

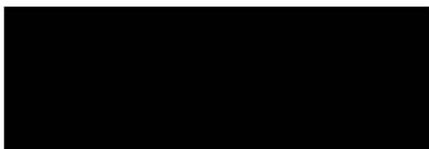


U.S. Citizenship
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Services

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FILE: LIN 06 073 52596 Office: NEBRASKA SERVICE CENTER Date: DEC 02 2008

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:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. At the time she filed the petition, the petitioner was a postdoctoral research associate at Washington University in St. Louis, Missouri. 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.

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

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

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

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

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

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In a statement accompanying the initial filing, counsel referred to the petitioner as “a computational biologist,” although all of the petitioner’s degrees relate to chemistry rather than biology. The record contains no evidence that the petitioner’s work related directly to biology or medicine before September 2004, roughly 16 months before she filed the present petition.

The petitioner’s initial submission included seven letters, each from a past or present collaborator, professor or superior. We shall discuss examples of these letters here. Several of the letters focus on the petitioner’s past work in polymer physics that had little to do, directly, with biology, medicine, or drug design. [REDACTED] of Syracuse University, taught a course to the petitioner while the petitioner was a doctoral student at the State University of New York College of Environmental Science and Forestry (which operates in cooperation with Syracuse University). [REDACTED] stated:

I first came to know [the petitioner’s] dedication to her field and her brilliant theoretical expertise when I had her as a student in my course, “Thermodynamics and Statistics.” . . . A

few years later I was also a member of her Ph.D. exam and thesis defense committees. On both occasions I was extremely impressed with [the petitioner's] ability and motivation.

[The petitioner's] Ph.D. research was related to both theoretical and applied aspects of physical chemistry. She focused on understanding the structure and thermodynamics of polymeric materials by observing two phenomena: percolation and shear flow. . . . Percolation can be observed in the common phenomenon of forest fires. Objects or small clusters, in this case a small brushfire, can be connected and eventually expand to form infinitely extended clusters, as in the way a forest fire spreads. In materials science terms, percolation significantly affects the mechanical properties of composite materials. Polymer solutions and blends are also subject to shear flow in many industrial applications where polymers are processed. [The petitioner] analyzed these phenomena using highly theoretical computational methods, then devised advanced her own [*sic*] modeling methods that can be applied to these and related topics.

Currently, at Washington University in St. Louis, [the petitioner] has used her impressive background in computational science to study the causes of Huntington's disease. . . . [The petitioner] has analyzed deformations in the structure of the protein, huntingtin, that is suspected of causing the onset of Huntington's disease and other neurodegenerative disorders. . . . In the past year, she has already made significant discoveries that are potential therapeutic targets for these diseases. The foundations that support her work clearly see in [the petitioner] a scientist who is capable of making a profound impact on the understanding a treatment [*sic*] of Huntington's disease.

The petitioner did not submit statements from "[t]he foundations that support her work," such as the March of Dimes Foundation, to corroborate [REDACTED] last statement. Therefore, it is not clear whether [REDACTED] assessment is based on statements from foundation officials, or merely on the assumption that, because the petitioner's work is grant-funded, the funding entities must therefore foresee "a profound impact" from the petitioner's work. [REDACTED] a physics professor whose "research is in theoretical condensed matter physics, spanning superconductivity, vortex matter in superconductors, nonequilibrium statistical physics and polymer physics," claimed no particular expertise in chemistry, biology or medicine.

The petitioner's supervisor at Washington University, Assistant [REDACTED] u, stated:

[The petitioner's] research efforts are focused on understanding the mechanisms of polyglutamine domain aggregation – an issue which has important implications for a variety of neurodegenerative disorders, including Huntington's disease. This is highly challenging work due to the difficulties in obtaining atomic-level information regarding events that nucleate the formation of deleterious protein aggregates. [The petitioner's] training in polymer physics and her growing expertise in the area of molecular simulations make her ideally-suited for the challenges of this research project. [The petitioner] has obtained intriguing results that will have a major impact on our mechanistic understanding of

polyglutamine aggregation. These insights are particularly relevant in identifying and targeting the molecular players responsible for neurodegeneration.

██████████ also of Washington University, offered further details about the petitioner's work at that university:

Huntington's disease together with nine other neurodegenerative disorders are known collectively as polyglutamine expansion diseases, science [*sic*] they are caused by the mutational expansion of polyglutamine domain in certain protein. . . . The proposed mechanism by which these diseases occur is the self-association of expanded polyglutamine domains. These domains undergo self-association, resulting in aggregates known as amyloids that are deposited within neurons, triggering the onset of neuronal dysfunction and leading to neurodegeneration. [The petitioner] has tirelessly worked to understand on an atomic level the self-association process of expanded polyglutamine domains. . . . Specifically, her goal is to quantify the structure of the nuclei for aggregates and the aggregation propensity as a function of polyglutamine chain length. She has already discovered that the conformational topology of polyglutamine is consistent with antiparallel β -sheet structure. [The petitioner] has used this remarkable discovery to propose the antiparallel β -sheet as a candidate for the nucleus of the aggregates, an advancement that could lead to potential targets for therapeutics.

At the time she filed the petition, the petitioner indicated that she had published six articles and one book chapter, with an additional article in press. The petitioner demonstrated that her articles had been cited a total of 14 times, including six self-citations by the petitioner and/or her doctoral advisor, ██████████. The petitioner's initial submission therefore documented only six independent citations of her work.

On March 23, 2006, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence to "establish . . . a past record of specific prior achievement which justifies projections of future benefit to the national interest." In response, the petitioner submitted three additional witness letters. ██████████ of Washington University repeated the prior claim that the petitioner "has proposed the antiparallel β -sheet as a candidate for nucleus of the aggregates, an important advance as knowledge of the structure of the nucleus will provide targets for therapeutics." ██████████ asserts that the petitioner's "skills and expertise" are "critical to her post-doctoral research at Washington University." The question is not whether the petitioner possesses useful skills for her post-doctoral work, but whether it is in the national interest to exempt the petitioner from the job offer/labor certification process. Possessing necessary skills does not establish eligibility for the waiver.

██████████ of the University of Wisconsin-Madison stated:

I am aware of [the petitioner's] outstanding research from being in the same research field as she. I have never collaborated with her, and therefore, I am able to provide an independent evaluation of her research. . . .

[The petitioner] has proven herself an exceptionally talented and innovative research scientist in the emerging field of biothermodynamics. Her efforts are clearly at the threshold of the field of computational biology, and her published [articles] . . . shows [*sic*] that her continuing scientific research is vital to the health research priorities of the United States.

[REDACTED] of the University of Illinois stated that the petitioner “has proven herself to be a new talent in her field” whose work has “led to an increasing record of published research.”

The new letters offered additional details about the nature of the petitioner’s work, but shed no further light about why the petitioner’s work is of greater significance than the work being conducted by others in the specialty. General assertions about Huntington’s disease and other neurodegenerative disorders speak to the intrinsic merit of the petitioner’s work, but do not distinguish the petitioner from others in the field.

The petitioner also submitted updated citation information, showing 20 citations of the petitioner’s work. Subtracting seven self-citations leaves a net total of 13 independent citations of the petitioner’s work. A number of these citations are “group” citations, in which the petitioner’s work is cited alongside other, earlier articles containing similar information. Other citations do not appear to highlight the petitioner’s work as being particularly significant or even correct. One of these citations appears in conjunction with this observation: “Our results are somewhat at variance with predictions from recent calculations [by the petitioner and her colleagues]. . . . The low PPII and high β -propensity of S and T are not reproduced at all by their calculations.”¹ Another citing article seems to indicate that confirmation of the petitioner’s predictions “remains elusive from a quantitative and experimental point of view.”² A third article indicated that the petitioner’s work “leads to only modest improvement” compared to a previous model.³

The director denied the petition on April 16, 2007. The director acknowledged the intrinsic merit and national scope of the petitioner’s work, but found that the petitioner had failed to distinguish herself significantly from others working in the same specialty.

On appeal, counsel protests that the director did not discuss the petitioner’s evidence in sufficient detail, and that the evidence “does show that the beneficiary’s work has had the requisite degree of influence on the field as described by the letters of testimony of experts in the field, and the other documentation submitted.” Space considerations prevent in-depth discussion of each and every piece of evidence in the record, but this does not mean that the evidence has not received consideration.

Counsel argues: “publication in and of itself is a valid way to test whether the scientist[’]s work is considered by experts in the field to be worthy of notice.” There is no statute, regulation, or case law to indicate that

¹ Hagarman A., Measey T., Doddasomayajula R.S., et al. “Conformational analysis of XA and AX dipeptides in water by electronic circular dichroism and ¹H NMR spectroscopy.” *Journal of Physical Chemistry B*, 110 (13): 6979-6986, April 6, 2006.

² Vigolo B., Coulon C., Maugey M., et al. “An experimental approach to the percolation of sticky nanotubes.” *Science* 309 (5736): 920-923, August 5, 2005.

³ Dua A., Cherayil B.J. “Polymer dynamics in linear mixed flow.” *Journal of Chemical Physics*, 119 (11): 5696-5700, September 15, 2003.

publication of one's work is presumptive evidence of eligibility for a national interest waiver. Given the sheer volume of articles published each year in countless scholarly journals, such a policy would be neither reasonable nor feasible.⁴ The petitioner has not shown that her publication record, or the citation history of those publications, set her apart from her peers in any significant way.

Counsel argues that *Matter of New York State Dept. of Transportation* requires only “‘some degree of influence,’ which is a minimal threshold, with no need to determine ‘how widely’ the alien’s work has influenced the field.” Counsel’s selective quotation of the precedent decision does not capture the spirit of the quoted passage. Quoted more fully, the passage reads:

The alien . . . clearly must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. 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. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien’s ability to benefit the national interest.

Matter of New York State Dept. of Transportation at 219, n.6. We reject counsel’s apparent contention that the precedent decision compels us to regard any and all evidence of even *de minimis* “influence” as presumptive evidence of eligibility.

Disputing the director’s finding that the petitioner did not submit “evidence that the [petitioner’s work] is widely cited,” counsel observes “the petitioner’s published research . . . has been cited.” This argument ignores the distinction between “cited” and “widely cited.” Having already addressed the quality and quantity of the citations, we will not revisit that issue in detail here.

The available evidence indicates that the petitioner is a successful and productive researcher at the beginning of a promising career, but we reject counsel’s contention that the supporting evidence of record, by its very existence, is *prima facie* evidence of the petitioner’s eligibility for the special benefit of the national interest waiver. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). At best, the petition appears to have been filed prematurely.

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.

⁴ According to a 2004 report issued by the Select Committee on Science and Technology of the British Parliament’s House of Commons, “there are 24,000 [research journals] in all, publishing 2,500,000 articles per year.” Source: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/399we151.htm> (visited November 12, 2008; copy incorporated into record).

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.