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U.S. Citizenship and Immigration Services

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[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 04 2008
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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.

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 an alien of exceptional ability in the sciences. The petitioner is a research associate at the University of Maryland, Baltimore. 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. While the petitioner claimed eligibility as an alien of exceptional ability in the sciences, such a finding would be of no further benefit to the petitioner as he already qualifies for classification under section 203(b)(2) of the Act, except for the issue of the job offer requirement, and exceptional ability is not grounds for a waiver of that requirement.

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 an introductory statement, counsel stated:

[The petitioner] is an organic chemist of unique and exceptional ability who is currently conducting research to aid in the early diagnosis and treatment of devastating neurodegenerative disorders. . . .

His work is internationally recognized and is cited by his peers who hail him as an outstanding scientist with multi-disciplinary skills rarely found in his field anywhere in the world.

Eight witness letters accompanied the petitioner's initial submission. We shall discuss examples of these letters here. [REDACTED] of the University of Maryland described his collaboration with the petitioner:

Since joining the Nanobiology Program, [the petitioner] has focused on developing a set of biophotonic molecular tools known as "caged molecules." . . . [The petitioner] has been indispensable in the development of the new molecules, which are already proving to be breakthrough developments in my field of neuroscience. . . . [The petitioner's] novel work has stimulated entirely new approaches to the investigation of neuronal interactions, and will no doubt lead to future important discoveries.

[The petitioner's] latest chemical device has opened up a new avenue of investigation of the action of endogenous cannabis-like molecules (endocannabinoids) in regulating cellular processes that underlie learning and memory. . . .

[The petitioner's] work is so highly regarded that eminent scientists from across the U.S. have already been seeking out his expertise and his molecular [sic] for use in their own programs.

did not identify the "eminent scientists," and the petitioner did not submit documentary evidence to substantiate or clarify [REDACTED]'s claim.

now president of Sunmeck, Inc., was formerly vice president of ChemPacific Company, a pharmaceutical firm, while the beneficiary worked there as an organic chemist. [REDACTED] stated:

[The petitioner's] responsibilities included design and execution of organic multi-step synthesis in the laboratory and process development for the pilot plant. With his hands-on experiences and techniques, he devised more effective and innovative synthetic methodologies to produce several important chemicals by using fewer synthetic steps. . . .

Compared with US chemists at his level in the field of organic synthesis and pharmaceutical sciences, [the petitioner] has unique and exceptional talents with broader knowledge, more research experience and process skills.

Almost all of the initial witnesses had supervised or collaborated with the petitioner. The only exception is [REDACTED], associate professor at the State University of New York Downstate Medical Center, Brooklyn, who stated:

I have not had the pleasure of working with [the petitioner]. However, I know him by his research interest on design and synthesis of active pharmaceutical ingredients for clinical purposes in ChemPacific Co. and I am also familiar with the research he did with [REDACTED] [REDACTED] in the School of Medicine (neuroscience program) at University of Maryland. . . .

It is necessary to discover and develop a new kind of molecular probes to accurately and sensitively diagnose the abnormal structures in the brain cells in the early stage [of Alzheimer's disease and related disorders] and take an effective measure to relieve or prevent these diseases from becoming worse as earlier as possible. Caged compound provides specific method to probe the brain cells and neurons. . . .

In [research relating to Parkinson's disease (PD), the petitioner] synthesized another kind of caged vanilloid compound. . . . This approach helped medical researchers to develop more accurate and less expensive early diagnostic method in PD diagnosis. . . .

Compared with the US scientists at his level in the area of synthetic organic chemistry, I consider [the petitioner] to have broader knowledge, more research experience and higher productivity.

(*Sic.*) The petitioner submitted copies of 15 articles he co-wrote between 1995 and 2005. The petitioner also listed eight citations of his work that appeared in other articles. The record shows that six of these eight citations are self-citations in which the petitioner referred to his own prior work. The other two citations are self-citations by the petitioner's co-authors. This initial citation list, therefore, showed no independent citation of the petitioner's work.

On April 12, 2007, the director issued a request for evidence, instructing the petitioner to submit evidence to establish "a degree of influence on your field that distinguishes you from other research scientists with comparable academic/professional qualifications." In response, counsel stated:

[The petitioner's] breakthrough findings in the areas of synthetic organic chemistry have revolutionized the way that both industrial and academic researchers have approached some of the most troubling issues in the field. His findings have been published in two of the field's most influential journals, Journal of Neuroscience and Biochemistry. Moreover, despite having been published only a short time ago, these papers have already been cited by several other scientists and prestigious journals in the field of neuroscience.

When considering counsel's claims regarding the significance of a particular piece of evidence, we keep in mind that 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).

Regarding the articles mentioned above, the petitioner documented six citations of one article ("Endocannabinoid Signaling Dynamics Probed with Optical Tools") and two citations of another article ("Caged Vanilloid Ligands for Activation of TRPV1 Receptors by 1- and 2-Photon Excitation"). Of these eight citations, five are self-citations by the petitioner's collaborators, [REDACTED] and [REDACTED]. There remain only three independent citations, two of the first article and one of the second.

The petitioner submitted three further witness letters. Two of the letters are from University of Maryland faculty members. [REDACTED] stated that the petitioner's "chemical tools have opened up new fields of investigation." [REDACTED] stated that a grant proposal involving the petitioner's research won high ratings from a peer-review panel, and that the petitioner "is indispensable to the development and execution of our research program." [REDACTED] did not specify what role the petitioner would have in the program once his temporary postdoctoral appointment expires, nor did he explain why permanent immigration benefits are needed for a non-permanent appointment. The petitioner's nonimmigrant status permits him to work at the University of Maryland through October 9, 2011.¹

The remaining witness, [REDACTED] is an associate professor at Stanford University Medical Center. [REDACTED] stated that his laboratory uses "caged bioactive substances," activated by light pulses, "to control the biochemical processes underlying cellular neurophysiology." [REDACTED] asserted that the petitioner "is one of very few experts in this emergent technological field. He has made some of the most scientifically interesting and useful caged molecules." *Matter of New York State Dept. of Transportation at 220-221* specifically rejected the argument that a shortage of qualified workers is grounds for a national interest waiver.

[REDACTED] is also the editor of a journal that carried one of the petitioner's articles. [REDACTED] stated that the petitioner's article "was highly original and of superior quality." Regarding the petitioner's subsequent work, [REDACTED] stated:

[T]he tools created by [the petitioner] have given insight into molecular communications between nerve cells in the brain and in the peripheral nervous system. More importantly, they represent an entirely new approach to investigate how nerve cells send and receive signals in the form of labile lipid molecules. For this reason, [the petitioner's] work truly breaks new ground.

The director denied the petition on February 1, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner had not shown that he presents a potential national benefit that outweighs the national interest inherent in the labor certification process. The director noted that most of the citations of the petitioner's work originate from "members of the petitioner's own research group," and that the witness letters "fall short of establishing a past history of significant accomplishment on the part of the petitioner." The director found only a small amount of evidence of the petitioner's impact outside of his own research group.

On appeal, counsel asserts that "a citation is just a number," and that quality is more important than quantity. Counsel contends that the petitioner's "articles were singularly cited by other researchers due to the valuable scientific data produced by the petitioner." The AAO acknowledges that citation figures are something of a blunt instrument when gauging an alien's impact on his or her field, but they have the advantage of being objective evidence that exists for its own sake, rather than being specifically created for the express purpose of supporting a petition.

¹ An H-1B nonimmigrant petition, receipt number WAC 08 245 51541, was approved on September 19, 2008.

Counsel argues that the independent citations of the petitioner's work, while few in number, nevertheless are of a "qualitative value" that establishes the significance of the petitioner's contributions. We therefore turn to the three independent citations that preceded the appeal, to determine the extent to which other researchers have singled out the petitioner's work as being especially significant.

In the article "Endocannabinoid-Mediated Synaptic Plasticity in the CNS" by [REDACTED], the passage citing the petitioner's work reads: "The fast onset of DSI (Heinbockel et al. 2005) is consistent with direct $\beta\gamma$ interaction with the N-type Ca^{2+} channel." The cited passage is surrounded by similar references to findings set forth in other articles. There is no indication that the petitioner's article (of which Heinbockel was the primary author) was in any way singled out as being more significant than the numerous other articles cited on the same page of [REDACTED]'s article, some of which (unlike the petitioner's article) are cited more than once.

[REDACTED] mentioned the same Heinbockel article once in their ten page-article "Two Coincidence Detectors for Spike Timing-Dependent Plasticity in Somatosensory Cortex." In discussing "the presynaptic coincidence detector model, which has been proposed by [REDACTED] and her co-authors wrote: "A potential difficulty for this model is that eCB synthesis, diffusion, and CB1 receptor signaling may be too slow to allow precise encoding of postsynaptic spike timing (Wilson and Nicoll, 2002; Heinbockel et al., 2005)." In this context, it appears that the authors cited the petitioner's work only in passing, to mention a finding that another research group had already reported three years earlier.

The remaining independent citation appeared in "Caged Capsaicins: New Tools for the Examination of TRPV1 Channels in Somatosensory Neurons" by [REDACTED], an article not submitted for publication until October 16, 2006, several months after the petition's June 6, 2006 filing date. Citation number 14 denotes the petitioner's article in this sentence:

Caged capsaicin⁽¹²⁾ or vanilloid analogues^(13, 14) have been introduced in several recent publications, and here we report the synthesis and application of two novel caged capsaicins that were developed specifically for electrophysiological experimentation, including the kinetic analysis of TRPV1 channels and the distinction between intra- and extracellular actions of capsaicin.

Once again, it is not clear how this joint citation of the petitioner's work with that of another research team establishes the petitioner's article to be of superior "qualitative value" compared to the other cited works.

Counsel contends "[t]he concept of independent citations is irrelevant" because the petitioner "belongs to a small, elite group of researchers." We note that counsel had previously asserted that the petitioner's "work is internationally recognized and is cited by his peers," and counsel never sought to diminish the importance of independent citation until after the director observed the scarcity of such citations relating to the petitioner's work. While it appears that relatively few scientists are engaged in precisely the same kind of work as the petitioner, the small size of the group does not necessarily classify the group as "elite," such that a great many other researchers wish to perform this work, but lack the skills required to do so. A more likely explanation is

that the explosive diversity of scientific research in recent decades has resulted in an unprecedented degree of specialization within fields.

The petitioner documents nine new independent citations of his work, all published after the petition's filing date. (Two of the new articles are by the same research team – [REDACTED] and [REDACTED] – and the passages containing the citations are nearly identical in both articles.) These newly claimed citations do not continue a pattern of heavy citation already evident at the time of filing. Even if the petitioner had documented substantially more citations on appeal, the beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Counsel argues that the petitioner's "past history of accomplishments must be judged based on the impact of his work as well as the unique creativity he has brought to the field." Creativity without impact is of questionable value to the national interest, and it is also difficult to gauge objectively. The AAO has no quarrel with the contention that the petitioner's work "must be judged based on [its] impact," but the burden of proof is on the petitioner to establish that impact.

The petitioner submits several new witness letters on appeal. These letters follow the same general pattern: First, the witnesses assert that they first became aware of the petitioner's work upon the October 2005 publication of "Endocannabinoid Signaling Dynamics Probed with Optical Tools" in the *Journal of Neuroscience*; the witnesses observe that the journal's publishers selected the article as a highlight of that issue of the journal. The witnesses then devote particular attention to a presentation by the petitioner at the Gordon Research Conference in October 2007. Finally, the witnesses state that researchers with the petitioner's particular skills are rare.

The 2007 presentation took place well over a year after the petition's June 2006 filing date, and therefore the reception of the petitioner's work at that conference is not evidence of the petitioner's impact as of the date of filing. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak* at 49. We have already addressed and refuted the argument that the scarcity of a given talent is presumptive evidence of eligibility for the waiver.

[REDACTED] of the University of California, Irvine, refers to the petitioner's 2005 article as "a groundbreaking paper" that rests on "[t]he novel chemical tools developed by" the petitioner. [REDACTED], a research director at INSERM in Bordeaux, France, states: "the tools created by [the petitioner] have given insight into the mechanisms of communications between nerve cells in the brain and in the peripheral nervous system. Most significantly, they constitute an entirely new approach to investigate how nerve cells send and receive signals in the form of labile lipid molecules."

[REDACTED], an associate professor at Yeshiva University, credits the petitioner with developing "the means to manipulate and control, with high spatial and temporal precision, the physiological process of lipid signaling in living brain tissue." [REDACTED], a senior investigator at the National Institutes of Health,

states: “researchers who fashion new tools are essential to the health and vitality of science. I believe that [the petitioner’s] innovations place him in this select group.”

Witness letters are not without weight, but a petitioner can hardly be expected to submit unfavorable witness letters or identify potential witnesses who declined to provide such letters; it is not unreasonable to expect some level of objective confirmation to support the claims made in such letters. Published articles in the record make it clear that the petitioner did not invent the technique of using light pulses to activate “caged molecules.” Bibliographies in the record mention articles on the subject as early as 1988. The petitioner may have been on the first research team to apply this process to certain compounds, but the record identifies over two dozen other compounds previously subjected to the process. The record does not objectively establish that the petitioner’s work in this area has attracted significantly more attention than previous work with other “caged molecules” prior to 2005.

The petitioner has demonstrated some independent support for his petition, but the bulk of his recognition appears to have occurred well after the petition’s filing date. The AAO will take no position here as to whether that late recognition would, itself, suffice to justify a national interest waiver. The present petition appears to be premature at best.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The 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.