] is also an expert in hydroperoxyl radical (HO_2) and peroxide measurements in the atmosphere. His expertise has received international recognition along with the publication of his significant research findings in peer-reviewed and internationally circulated journals.

To document his research work, the petitioner submitted copies of three journal articles and abstracts of four conference papers. The three journal articles all appeared in 2003 or 2004, based on the petitioner's work at Stony Brook University. The initial submission contained no articles by the petitioner published after 2004.

To establish the impact of his published work, the petitioner submitted a printout from a citation database, showing 17 citations of an article from 2003 and six citations of a 2004 article. Nine of these 23 citations are self-citations by the petitioner's co-authors, leaving 14 independent citations.

On August 21, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence to distinguish his work from that of others in his field. In response, the petitioner submitted copies of three articles published in 2008, three new witness letters, and other materials.

, the petitioner's supervisor at Texas A&M University, stated:

> [The petitioner] was heavily and critically involved in the design, fabrication, and assembly of the first PTR-MS unit in my group. . . . With his critical input, our group soon discovered that PTR-MS has rather limited applications for studying hydrocarbon reactions. . . . [The petitioner] then embarked on a more ambitious task to develop an ion drift-chemical ionization mass spectrometry (ID-CIMS) instrument. . . . This is a truly original and significant invention. . . . His work was critical in building two ID-CIMS instruments in my group that have been successfully used in various laboratory studies, and his effort was instrumental for the development of the ID-CIMS systems. . . .
>
> Another major contribution [the petitioner] has made in my lab is his work on the conversion of the lab ID-CIMS instrument for field measurements of VOCs and inorganic compounds. . . . To date he has participated in several major field campaigns among some of the most polluted megacities in the world. . . .
>
> To the best of my knowledge, [the petitioner] is the only researcher that has conducted field measurements of air pollution in those major field campaigns worldwide.

of the University of Maryland, College Park, met the petitioner during a visit to Texas A&M University. Prof. Dickerson stated that the petitioner "possesses a rare ability in his field and has made significant contributions to atmospheric chemistry through developing

instrumentations to measure [chemicals] that play crucial roles in the chemistry of the polluted atmosphere." concluded that the petitioner's "work is an indispens[a]ble step [in] a series of efforts to defeat air pollutions [*sic*] even from outside of the U.S."

President of the Molina Center for Strategic Studies in Energy and the Environment, La Jolla, California, stated:

> I coordinated the MILAGRO Campaign . . . [in] March 2006. Due to [the petitioner's] outstanding analytical skills, he was invited to conduct measurements of nitric acid and nitrogen oxides in Mexico City. [The petitioner] found that nitric acid was unexpectedly low in this tropical site and concluded that it was controlled by the gas/particle partitioning process. This is a major contribution to our understanding of the nitrogen oxides chemistry and evaluation of the regional effects of nitrogen oxides emission from Mexico City; it provides important insights for other urban centers around the world.

The petitioner submitted copies of three articles that he co-wrote, arising from his work on the MILAGRO project. All of these articles were submitted for publication after the petition's July 2007 filing date.

A citation printout showed eleven citations of an article published in 2003, but not included in the petitioner's earlier submission of citation data. About half of the citing articles were published after the filing date. The petitioner submitted a copy of one citing article, which counsel stated "highlighted and reviewed" the petitioner's "pioneering work of the instrument for aqueous phase superoxide radical detection." The article, "Fluorescent and luminescent probes for measurement of oxidative and nitrosative species in cells and tissues: Progress, pitfalls, and prospects," focuses on biochemistry rather than on atmospheric chemistry. The article is a review article, comprising a survey of literature on the topic of choice. The petitioner's article was one of 310 source articles cited in the review article. The citation of the petitioner's article occurred in the phrase "there have been some . . . impressive demonstrations of quantitation of superoxide in chemical . . . model systems." It is not clear how this article establishes the petitioner's impact on the study of atmospheric pollution, nor is it evident that a sentence fragment in a nearly 20-page article constitutes a "highlight."

The director denied the petition on October 23, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner's "research has not risen to the level of significance in which [*sic*] to grant a national interest waiver."

On appeal, counsel argues that the director disregarded persuasive evidence of the petitioner's contributions and influence. Counsel states: "Letters of recommendation from experts provide critical evidence of an alien's professional accomplishment." Counsel noted that, in prior decisions, the AAO has "held specifically that these testimonials could serve to establish the beneficiary's reputation within his field." While the cited AAO decisions are unpublished, and therefore not binding as precedent under 8 C.F.R. § 103.3(c), counsel is correct in stating the AAO's position that witness letters can represent strong evidence. This does not mean, however, that submission of strongly worded witness

letters compels or guarantees approval of a given petition. The AAO reviews each record of proceeding individually, in its entirety and with all submissions in the proper context.

In this instance, most of the witnesses have worked directly with the petitioner. The perspectives of such witnesses are valuable because they describe the nature of the petitioner's contributions to a particular project, but their statements are not direct evidence of the extent of the petitioner's impact.

Counsel observes that the witnesses "are unanimous in terms of the significance of the beneficiary's contributions." This unanimity is less impressive than it may seem at first glance. Unanimity among every letter submitted does not imply unanimity among every potential witness that the petitioner contacted, and we would hardly expect the petitioner to submit a witness letter that cast his work in anything but the most favorable light. Therefore, while we take the letters into account, we will not presume or pretend that the witnesses chosen by the petitioner in this way constitute a random or representative cross-section of the field as a whole.

Witnesses have praised the petitioner's construction and modification of measurement devices, and asserted that the petitioner's work in this area represents a significant advance in the field. The record, however, fails to show that other atmospheric chemists have adopted the petitioner's technology. The record shows that the petitioner is a valued part of certain research projects, but the record also shows that many of these projects involve large groups of scientists. For instance, background materials in the record state that "[m]ore than 300 scientists from over 60 universities and research institutions . . . participated in the MILAGRO field campaign." The record does not show that the petitioner played an especially important or central role in that campaign. The record simply identifies the petitioner's specific tasks in the project.

Counsel has asserted that the Texas Commission on Environmental Quality has used the petitioner's findings. Counsel has not explained why this is remarkable, considering that the petitioner was involved in pollution readings in the air over Texas. The utilization of the petitioner's work would be notable only if the Commission typically ignores air quality readings, but made an exception in the petitioner's case owing to the quality of his data. The record contains nothing from the Commission to indicate that its findings, recommendations or actions would have been different if the readings had been taken by another qualified scientist instead of the petitioner.

Also, while witnesses credit the petitioner with modifications to laboratory and field equipment, the record does not show widespread adoption of these modifications by other laboratories. The issuance of a patent is not evidence of widespread use or interest in the patented device. Similarly, while the petitioner has shown some citations of his published work, the petitioner has not shown that the level of citation is substantially higher than what others in the same field have achieved.

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.