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



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **SEP 03 2009**
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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:

SELF-REPRESENTED

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 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 research and development chemist at Feed Energy Company, Des Moines, Iowa. 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 various exhibits and arguments from [redacted] of Apollo Beach, Florida.

The term “attorney” means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law. 8 C.F.R. § 1.1(f).

[redacted] identifies himself as the petitioner’s attorney of record, and claims to be a member in good standing of the Pennsylvania bar. The Disciplinary Board of the Supreme Court of Pennsylvania, however, lists [redacted] status as “inactive”: http://www.padisciplinaryboard.org/pa_attorney_info.php?id=57798&pdcount=0 (printout added to record July 14, 2009). On July 14, 2009, the AAO wrote to [redacted] instructing him to provide documentation to establish that he is currently entitled to practice law. The AAO has received no response to this request. Because Mr.

[redacted] has given us no evidence that he is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, he has not shown that he meets the definition of an “attorney” at 8 C.F.R. § 1.1(f). Therefore, the AAO considers the petitioner to be self-represented. While 8 C.F.R. § 103.3(a)(2)(x) requires that a copy of the decision must be served on the affected party and the attorney or representative of record, this regulation does not apply here because [redacted] has not shown that he is an attorney, and has not claimed that he otherwise qualifies as a representative under 8 C.F.R. § 292.1(a).

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.

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 filed the petition on August 29, 2008. In a statement accompanying the initial submission, _____ indicated that the petitioner, in his research, seeks to understand the cause(s) of the astringency, or bitter taste, of soy milk, in order to remedy this problem and thereby increase public acceptance of the product. _____ asserted that isoflavones have previously been posited as the cause, but that the petitioner’s research suggests that the blame lies with phytic ions.

_____ stated that a published article by the petitioner on this subject has been cited six times. A printout from the Google Scholar database (<http://scholar.google.com>) shows only five citations. The printout lists six citing articles, but one article is listed twice. The petitioner submitted copies of other published articles, but did not claim any citations of those articles.

The petitioner submitted letters from two witnesses, both on the faculty of Iowa State University, Ames. When the witnesses wrote their letters in December 2007, the petitioner was a postdoctoral research associate at the university. (The letters originally accompanied an earlier, denied petition.) Assistant Professor _____ stated that the petitioner “has added considerably to an understanding of the nature of the astringency of soymilk.”

_____ praised the petitioner’s “level of insight into the food chemistry of the soybean,” and stated that the petitioner’s “ideas about the relationship between isoflavones and the sensation of astringency in soy products . . . , in part, informed the design of my own study.” Prof. _____ asserted that the petitioner “is an internationally known scientist,” but the record does not support this claim except insofar as the five citations of the petitioner’s work originate from more than one country.

The petitioner’s waiver claim rests exclusively on his research regarding the flavor of soy milk. He did not, however, demonstrate that he continues to perform such research. On his résumé, the petitioner described the responsibilities of his position at Feed Energy Company as “Feed production, product development, develop value-added products, feed quality control, feeding management etc.” The petitioner submitted nothing from Feed Energy Company or any other source to indicate that Feed Energy Company is involved in the study or production of soy milk.

The director denied the petition on September 22, 2008, stating that the petitioner's citation record does not readily suggest that the petitioner's work has been especially influential in the field. The director also found that the letters did not show the petitioner's impact outside of Iowa State University.

On appeal, [redacted] argues that the director erred in using a "quantitative analysis" rather than "a more qualitative analysis of the citations to [the petitioner's] work . . . [and] of the *entire* file" (emphasis in original). With regard to the witness letters, [redacted] cites *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972). The cited precedent decision concerns "information in an affidavit," whereas the witness letters are not sworn affidavits. Furthermore, the director did not challenge the credibility of the witness letters as [redacted] alleges. The director did not dispute the witnesses' factual assertions. Rather, the director found that the documentary evidence did not tend to support the witnesses' subjective assessments of the importance and influence of the petitioner's work.

[redacted] asserts that he does not specifically dispute the director's findings regarding the petitioner's citations, or regarding the witness letters; he goes so far as to concede "we do not specifically challenge the Director's denial." Rather, he asserts that, while each of the various exhibits has problems of its own, taken together they should establish that the petitioner is "more likely than not" eligible for the waiver, because the petitioner's burden of proof is only to show eligibility by a preponderance of evidence. The petitioner does not meet this burden, however, simply by asserting that even flawed evidence, when submitted in sufficient quantities, must eventually tip the scales in his favor. The petitioner has not shown that the submitted evidence either quantitatively or qualitatively establishes his eligibility for the benefit sought.

[redacted] asserts: "the Director *completely failed* to ask whether commercial enterprise has expressed an interest in [the petitioner's] soybean work" (emphasis in original; footnote omitted). To establish this commercial interest, the petitioner submits a letter from [redacted] Research and Development Director at Feed Energy Company, who states:

For more than thirty years, Feed Energy Company has been the premier supplier of energy solutions to the American livestock industry. . . .

[W]e use cutting edge science to get the most nutrition, available calories, out of raw product possible. We knew of recent work undertaken by [the petitioner] . . . and his approach has influenced our approach to aqueous extraction process.

Most soybean oil extraction is carried out by direct solvent extraction of uncooked soybean flakes. The use of a petroleum distillate containing about two-thirds n-hexane is typically used in the commercial extraction of soybean oil. . . . The Environmental Protection Agency has identified solvent emissions in oilseed extraction to be a significant source of air pollution. . . . To reduce hexane emissions, alternative methods for edible oil extraction have been proposed. The aqueous extraction process (AEP) . . . is one such alternative that we think holds promise. . . .

Use of enzymes to assist this AEP increases the available calories. But . . . developing the EAEP into a dependable process has, thus far, proved elusive. [The petitioner's] research showed that he knows how to find the enzymes necessary to improve available calories. And his pretreatment techniques increased the efficiency of his use of EAEP.

. . . We are convinced . . . that [the petitioner] is singularly qualified to help Feed Energy Company timely achieve this goal [of environmentally responsible oil extraction]. Of course, his article concerns soybeans and our research concerns gums and soapstock, but there are sufficient similarities that we believe [the petitioner's] pretreatment-EAEP work will be applicable to our research.

The above letter does not indicate that the petitioner continues to work with soy milk, and the record does not show that the petitioner solved the problem of soy milk astringency before he ceased working on the problem. Rather, the letter shows that the petitioner's current work is largely unrelated to the one issue (soy milk bitterness) that formed the cornerstone of the initial filing. The petitioner's heavy focus on the soy milk issue, coupled with his initial failure to disclose that he no longer performed such work, was misleading at best. Considering that the petitioner's initial submission contained no mention whatsoever of his work with aqueous extraction of vegetable oils using gums and soapstock, there can be no justifiable complaint that the director failed to take that work into account.

The petitioner, in his initial filing, did not show that his work with soy milk was particularly important or influential in relation to the work of others working in the same area. Given the petitioner's cessation of that work, the petitioner cannot reasonably argue that his future work will continue to benefit the soy milk industry, and he has not shown that his past work in that area was of such a caliber that we can assume that the United States will see great benefit from his future work, whatever its nature. In terms of his current work, we note that the petitioner joined Feed Energy Company only about five weeks before he filed the petition, and there is no evidence that he had made significant progress in his new work during or since that time.

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 decision 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.