(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: APR 16 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The AAO withdrew the director's decision and remanded the petition to the director for further consideration and action. The director again denied the petition and certified the decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 6, 2012, seeking classification under 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 engineer at
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 denied the petition on November 19, 2012, stating 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.

The petitioner appealed the decision to the AAO, which withdrew the director's decision. The April 3, 2013 remand order indicated that the director based the denial on improper factors, but that other concerns existed that the petitioner needed to address before U.S. Citizenship and Immigration Services (USCIS) could approve the petition. The director issued a request for evidence (RFE) on July 22, 2013. After the petitioner responded to that notice, the director issued a certified denial notice on December 12, 2013.

In response to the certified decision, the petitioner submits a brief and copies of supporting documentation.

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, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now 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.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included 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. *Id.*

The USCIS 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 April 2013 remand notice contains a fuller discussion of the record and the proceeding to date, but a condensed summary follows. In a statement that accompanied the initial filing of the petition, the petitioner stated:

> [The petitioner] has made exceptional contributions to the field of physics, with emphasis in advancement of next generation materials such as thermoelectric materials and nanomaterials and high-technology applications. . . .
>
> Among [the petitioner's] most impressive achievements is the development of more efficient thermoelectric materials. High quality thermoelectric materials should be excellent conductors of electricity but poor conductors of heat, a combination of properties that is exceedingly rare. Finding or creating new materials with good thermoelectric properties is one of the primary objectives of the field. [The petitioner] has been a leading researcher in this highly important drive to find new thermoelectric materials. . . .
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> [The petitioner's] important scientific contributions have not been confined to thermoelectrics. His work also has been important in nanomaterials through his original investigations of the transport properties of carbon nanotubes. . . . [The petitioner] was able to achieve carbon nanotube aggregates that outperformed samples made using previous methods by about 10 times, an incredibly significant result. . . .
>
> All of these achievements prove [the petitioner] is destined to make great contributions to his field in the future.

The substantial intrinsic merit and national scope of the petitioner's occupation are not in dispute in this proceeding. The issue at hand is whether, after conducting highly productive and influential research as a graduate student, the petitioner has continued to influence his field, thereby justifying expectations that he will continue to do so in the future.

The petitioner completed his doctorate at [redacted] in August 2009, followed by a postdoctoral fellowship at [redacted] from November 2009 to July 2010. By the time he filed the petition, the petitioner had also worked for three employers in succession: [redacted] from September 2010 to September 2011; [redacted] from October 2011 to December 2011; and at [redacted] since January 2012.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Therefore, to justify projections of future benefit, the petitioner cannot rely solely on his achievements

at He must show that he continued to engage in qualifying activities with his employers, and that he remains eligible for the waiver.

Database printouts submitted with the petition showed over 100 citations of the petitioner's published work. In the denial notice, the director stated that the petitioner had not established the significance of the citations. The 2013 remand order withdrew this finding, while indicating that other issues prevented outright approval of the petition, including adverse information regarding and a lack of evidence of the petitioner's ongoing influence on his field.

The petitioner's initial submission included five witness letters from researchers who described the petitioner's past work and stated that they strongly supported the petition. One of the witnesses, founder, chairman and chief executive officer (CEO) of stated that his company "developed the prototype of in 2001, after a bioterrorism incident involving anthrax spores sent through the mail. Mr. stated:

> [The petitioner] has worked at since September 2010. I was, however, aware of his work in the area of thermal science, physics, and materials engineering through his publications even before I recruited him to join our company. Having read of [the petitioner's] previous work experiences and unprecedented scientific contributions in both fundamental physics and thermodynamics as well as his more recent infrared technology research . . . , I offered him a permanent position as Thermal Research Scientist at to conduct the fundamental research investigations for
>
> He has played a major role on our research team since joining, and his expertise has enabled us to make significant advances in thermal dynamic issues.

The remand order contained the following passage:

> All of the witness letters in the record date from June and July of 2011, eight to nine months before the petition's March 2012 filing date. When the witnesses wrote their letters, the petitioner worked at For the most part, the witnesses discussed the petitioner's graduate studies at Every published article by the petitioner identified as the petitioner's institutional affiliation. Also, every article names who supervised the petitioner's doctoral studies, as a co-author. The record, therefore, does not show that the petitioner has produced new research for publication since leaving Articles published after the petitioner left appear to be based on work that the petitioner had previously performed at that university.
>
> Since leaving in 2009, the petitioner has worked for four different employers, but appears to have ceased to publish new research. Therefore, his

> production of highly-cited work while a doctoral student at is not a reliable gauge of his continuing impact on the field. . . .
>
> The petitioner left [in September 2011], and therefore his employment with that company offers no prospective benefit to the United States. The petitioner arrived at in January 2012 after three months at but the initial submission contains little information about the petitioner's work at either company, or about his earlier postdoctoral training at from 2009 to 2010. . . .
>
> Because the record is virtually silent regarding the petitioner's post- work for employers other than the AAO cannot consider the impressive citation rate of his student work to be the final or definitive word on his ongoing impact and influence on his field. In the absence of new published research, the petitioner must identify some other means by which he continues to influence his field to an extent that would warrant approval of the national interest waiver.

The remand order also indicated that the Securities and Exchange Commission had filed a complaint against charging principals of that company, including with "defrauding investors through various misrepresentations and schemes while raising at least $26 million in investor funds" while the company sold "fewer than ten machines" "[i]n its ten year history." The remand order stated:

> There is no evidence, and the AAO does not allege, that the petitioner participated or was in any way aware of the violations alleged in the Commission's complaint. Nevertheless, the complaint is directly relevant because, apart from the petitioner's now-completed student work, the record focuses on the petitioner's work at to illustrate the petitioner's ongoing contributions to the national interest. If, as alleged, the company sold "fewer than ten machines" to disinfect mail, then the scope of the company's impact (and therefore that of its employees) is greatly limited.

With respect to his most recent employment, the petitioner himself provided this description of his duties at "Develop and research technology based solutions that advance the science and application of generating, controlling, and utilizing energy beams." president and chief executive officer of stated that the petitioner "is engaged in the development and delivery of technology based solutions that advance the science and application of generating, controlling and utilizing energy beams. His work is across a broad range of high technology applications."

The remand order quoted a web site, operated by

> We design, manufacture and sell quality products that support the sciences, including histology, light microscopy, electron microscopy, materials science and products for the production, control and application of electron beam technology.

> offers vented laboratory microwave ovens for light and electron microscopy and histology specimen preparation. Our microwaves are available with a options [*sic*] for applications from basic tissue staining with air agitation to tissue processing or fixation procedures that require precise temperature control.
>
> For over 40 years, has specialized in manufacturing Filaments, apertures and many other components for Electron Beam applications. In addition to our standard offerings for Electron Microscopy and E-Beam Welding, we also provide many OEMs with specialty filaments for applications like Vacuum Deposition, Ion Implant and X-Ray, just to name a few.

The remand order stated: "From the above description, it is not evident how the achievements described at length in counsel's introductory statement and in the witness letters relate to the petitioner's work at

In the July 2013 RFE, the director advised the petitioner that the available evidence indicated that the petitioner made significant contributions with impact on the field while studying at but did not show further impact from the petitioner's subsequent work. The director instructed the petitioner to "submit evidence to establish that . . . the beneficiary continues to impact and influence the field."

The petitioner's response included updated citation information. The petitioner stated that his "work has been cited at least 169 times, with 117 citations by independent researchers worldwide," which "is a reliable indication that [the petitioner's] original work has continued and will continue to have a greater influence and impact [than] others in his field." The citations all relate to work that the petitioner undertook at The increasing number of citations shows the lasting impact of work that the petitioner completed at but it does not establish that the petitioner continues to engage in influential work. The ongoing impact of work published years ago is independent of the petitioner's future presence in the United States. Therefore, the citation data does not address whether the petitioner's work after leaving has continued to influence the field.

The petitioner's response to the RFE did not include any documentary evidence to establish the impact of his work at Instead, the petitioner focused on his current employment with In a new letter, described the petitioner's work at a research and development engineer at that company:

> [The petitioner] is engaged in research, development, production, continuous improvement, process documentation, and engineering support for a range of products manufactured for electron beam applications. The physics research that [the petitioner] is conducting covers a wide breadth of research responsibilities, including the selection of proper materials, as well as in-depth processing and characterization of the materials to optimize emissions.

In his research projects, [the petitioner] is devoted to more precisely measuring emitter operating parameters and keeping them in spec. The fruits of his research are intended to improve product performance at such as the These devices are widely employed for semiconductor and micro device inspection. Our customers include companies like many others, and are spread all over the world, from the United States, to Asia, and Europe. Using these companies inspect integrated circuit chips on their production line, promoting quality control in nationally and internationally-distributed semiconductor technologies.

Moreover, other research and development projects [the petitioner] has contributed to include the following:

1. [The petitioner] has contributed to the design of x-ray tube prototypes that reduce spot sizes to the micrometer range. This prototype has been procured by based leading supplier of advanced nano-optical and x-ray components used in display electronics, imaging, and analytical instrumentation.
2. [The petitioner] has also conducted research for the development of x-ray tubes with micrometer range spot size to dramatically improve the resolution of On behalf of [the petitioner] is applying electron-beam lithography to characterize the spot size of these micro x-ray tubes for the of our client, an international company with offices in Michigan, Canada, and Japan.
3. In another important national project, [the petitioner] designed and manufactured These are currently being implemented[]by the a U.S. Department of Energy government research laboratory, in their furthering their national research goal of realizing a temporal resolution of 100 nanoseconds.

Given the role [the petitioner] plays in these nationally crucial electron-optics projects, it is in the national interest of our country to keep such a talented and gifted scientist in our midst. With a demonstrated record of achievements in the field of physics, both in academia and industry, continued contributions can be expected from him.

The above letter describes the nature of the petitioner's work, but does not establish the significance, impact, or influence of that work. Mr. did not say how the petitioner's accomplishments stand out from those of other research and development engineers in the industry.

A purchase order from the shows that had contracted with for the following:

Item	Material/Description
1	Design, Tooling and First Article Prototype Emitter per attached drawing General Prototype Specifications: 1. Cathode Base: Standard Denka 174C Type 2. Emission Material: Tantalum 3. Surface Finish: Mirror 4. Parallelism: 0.05mm
2	1 Additional Emitter Prototype Parts, per attached drawing No design modifications General Prototype Specifications [as stated above]

The purchase order shows a "Completion Date" of June 27, 2012, but also includes a noted indicating "Prices are in accordance with your offer number dated May 1, 2013 provided by . The prices are obscured; the purchase order included the instruction "DECLARE NO VALUE, DO NOT INSURE." A contracts specialist signed the purchase order on May 7, 2013, nearly a year after its stated completion date, and after the AAO had issued the remand order.

The petitioner submitted printout of electronic mail messages with the subject line "design of photoemission tip for . Dr. ; was one of the contacts at concerning the project. Most of the messages are from mid-April 2013, but one message chain dates from September 2013. The petitioner sent some of the messages and received others; some messages were addressed to others and the petitioner received forwarded copies. The messages refer to "the emitter . . . for the photoemission gun," and Mr. told Dr. that the petitioner's "background is in physics and he is responsible for R&D in our E-Beam division. . . . [H]e has already started boning up on photoemission theory." In a message to Dr. the petitioner offered technical comments and questions such as "Does the laser shine the plate with pulses or continuously?" In a September 2013 follow-up message, Dr. stated:

> We have installed the emitter in the gun and the gun is on the microscope. At the moment we are going through the alignment process and as soon as we get a beam that we can use we will let you know. There are some minor changes that we would make to the emitter for the next version, but we are waiting for the instrument to work and then will send you all the information and what we will need for version 2.

The exhibits described above demonstrate that the petitioner worked on contract with on a project relating to the electron microscope, but they do not establish that the petitioner's work has had an impact on the field that would warrant the national interest waiver.

Innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *NYSDOT* at 221 n.7. There is no blanket waiver for engineers in the petitioner's specialty, and not everyone who designs new products, or improves existing ones, qualifies for the waiver.

The petitioner stated that, based on his earlier achievements as well as his "continuing achievements at it is reasonable to predict" future benefit to the national interest that would warrant a waiver. The initial waiver claim had, as described in the initial filing, "emphasis [on] advancement of next generation materials such as thermoelectric materials and nanomaterials and high-technology applications." The latest submission does not address the concerns expressed in the remand order; it does not show that the petitioner's work at relates to "next generation materials such as thermoelectric materials and nanomaterials."

At the time of the remand order in April 2013, the evidence of record suggested that, while the petitioner had conducted influential research on thermoelectric materials as part of his graduate studies, he has not continued in that field. The evidence submitted in response to the RFE supports this conclusion, as does the continued lack of evidence regarding the nature of the petitioner's employment at from 2009 to 2011. The remand order had included the observation that that "the initial submission contains little information about the petitioner's work" at those companies.

In the December 2013 certified denial notice, the director acknowledged the petitioner's latest submissions, but concluded that the petitioner had not established that his ongoing work after leaving has continued to influence the field, or that the petitioner has continued conducting research of the type that formed the foundation of the original waiver claim.

In response to the certified decision, the petitioner states that the director failed to consider "critical evidence of Petitioner's post-graduation research," specifically "two peer-reviewed journal papers [published] after August 3, 2009. . . . [T]hese two papers have so far been cited 8 times, 7 of which are independent." The director had previously addressed these papers, stating that they "reflect[] work that the beneficiary performed at

The petitioner asserts that the director's conclusions were "drawn in a hurry without scrutiny," although he also acknowledges that those conclusions are "possibly true." The petitioner states that the director did not rule out "the possibility that Dr. is a co-author because Dr. characterized the samples prepared after the Petitioner left The petitioner submits no evidence to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner also asserts that "it is not uncommon for fresh PhD graduates to have their doctoral advisor as a co-author of their papers in the early years of their career." To support this assertion, the petitioner submits the *curriculum vitae* of another researcher who earned a doctorate in 2000, and whose published work sometimes named his doctoral advisor as a co-author as late as 2008. The record does not contain sufficient evidence to show that the petitioner's situation parallels that of the other scientist.

Both of the petitioner's new articles show the petitioner's institutional affiliation as (one also lists as a secondary affiliation), and all but one of the listed co-authors were also at The internal evidence within the articles themselves, therefore, is consistent with the conclusion that the articles report research performed by researchers.

In a new letter dated December 30, 2012, Dr. assistant professor at second author of both of the papers under discussion, stated that the petitioner's "data analysis and theoretical modeling after he completed his degree constitute a crucial part for the successful publication of these two peer-reviewed journal papers." It is evident that the petitioner's late contributions to the papers represent the completion of research that he had begun before graduating.

Dr. adds: "[the petitioner] and I had recently put together a full manuscript on the magnetic properties of " There is no evidence that any journal had accepted the manuscript for publication. Dr. did not claim that this manuscript relied on research that the petitioner continues to perform. It is based, rather, "upon many phone and email discussions in the past 2 years." The petitioner submits printouts of electronic mail messages dated between March 2011 and January 2012. In a January 12, 2012 message, the petitioner stated: "January is a little slow here in my company . . . So I am now reading the data again these days. . . . I'm going to put all the data together and make a story out of them. Do you think we have enough data to publish a paper now?" The correspondence indicates that, while the manuscript itself is new, the information in that manuscript involves data collected previously which the petitioner newly analyzed during a "slow" period at

The petitioner states that newly submitted figures show that his post-2009 papers have earned an above-average number of independent citations, and that previous witnesses who commented on those papers "cannot tell which part of the work on the paper was completed after Petitioner graduated." One of those previous witnesses, Dr. of the asserts in a new letter that the petitioner's two post-2009 papers continue to influence Dr. own research. These assertions do not address the key ground for denial of the petition, specifically the absence of evidence that the petitioner has continued to perform influential research in thermoelectric materials after leaving There is no evidence that the petitioner's employment outside of has generated further peer-reviewed published work. The response to the certified denial does not establish that the petitioner's work at closely relates to the earlier work that formed the basis for the waiver claim. It shows, rather, that the petitioner has occasionally revisited work that remained unfinished at the time he completed his dissertation, while employed at evidently unrelated tasks.

The record supports the director's decision. The petitioner's graduate work with thermoelectric materials produced several high-impact articles, and those articles will continue to influence researchers regardless of the petitioner's future immigration status. Since that time, however, the record does not show that the petitioner has continued to perform new research or to publish the results from it. Early submissions emphasized the benefit to national security from the petitioner's work with The petitioner has not responded to documentation that calls into question the extent, if any, to which engineers have materially contributed to the field. The latest information relating to the petitioner's current employment shows that the petitioner has participated in fulfilling contracts with various clients, but the record does not establish the significance of these recent activities. The profile of the clients (such as does not necessarily correlate to the importance of a given project.

The petitioner has not established a history of ongoing achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that his influence be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole").

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 AAO will affirm the certified denial for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The director's decision of December 12, 2013 is affirmed. The petition is denied.