

(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: **JUN 03 2014** OFFICE: NEBRASKA 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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks 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 seeks employment as a postdoctoral research associate at [REDACTED] Inc. [REDACTED] affiliated with [REDACTED] Washington. 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 and several exhibits, most of which duplicate prior submissions.

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 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.

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 petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 7, 2012. In an introductory statement, the petitioner stated that he “has been conducting pioneering research in the field of plant/food safety and food microbiology, specializing in control of bacterial spoilage and foodborne pathogens on leafy greens and raw sprouts.” Supporting evidence establishes that the petitioner’s occupation has substantial intrinsic merit, and results in benefit that is national in scope.

The petitioner asserted that his employer would not be able to obtain a labor certification for the petitioner, because the “[e]mployer requires specific and outstanding qualifications of [the petitioner] based on his personal research achievements and novel findings,” and Department of Labor regulations do not permit an application for labor certification to be narrowly tailored in this way. The petitioner has not shown that the above is a requirement for the position, rather than the employer’s preference. More importantly the statutory threshold for the waiver of the job offer requirement is the national interest, rather than the employer’s claimed inability to obtain a labor certification for the prospective employee.

Documentation of the petitioner’s membership in several professional associations serves to establish that he is active in his field, but does not demonstrate eligibility for the waiver. Such memberships can form part of a claim of exceptional ability under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E), but aliens of exceptional ability remain subject to the statutory job offer requirement.

Several witness letters accompanied the petition. Two witnesses are professors at [REDACTED] where the petitioner earned his doctorate. Professors [REDACTED] the petitioner’s doctoral advisor, described in technical detail the petitioner’s work with cucumber mosaic virus (CMV). Prof. [REDACTED] stated:

[The petitioner] was the first researcher to reveal that the CMV 2b protein is needed for systematic infection and for accumulation of the virus in [REDACTED] plant at the cellular level. . . . [H]is discovery has important applications in the development of new strategies for the fundamental understanding of the generation of baseline data that can be applied to eliminating CMV symptoms in [REDACTED]

Prof. [REDACTED] also stated that the petitioner “performed a critical role in two . . . research projects on controlling aphid-borne viruses in cucurbit crop plants”:

[The petitioner] played a key role in analyzing computer-based statistical data analysis of variance using SAS program which revealed that UV-reflective mulches can reduce insects from entering a crop with coincidental reductions in virus incidence. . . . Further, [the petitioner] collaborated in the research on “Inter-row soil cover to reduce incidence of aphid-borne virus in pumpkin.” . . . [T]he data revealed that pumpkin plants grown with an inter-row soil cover demonstrate lower aphid-borne virus burden during the 2-year investigation period (2006-2007).

Professor [REDACTED]’s letter contains similar observations and, at times, the same wording. Both letters, for instance, indicate that the petitioner’s findings are useful “for home grown farmers in the southeastern United States who wish to grow summer squash in early summer in order to avoid abundant sources of virus and large insect vector populations that may occur at later times during the growing season.”

Three witnesses are officials of [REDACTED] assistant corporate counsel for [REDACTED], stated:

[The petitioner] is an exceptional research scientist who is recognized for significant contributions in the field of food and agricultural biosecurity, plant/food safety and quality, food microbiology, and plant sciences-plant biology.

. . . His main duties are to conduct leading edge research in the projects funded by the USDA, FDA, and Food Industry. He plays a critical role in plant/food safety research projects. . . .

[The petitioner] was recruited by [REDACTED] based on his exceptional research ability and accomplishments in the area of plant sciences-plant pathology. [The petitioner] has made original scientific research contributions to the understanding of the control and management methods of vegetable crop diseases as well as the prevention of plant-based food products from contamination with food-borne pathogens. . . . If he were replaced by scientists having only the minimum qualifications, the research projects would suffer a substantial delay.

[REDACTED] executives provided further details regarding the petitioner's work for the company. Dr. [REDACTED] president and chief executive officer of [REDACTED], described the petitioner's work for that company:

[The petitioner] has conducted important research on the effect of ascorbic acid wash treatments on shelf life of minimally processed leafy vegetables. . . . His pioneering research . . . serves as a basis for developing and reinforcing new hygienic strategies to extend shelf life of leafy vegetable products as a guideline for fresh produce growers all over the U.S.

[The petitioner] elucidated a novel molecular biology approach to detect spoilage microorganisms on leafy greens. . . . Indirectly, his approach has diminished the risk of human pathogen contamination associated with bacterial spoilage. . . . His research indicates that early detection will aid in an appropriate post-harvest management strategy which can extend the shelf life of food and reduce product loss. . . .

[The petitioner] has developed at least three novel micro methodologies based on chemical, physical, and biological treatments to decontaminate plant seeds for sprout production. . . . Collectively, these methods are aimed at reducing the populations of spoilage bacteria . . . and diminish[ing] the risk of foodborne illnesses associated with sprout consumption. . . .

[The petitioner] is the lead scientist in the important FDA-, USDA- and food industry-funded research projects at [REDACTED] which are currently in a very critical stage;

in my opinion, it would be impossible to find someone with his expertise and novel knowledge in food safety research to continue them.

Dr. [REDACTED]'s vice president for [REDACTED], offered many of the same observations, stating, for instance, that the petitioner "developed at least three novel methodologies to decontaminate plant seeds for sprout production."

Letters from other witnesses overlap in terms of structure and, sometimes, exact wording. The phrase "early detection will aid in an appropriate post-harvest management strategy which can extend the shelf life of food and reduce product loss," found in Dr. [REDACTED]'s letter, appears in slightly modified form in a letter from Dr. [REDACTED] senior researcher for the [REDACTED] "early detection of their presence will aid in appropriate post-harvest management strategies which can extend the shelf life of plant food and reduce product loss."

Dr. [REDACTED]'s letter contains the sentence:

He was the first to discover that the average extent of bacterial spoilage pathogens in leafy samples, using his multiplex PCR, revealed 37.2% of tested samples collected in the [REDACTED] California, the largest fresh vegetable production district in the world, to be shown to harbor both *Erwinia carotovora* and *Pseudomonas syringae*, the most prevalent bacterial plant pathogens causing spoilage in varieties of vegetables.

A variant passage appears in a letter signed by Dr. [REDACTED], director of Scientific and Regulatory Affairs for Diagnostics for the [REDACTED] Ltd.:

He was the first scientist who discovered the average extent of bacterial spoilage pathogens by 37.2% of tested leafy samples collected in the [REDACTED] California, the largest fresh vegetable production district in the world, to be shown to endemically harbor the most prevalent bacterial plant pathogens causing spoilage in varieties of vegetables.

A letter signed by Dr. [REDACTED] director of [REDACTED] Production at [REDACTED] Inc., contains another variation of this same passage:

[The petitioner] was one of the first ever to discover that the average extent of bacterial spoilage pathogens in leafy samples collected in the [REDACTED] California (the largest fresh vegetable production district in the world) revealed 37.2% of tested samples to be shown to endemically harbor two major plant-pathogenic bacteria; *Erwinia carotovora*, and *Pseudomonas syringae*, the most prevalent bacterial plant pathogens causing spoilage in varieties of vegetables.

All three of the above quoted passages resemble a passage found in Dr. Samadpour's letter:

His significant studies showed that 37.2% of tested leafy samples collected in the Salinas Valley, California, the largest fresh vegetable production district in the world, were shown to harbor both *Erwinia carotovora* and *Pseudomonas syringae*, the most prevalent bacterial-plant pathogens causing spoilage in the leafy green samples.

The petitioner also provided his own 23-page statement, describing his work in technical detail. This statement includes another variation of a passage that appears in several witness letters:

The testing for bacterial spoilage pathogens in leafy greens using multiplex PCR showed that 37.2% of samples collected in the [REDACTED] California (the largest fresh vegetable production district in the world) were shown to harbor both *Erwinia carotovora* and *Pseudomonas syringae*, the most prevalent bacterial plant pathogens causing spoilage in varieties of vegetables.

Given the demonstrable similarities between the letters as well as the petitioner's statement, detailed discussion of each of these exhibits would be redundant. The letters contain detailed discussion of the claimed importance of the petitioner's work, but the initial submission did not include documentary evidence to support those claims.

The petitioner submitted documentation relating to two provisional patent applications that [REDACTED] filed in 2012, relating to an [REDACTED] and a [REDACTED]. The petitioner called this material "[e]vidence that [the petitioner] is a main inventor of the Patent Application[s] (Pending)." The petitioner's name does not appear in the submitted patent application documents; the only identified inventor is Dr. [REDACTED]. Therefore, those documents are not evidence that the petitioner is a main inventor as claimed. Furthermore, development of a patented innovation is not always sufficient to meet the national interest threshold. The petitioner must establish that the specific innovation serves the national interest. See *NYS DOT*, 22 I&N Dec. 221 n.7.

The petitioner stated that he "has published significant scientific research papers" and presented his work at conferences, and that "[o]ther scientists have cited [the petitioner's] research publications as authoritative in their scientific papers." A printout from the Google Scholar search engine shows a total of six citations of the petitioner's published work, with three articles respectively cited one, two, and three times. The printout did not identify the citing articles or their authors, and therefore the petitioner did not establish how many of the citations are independent citations rather than self-citations by the petitioner and/or his co-authors.

The petitioner also submitted copies of five claimed citing materials. The petitioner's exhibit list showed six items, but item 6 is a repetition of item 4 on the list. Regarding the first of the five items, the petitioner stated: "Dr. [REDACTED] and his colleagues . . . published a review article entitled [REDACTED] on the most important research

achievements, which included [the petitioner's] research publication." The petitioner did not submit a copy of an article with that title. Instead, the petitioner submitted grant funding documentation relating to Dr. [REDACTED]'s laboratory. The grant documentation, bearing the title "Research Spending & Results," identifies the "Award Title or Description" as "[REDACTED]" and it lists several "Publications Produced as a Result of this Research." The petitioner's article appears in that list. Thus, the evidence indicates that Dr. [REDACTED]'s research led to the petitioner's article, rather than *vice versa* as the petitioner claimed.

The petitioner's own *curriculum vitae* repeats the assertion that Dr. [REDACTED] wrote "a review article . . . entitled '[REDACTED]'" but the record contains no evidence that such an article exists. The petitioner did not identify the journal that purportedly published this article. The *curriculum vitae* also identifies the same four citing articles named in the petitioner's exhibit list. The petitioner submitted copies of those four articles.

The first citing article is by [REDACTED] researchers, including the petitioner's co-authors [REDACTED] and [REDACTED] citing their own previous work with the petitioner. Likewise, the fourth citing article is by [REDACTED]. The petitioner's initial submission, therefore, documents two independent citations of the petitioner's work.

The director issued a request for evidence on March 25, 2013. The director requested additional citation evidence and "documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest."

In response, the petitioner submitted copies of additional articles and conference presentation materials. These materials show that the petitioner continues to be a productive researcher, but the petitioner's own articles and presentations are not evidence of their own impact. Evidence that post-dates the filing of the petition cannot retroactively establish eligibility as of the filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. §§ 103.2(b)(1), (12). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner submitted an updated Google Scholar printout showing seven citations of his work, again without identifying the citing articles. The petitioner also submitted copies of the same four citing articles submitted previously, along with the grant documentation regarding Dr. [REDACTED]. On this occasion, the petitioner did not call it a "review article." Instead, the petitioner stated: "Dr. [REDACTED] and his colleagues . . . wrote a [REDACTED] report entitled [REDACTED] on the most important research achievements, which included [the petitioner's] Research publication." The "[REDACTED]" document does not single out the petitioner's work as being among "the most important research achievements." Rather, it lists "Publications Produced as a Result of this Research." The submitted list identifies 71 articles, with nothing to distinguish the petitioner's article from the other

70 listed titles or to indicate that these articles are “the most important” out of a larger pool of articles.

In a letter dated April 4, 2013, Dr. [REDACTED] the petitioner’s vice president for research and development, stated:

For the last 6 months, [the petitioner] has focused his efforts on developing diagnostic kits intended to improve food safety, while continuing on his basic research pertaining to leafy green and sprout food safety. . . .

In November of 2012 our company expanded our corporate interests to include development of antibody-based diagnostic kits for detection of food-borne pathogens and FDA-regulated food allergens.

Dr. [REDACTED] then explained the petitioner’s role in this project. The petitioner submitted several documents relating to the detection kit project. The project did not begin until November 2012, several months after the petition’s August 7, 2012 filing date; the project documents all date from 2013. Therefore, whatever the merits of this project, it cannot establish that the petitioner was already eligible for the waiver at the time of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The director denied the petition on May 16, 2013, stating that the petitioner met the first two prongs of the *NYSDOT* national interest test, pertaining to intrinsic merit and national scope, but had not met the third prong by establishing his past influence on his field as a whole. The director acknowledged that the petitioner’s witnesses described his work in great detail, but the director found that the record did not contain objective documentary evidence to corroborate the witnesses’ claims regarding the importance of the petitioner’s work (rather than the unchallenged overall importance of food safety research).

The director asserted that publication is evidence of the originality of the petitioner’s work, but that the petitioner had not shown that “the research community’s reaction to those articles” sets the petitioner’s work apart from that of others in the field. The director acknowledged several of the petitioner’s ongoing projects, but found no evidence that they have yielded products that are “currently being used.” The director also noted the patent applications, stating: “these patents are still pending and no inference can be drawn by the Service concerning their effect on the petitioner’s field of endeavor.”

On appeal, the petitioner submits several dozen exhibits. Most of the exhibits submitted on appeal are duplicates of materials previously submitted with the initial filing of the petition or in response to the request for evidence. Among the duplicate exhibits are the patent application materials from the initial filing. The record does not show that the petitioner holds any patents. [REDACTED] had filed both of the applications as provisional patent applications, which are placeholders to preserve an inventor’s

priority while a more complete application is in preparation. The web site of the U.S. Patent and Trademark Office states:

A provisional application for patent . . . allows filing without a formal patent claim, oath or declaration, or any information disclosure (prior art) statement. It provides the means to establish an early effective filing date in a later filed non-provisional patent application filed under 35 U.S.C. §111(a). It also allows the term “Patent Pending” to be applied in connection with the description of the invention.

A provisional application for patent (provisional application) has a pendency lasting 12 months from the date the provisional application is filed. The 12-month pendency period cannot be extended. . . .

A provisional application cannot result in a U. S. patent unless one of the following two events occur within 12 months of the provisional application filing date:

1. a corresponding non-provisional application for patent entitled to a filing date is filed that claims the benefit of the earlier filed provisional application; or
2. a grantable petition under 37 CFR 1.53(c)(3) to convert the provisional application into a non-provisional application is filed. . . .

Provisional applications are not examined on their merits.¹

s submitted provisional patent applications show receipt dates of February 13, 2012 and June 1, 2012. By the time the petitioner filed the appeal on June 18, 2013, the 12-month deadline to file a non-provisional application had passed for both of the provisional applications. The petitioner continues to call the applications “[p]ending,” but the appeal includes no evidence that followed up on the provisional applications by converting them or filing non-provisional patent applications.

The same web page advises: “If there are multiple inventors, each inventor must be named in the application.” As noted previously, the submitted documents relating to the provisional patent application do not name the petitioner as an inventor.

The petitioner’s appellate brief begins with the assertion that has hired the petitioner “to develop cutting edge antibody-based diagnostic kits for detection of FDA-regulated food allergens.” The appeal includes a new letter, dated June 13, 2013, in which Dr. praises the petitioner’s past and present work but emphasizes the detection kits as the petitioner’s “primary role” and the means by which his efforts will benefit the United States.

¹ Source: <http://www.uspto.gov/patents/resources/types/provapp.jsp> (printout added to record February 27, 2014).

As noted previously, the initial filing of the petition did not mention these diagnostic kits, and Dr. [REDACTED] states that the petitioner did not begin the project until November 2012, several months after the petition's August 2012 filing date. The petitioner's subsequent work on the kits cannot establish that the petition was already approvable in August 2012, before he began that work.

Dr. [REDACTED] does not claim that the kits are in commercial use. Rather, he states that "these detection Kits will be distributed in the market in the near future." Dr. [REDACTED] claims that the kits' "significant influence has already been proven by the distinctive ability to detect very low levels of antigen and to detect across a broad dynamic range that exceeds that of commercially available rapid diagnostic tools that are currently employed in the food industry." Dr. [REDACTED] does not explain how claims regarding the superiority of the kits have "proven" their "significant influence" even before they have become available.

Dr. [REDACTED] refers to the petitioner's "ongoing contributions in patenting a [REDACTED] product at our company," but the record does not establish that the petitioner's name appears on any patent or patent application.

The petitioner asserts that, in the initial submission, he "proffered seven (7) expert opinion letters to attest that he has made original research contributions of important influence in the field." The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.*

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. See *id.* at 795; see also *Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). See also *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 letters described the petitioner's work in detail, but the record lacks corroborating evidence to support the claims in the letters regarding the influence of the petitioner's past work. Therefore, the letters themselves are the petitioner's only evidence of that influence. Furthermore, the demonstrable similarities between the witness letters and the petitioner's own introductory statement are consistent with common authorship. These similarities support the inference that the petitioner himself is the source of the common language. Cf. *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d

517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). Letters apparently from a common source, unsupported by verifiable documentation, do not meet the petitioner's burden of proof. The record establishes that the petitioner conducted the research described in the record, but not that the petitioner's work has influenced the field as a whole and thereby warranted approval of the national interest waiver.

The petitioner asserts that the director erred because the Department of Labor would not approve an application for labor certification tailored to the petitioner's skills and background. This assertion repeats a claim from the initial filing. The petitioner supports this assertion by quoting the phrases "normally required for the job in the United States" and "Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.)," which originated in the former regulations at 20 C.F.R. §§ 656.21(b)(2)(i)(A) and (B) (2003). The quoted regulations are obsolete; see 69 Fed. Reg. 77326 (December 27, 2004). The current regulation at 20 C.F.R. § 656.17(h) states:

The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

Furthermore, the claim that the petitioner would have difficulty obtaining labor certification does not establish that it is in the national interest to waive the statutory job offer requirement. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien seeking the waiver will serve the national interest to a substantially greater degree than do others in the same field. See *NYSDOT* at 218 n.5.

The petitioner quotes from *NYSDOT* at 219 n.6: "The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole." The petitioner contends that the "Director erred in seeking a quantified threshold of the total number of citations to judge Petitioner's past achievements and influence in the field." The director's decision is not in conflict with *NYSDOT*. In context, the sense of the quoted passage is that one need not hold a particular degree or have a particular amount of past employment experience in order to qualify for the waiver (beyond degree and/or experience requirements inherent in the statute and regulations). The director, by finding the petitioner's citation record to be minimal, did not require "a quantified threshold of experience or education." The petitioner's truncation of the phrase to "a quantified threshold" omits crucial context.

The petitioner states that USCIS “has long reorganized [*sic*] that citations can be much fewer in certain fields,” and that the director “deviated [from] this correct policy.” The petitioner has submitted no evidence to establish average citation rates in the petitioner’s field or to show that the citation rate of the petitioner’s articles is high when compared to others in that same field.

The petitioner states that he “has been making tremendous effort to apply his novel research discoveries and new methods to develop advanced products.” The record does not show that any of those products had reached the market by the petition’s filing date, or that the petitioner’s work had influenced the field as a whole at that time.

The petitioner has not established a past record of 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. *NYS DOT* 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.

We will dismiss the appeal 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 appeal is dismissed.