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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 15 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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:

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 matter is now before 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 an alien of exceptional ability in the sciences. At the time he filed the petition, the petitioner was a part-time graduate research assistant in dairy foods technology 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 found that the petitioner qualifies for the classification sought, 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 supporting 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 petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds a master's degree from qualifies as a member of the professions holding an advanced degree. An additional determination regarding the petitioner's claim of exceptional ability would be moot. 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 April 11, 2013. An introductory statement listed the supporting exhibits and stated, without elaboration, that the submitted evidence warrants approval of the waiver.

Several letters accompanied the petition, all from witnesses with ties to Dr. director of 's School of Animal Sciences, described the petitioner's studies and research at that institution:

> [The petitioner's] Master's thesis . . . research examined the use of low sonication conditions to enhance growth characteristics of bacteria cultures used to manufacture yogurt. This was a very unique, cutting edge technique for enhancing growth of bacteria cultures commonly used for making yogurt.
>
> [The petitioner] was accepted into a PhD program in functional dairy foods technology in the School of Animal Sciences in May 2011. While numerous students complete Master's degrees in the functional dairy foods lab, very few are awarded the opportunity to continue their training by pursuing a PhD in the same lab. This is one indication of his exceptional ability and reputation compared to others similarly employed in the functional dairy foods industry. His current research program is also very groundbreaking; using nanoparticles to reduce the sodium content of cheddar cheese and butter.
>
> [The petitioner] has several peer-reviewed research publications in scientific journals. He has made several presentations of his research findings at national and international scientific meetings. . . .
>
> He has also won several awards for the quality and innovation of his research. He was awarded first place at the 2012 graduate student research competition; 2nd place at the food product development competition in 2009; 4th place at the 2010 graduate student research competition and 5th place at the 2011 graduate student competition.

Regarding the awards identified above, the petitioner submitted printouts from the 's web site, identifying the petitioner as a "runner-up" in 2010 and 2011, but no evidence to confirm his claimed first place award in 2012. The petitioner also did not document his claimed second place award from in 2009. These two claimed awards also do not appear in the petitioner's exhibit list. Not every witness mentioned the petitioner's awards, but those that did mentioned only his runner-up showings in 2010 and 2011. Dr. is the only witness to claim that the petitioner won first place at the 2012 competition. 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)).

Dr. asserted: "While numerous students complete Master's degrees in the functional dairy foods lab, very few are awarded the opportunity to continue their training by pursuing a PhD in the same

lab." This is an objective, empirical claim, but the record contains no evidence to support it, such as documentation of the number of master's students in the lab and the number of those who continue in a doctoral program there. *See Matter of Soffici*, 22 I&N Dec. at 165. Even if the ratio of the second group to the first group were low, the petitioner would also need to establish how many of the master's students sought to remain there for their doctoral studies. A low number of students remaining in the lab for doctoral studies does not, by itself, establish that other students had sought, without success, to remain there.

Dr. , associate professor at stated:

> In January 2009 [the petitioner] officially became my graduate research assistant. . . .
>
> [The petitioner's] research determined that the sonication pasteurization method was more effective than the industrial pasteurization method in lowering coliform bacterial counts and total aerobic bacterial counts. It indicated that the whole milk processed by sonication is microbially safer to drink than the milk processed by high temperature and short time pasteurization method. . . .
>
> Also, he has worked on the application of mild sonication to improve the probiotics survival characteristics (tolerance [of] bile and acid fluids) of yogurt culture bacteria *Streptococcus thermophiles* ST-M5 and *Lactobacillus bulgaricus* LB-12. The results demonstrated that the application of mild sonication intensities improved some probiotics characteristics of the culture used in the yogurt manufacture, which also positively influence human health. . . .
>
> Additionally, his current PhD research work in the development of a nanosalt by the application of nanotechnology to reduce the sodium in dairy products is likely to have a significant impact on the development and production of healthier products.

Dr. stated:

> I am currently a Research Microbiologist at [the] since 2011. Before this position, I was an Associate Professor in the Department of Food Science at for 7 years. . . .
>
> [The petitioner] is [a] very sharp, dedicated and capable scientist. . . . The significance of [the petitioner's] work is rooted in his abilities to address old problems (dairy products with high sodium content and yogurt culture survival to the gastro intestinal conditions) with new approaches, based on the integration of his research expertise in different fields of processing functional dairy products, which are foods that go beyond simple nutrition and have specific targeted action, such as the enhancement of a certain physiological function or the reduction of cancer risk and cardiovascular disease. . . .

> With [the petitioner's] contributions, important advances were made in the field of processing functional dairy products (the enhancement of yogurt culture bacteria to tolerate probiotic characteristics and the use of nanotechnology to reduce sodium in dairy products).

Dr. assistant professor at "provided assistance [to the petitioner] in equipment and characterization of nanoparticles" in 2012. Dr. praised the petitioner's "willingness to develop new ideas and obtain solution[s] to important research issues," and stated that the petitioner's "unique cross-disciplinary background . . . provides him with the skills to make noticeable advances in the field."

Professor executive director of International Programs at stated that the petitioner's "multidisciplinary approach to his training and education makes him stand out from his peers." Prof. asserted that the petitioner's most recent research "is a significant contribution to the dairy industry in the production of low sodium dairy products."

Dr. scientific director of earned both of his degrees (a bachelor's degree in animal science and a doctorate in reproductive physiology) at Dr. discussed the petitioner's work in general terms, and concluded "that he has had a significantly higher impact in research in the field of Processing of Functional Dairy Products, compared to those equally employed in the same field." Dr. did not claim, and his *curriculum vitae* does not reflect, any specialized training or expertise in food science; his "areas of research and interest include in vitro fertilization, microsurgical procedures and embryo transfers in humans."

The initial witness letters do not establish the extent, if any, of the petitioner's impact beyond

The petitioner submitted copies of three journal articles, all published in 2012. Two articles appeared in the third in The petitioner also documented 12 conference presentations.

The director issued a request for evidence on May 24, 2013. The director quoted from some of the witness letters, and stated: "The record . . . does not demonstrate that you pioneered novel discoveries or that you are more skilled than others who perform the same or similar work. . . . [T]he record lacks any demonstrable prior achievements" that would demonstrate eligibility for the waiver. The director stated that the petitioner "must be able to demonstrate . . . a degree of influence on the field" to set him apart from others in that field.

In response, the petitioner submitted two new witness letters; copies of two previously submitted letters; a certificate naming the petitioner "3rd Place Winner" of the ' and a July 21, 2010 story from An

accompanying statement quoted from the various exhibits and stated that "the record clearly indicates, that [the petitioner] has a degree [of] influence in the field that distinguishes him from other Functional Dairy Food Researchers with comparable academic and professional qualifications."

The story reported on the petitioner's presentation at an annual meeting, regarding the use of sound waves to pasteurize milk using less energy, and at a lower temperature, than the conventional method. The story predated the filing of the petition by nearly three years, but the petitioner did not submit any evidence that milk producers have subsequently adopted the sonication method described in the petitioner's presentation. Without evidence of wider adoption, or continuing research based on the petitioner's findings, the article does not establish that the petitioner's work has influenced the field as a whole.

The new witness letters, like most of those submitted earlier, are from faculty members. Professor stated that the petitioner's graduate research "showed that he was an outstanding, innovative and capable scientist," and "has contributed significantly to the scientific dairy food area. . . . His continued presence in the United States is vital to our research efforts in this field." Concerning the petitioner's latest work, Prof. stated that the petitioner's "sodium reduction alternative contributes significantly to the production of low sodium dairy products," but the record does not show that the petitioner's methods have led to the manufacture of such products.

Dr. associate professor at and a co-author of two of the petitioner's three published articles, stated that the petitioner's various graduate projects, described above by other witnesses, "establish his ability to produce future benefits to the United States in the Processing of Functional Dairy Products." Dr. did not identify any product resulting from the petitioner's work that has reached the market, or any company that has sought to commercialize that work. The petitioner's research is practical rather than theoretical, but the record does not show that the petitioner's findings have been, or are being, put into practice outside of

The director denied the petition on October 24, 2013, stating that the petitioner had satisfied the first two prongs of the *NYSDOT* national interest test, pertaining to intrinsic merit and national scope, but that the petitioner had not established his impact on the field. The director stated that the petitioner had not shown that other researchers have cited the petitioner's published work, and that the record does not corroborate the witnesses' claims regarding the importance of the petitioner's research. Concerning the witness letters, the director stated:

> With respect to support letters, while the opinions of experts in the field are not without weight, 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 eligibility for the benefit sought. While the letters bolster the beneficiary's research findings, they do not establish that the beneficiary's expertise serves the national interest better than another qualified U.S. worker in the same field.

On appeal, the petitioner submits a partial copy of his completed doctoral dissertation (dated December 2013, although he submitted it on November 25, 2013). Completion of the dissertation demonstrates progress toward the awarding of a doctorate, but a doctorate does not establish eligibility for the waiver. Under section 203(b)(2)(A), a member of the professions holding an advanced degree remains subject to the job offer requirement, and the petitioner did not yet hold a doctorate when he filed the appeal. A letter from Dr. indicates that the petitioner "will graduate . . . with a PhD in Dairy Foods Technology on December 13, 2013."

Even if completion of the dissertation were a qualifying factor, the petitioner completed it after the petition's April 2013 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). 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).

On appeal, the petitioner states: "The decision noted the minimal citations to the Petitioner's work diminished its importance to the scientific community. Enclosed with this appeal are four new citations to the Petitioner's research. [Tabs 4-7]." Tab 4 corresponds to a series of abstracts published in a supplement to the the petitioner is a co-author of one of the abstracts. The petitioner does not explain how the publication of his own abstract is a "citation to the Petitioner's research."

Tabs 6 and 7 correspond to grant applications that Dr. filed, seeking continued funding from the The applications list the publications that have already resulted from the funded research. Among these publications are articles that Dr. wrote with the petitioner. Dr. 's list of his own publications in a grant application does not show that other researchers have cited the petitioner's published work.

Only one of "four new citations" is actually a published citation to the petitioner's published work. The citation appeared in an article in the The article has no date, and therefore it is not evident whether or not the article appeared before or after the petition's filing date.

The petitioner quotes from previously submitted witness letters, and asserts that the director did not give sufficient consideration to those letters. The petitioner states:

> *Matter of Caron International* is distinguishable from the instant case as it deals with the definition of a "professional" and eligibility for an H-1 visa under the INA of 1970. It does not address the scope of the present issues. . . . Accordingly, *Matter of Caron* is not controlling considering the evidentiary weight of the letters of support written on behalf of [the petitioner].

The specific issue in dispute in *Caron* is not the same as the issue in the present proceeding, but the reasoning behind *Caron* is not limited exclusively to the question of whether a given position requires a baccalaureate degree, and the petitioner has not explained why it should be limited in that way. *Caron* articulated the general provision that USCIS may evaluate the content of witness letters as to whether they support the alien's eligibility, and that USCIS may 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. at 165. In this instance, all of the witnesses are current or former LSU researchers. Therefore, the composition of the witness pool does not indicate that the petitioner's work has had impact or influence outside of LSU.

One of the letters quoted on appeal is from Dr. [redacted] who, as noted above, is not and does not claim to be a food scientist. The petitioner does not explain why this witness should be considered an authority in the petitioner's specialty. Another witness, Dr. [redacted] claimed that the petitioner received an award that no other witness has mentioned, and which the petitioner himself has neither claimed nor documented. More generally, the witnesses have described the potential significance of the petitioner's various research projects, but have not established that those projects have actually influenced the dairy industry with respect to, for instance, the pasteurization of milk.

The petitioner states: "The denial also makes no mention of the national awards . . . given by the [redacted] Recognition for achievements and significant contributions to the field can provide partial support for a claim of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(F). Because section 203(b)(2)(A) of the Act subjects aliens of exceptional ability to the job offer requirement, partial evidence of exceptional ability is not *prima facie* evidence that the petitioner qualifies for the waiver.

The petitioner has not established the significance of what he calls "national awards." In 2010 and 2011, the petitioner was named as a "runner-up" behind the first, second, and third place awardees. The petitioner's 2013 third-place award is not national; it was from the [redacted] of the [redacted] rather than the national organization. As the petitioner acknowledges, his recognitions from the [redacted] are inherently limited to graduate students, and as such they do not establish or imply his standing in comparison to fully qualified, established professionals in his field.

The record does not support the petitioner's assertion that "the record clearly indicates, that [he] has a degree of influence in the field that distinguishes him from other Functional Dairy Food Researchers with comparable academic and professional qualifications."

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. *NYSDOT*, 22 I&N Dec. 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 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 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.