

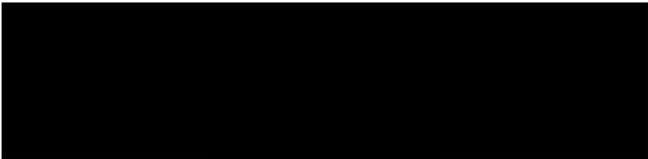


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FILE: [REDACTED]
LIN 06 007 51828

Office: NEBRASKA SERVICE CENTER

Date: MAY 30 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

fc *Maura Deadrick*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner seeks employment in the sciences. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and an additional letter of support. While not all of counsel's assertions are persuasive, we are satisfied that the petitioner has established his eligibility for the benefit sought.

Section 203(b) of the Act states in pertinent part that:

(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 requirement 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 issue of whether the petitioner may be an alien of exceptional ability is moot. The petitioner holds a Ph.D. in Aerospace Engineering and Mechanics from the University of Minnesota. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor 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 the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep’t. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, fluid mechanics and nanotechnology, and that the proposed benefits of his work, improved understanding of viscous potential flows and nanoparticle filtration, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep’t of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a “unique background.” Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-

trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner studied at the University of Minnesota under the direction of [REDACTED], a member of the National Academy of Engineering and the National Academy of Science. As a postdoctoral fellow, the petitioner has continued in [REDACTED] laboratory as well as working in the laboratory of [REDACTED], Director of the Particle Technology Laboratory at the University of Minnesota. The petitioner's work in [REDACTED] laboratory, however, had not been published as of the date of filing. Thus, that work had yet to be disseminated in the field and will not be considered. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

First, not all of the evidence carries the weight claimed by counsel. The petitioner submitted evidence of his academic fellowship from the University of Minnesota based on the potential of the petitioner's research proposal, his membership in the American Physical Society and a request to review an article from [REDACTED], Co-Editor of *Mechanics Research Communications*. Significantly, [REDACTED] requests that if the petitioner is too busy to complete the review, that he suggest a "colleague or post-doc at your own institution."

The director noted that memberships and recognition for achievements may be indicative of exceptional ability but that exceptional ability is not, in and of itself, a basis for waiving the alien employment certification process. On appeal, counsel asserts that the petitioner's accomplishments are beyond those set forth in the regulations for exceptional ability and should not have been dismissed.

Counsel is not persuasive. The statutory standard for exceptional ability is a degree of expertise significantly above that ordinarily encountered in the field. The petitioner submitted no evidence that the American Physical Society requires anything other than the payment of dues and participation in the field for membership. Without such evidence, the petitioner has not demonstrated that this membership is indicative of an influence in the field, at issue when considering whether to waive the alien employment certification process.

Regarding the fellowship, it appears to be based on the potential of the petitioner's proposal rather than in recognition of past influential work. Further, regarding the invitations to review manuscripts, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review

submitted articles. Thus, peer review is routine in the field; not every peer reviewer can be presumed to have influenced the field.

Regardless, as stated above, the issue of exceptional ability is moot. As noted by counsel, the national interest waiver is available to both advanced degree professionals and aliens of exceptional ability. The petitioner is an advanced degree professional. Thus, he need not demonstrate that he is also an alien of exceptional ability according to the evidentiary requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii). Even if we concluded that the petitioner was also an alien of exceptional ability, that classification normally requires an alien employment certification certified by the Department of Labor. Thus, we agree with the director that meeting one criterion, or even the requisite three criteria for aliens of exceptional ability does not, by itself, warrant a waiver of the alien employment certification requirement in the national interest. *Id.* at 222.

The petitioner also submitted several reference letters discussing his work in the field. Citizenship and Immigration Services (CIS) 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. 1988). However, CIS 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; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of an interest or positive response within the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

explains that the petitioner authored articles on lift in shear flows and "pioneered the use of empirical correlations on data sets generated by numerical simulations." In addition, discusses his own proposal that potential flow does not apply to the flow of inviscid fluids as commonly thought; rather, "when considering the potential flow it is never necessary and usually not useful to put the viscosity to zero." asserts that this is a major revision to the foundations of classical fluid mechanics, the demonstration of which posed a serious challenge to classical mathematical analysis. continues: "This is where [the petitioner's] superior analytical skills really shined. He prepared a series of really brilliant demonstrations of the validity of the main idea, putting the meat on the bones and making the major concept alive for the first time."

In addition, states:

Furthermore, his work even extends to a major revision of traditional boundary layer theory which takes into account the effects of viscosity on the potential flow outside. His work is a major advance in the field of dynamics of viscous fluids. This kind of work is not expected of a graduate student and would be considered as a major achievement even by a standard of established career scientists. The work resulted in a series of significant papers. Though I am second author on these papers, the main analytical ideas come from [the petitioner] himself. Most of these papers are accepted or have appeared in the best journals; others are under review.

Finally, [redacted] discusses the petitioner's recent work that had yet to be disseminated in the field as of the date of filing. Thus, we will not consider this work as evidence of eligibility as of that date.

The director noted that the petitioner had not held a co-investigator position prior to the date of filing. On appeal, counsel notes that the petitioner was qualified for this position as of the date of filing. We do not find that whether the petitioner was qualified as a principal investigator as of the date of filing is determinative. While such a position may be unusual for a postdoctoral researcher and indicative of his potential, the position itself has limited relevance to the issue of the petitioner's personal influence in the field. The record does not establish that principal investigator status is indicative of a past influence in the field rather than the normal career progression for those researchers who have completed their training. Thus, even if we concluded that the petitioner was a principal investigator as of the date of filing, that would not, by itself, justify a waiver of the alien employment certification process. Ultimately, [redacted] has affirmed the petitioner's roles on various completed projects based on his first hand knowledge of those roles. Thus, the more important issue is the influence of the published articles reporting the results of these projects.

[redacted], a professor at the New Jersey Institute of Technology, asserts that he has known the petitioner since he first began his studies at the University of Minnesota. Specifically, [redacted] has visited the University of Minnesota during collaborations with [redacted]. [redacted] asserts that the petitioner "introduced several excellent ideas for analyzing the results of direct numerical simulations," which allowed him to obtain "power law correlations for the particle velocity and equilibrium positions; including a formula for the lift force, similar to that of aerodynamics." [redacted] characterizes this work as "extraordinary." [redacted] further asserts that the petitioner showed that the pulling power of polymeric liquids can be greatly enhanced by adding nano sized particles. By studying floating particles with sharp edges the petitioner showed that the contact angle at the edge of a disk can be as large as 90 degrees. Finally, [redacted] asserts that the petitioner studied the potential flow of a second order fluid over spheres, showing that the viscoelastic effects are in competition with the inertia effects. These results are "in good agreement with several experimental observations in viscoelastic fluids."

[redacted] Endowed Chair in Engineering at the University of California, Irvine (UC Irvine) and a member of the National Academy of Engineering, asserts that he knows the petitioner through his articles and his presentations at UC Irvine. [redacted] affirms the significance of the

petitioner's research focus and asserts that the publication of the petitioner's work in top journals is evidence that his work has been "well received." As discussed above, at issue is the influence of the individual article, not the prestige of the journal in which it appeared. More significantly, [REDACTED] asserts that he "referenced several of [the petitioner's] publications on viscous potential flows" in two recent grant proposals. [REDACTED] asserts that his proposed research is just one of example of the opportunities for new approaches opened by the petitioner's "pioneering advancements."

[REDACTED], Director of Research at the French National Center for Scientific Research, asserts that he learned of the petitioner's work through reading his 2004 article on potential flow over a sphere. [REDACTED] asserts that he used the petitioner's paper "to design and test my experiments on complex fluids such as foams." [REDACTED] affirms that his results are in agreement with the petitioner's theoretical calculations. The record contains an article by [REDACTED] in which he cites two of the petitioner's first-authored articles. [REDACTED] spends an entire paragraph discussing how his work is consistent with the petitioner's 2004 article in the *Journal of Fluid Mechanics* and a manuscript "in preparation." In addition, at the end of the article, [REDACTED] thanks the petitioner for "enlightening discussions." The petitioner is the only member of his research team listed in the acknowledgements.

We will not presume that simply working with a member of the National Academy of Science or the National Academy of Engineering is evidence of an influence in the field. Nevertheless, the opinions of members carry significant weight. In this matter, the record contains two highly persuasive letters from members, including one who is independent of the petitioner and who is relying on the petitioner's work in his current research proposal. The letter from [REDACTED], in combination with his thorough citation of the petitioner's work, is also persuasive.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.