

identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

[REDACTED]
LIN 07 092 52389

Office: NEBRASKA SERVICE CENTER

Date: **APR 10 2009**

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. The petitioner is a postdoctoral research associate at Washington State University, Spokane. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted materials.

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 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.

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.

Several letters accompanied the petitioner’s initial submission. Some of the witnesses are or were on the faculty of the University of Connecticut (UConn), Storrs, where the petitioner earned his doctorate from 2000 to 2006. The record is silent with regard to his subsequent postdoctoral work at Washington State University. Assistant Professor [REDACTED] explained the nature of the petitioner’s work:

[The petitioner] has accomplished pioneering research in the development of CNT AFM probes. AFM stands for Atomic Force Microscopy. . . . The AFM consists of a microscale cantilever with a sharp tip (probe) at its end that is used to scan the

specimen surface. . . . The ideal AFM probe should have a high aspect ratio, the smallest radius possible, a well-defined and reproducible molecular structure, and be mechanically and chemical[ly] robust. Carbon nanotubes (CNTs), one of the most remarkable materials synthesized so far, are the only known materials that can satisfy all of these critical requirements. . . .

In [the petitioner's] research effort, CNTs were assembled onto conductive AFM probes using the state-of-the-art dielectrophoresis technique. . . . [H]e developed a novel, surfactant-assisted dissolution process to further optimize the length and stiffness of these CNT nanofibrils. He also demonstrated their stiffness could be further enhanced upon subsequent vacuum annealing. As planned, the resulting high aspect ratio CNT-AFM probes were tested and found to be mechanically robust, and thus may be used as structural nano-needle force sensors. More importantly, [the petitioner] demonstrated the possibility of forming radial and longitudinal heterojunctions with sequential dielectrophoretic assembly of new functionalized CNTs on the sidewalls and ends of previously grown nanofibrils. This paved the way for CNT AFM probes to act as electrochemical nanoprobe for use in measuring specific reactivities within cells for biological and medical research.

There is a great demand for single cell monitoring and manipulation, precise drug release, and spatially resolved real-time cell function monitoring, due to their importance to medical research. . . . CNTs . . . [are] suitable for a variety of bio-probing and detection applications. The advantage of this approach is that it will not affect cellular physiology and will be able to provide real-time measurements on a molecular level, which will likely revolutionize our understanding of a living cell's function. [The petitioner's] nanosized CNT-AFM probes, acting as CNT biosensors, are used to pierce mammalian cells and establish a minimally invasive electrical pathway with the interior, without disturbing normal cell-function. . . .

The ability to place desired types of CNTs with controlled orientation at desired sites presents one major challenge in assembling these remarkable nanostructures into functional devices which [the petitioner] overcame.

UConn Professor [REDACTED] stated that the petitioner's published "work immediately captured international attention. . . . Undoubtedly, [the petitioner] can be considered one of the top young nanotechnologist[s] in his field."

Former UConn Professor [REDACTED] now at the Ohio State University, Columbus, stated:

[The petitioner's] current research involves the formation of CNT patterns via metal-assisted self-assembly. For real application of CNT devices, it is crucial not only to align CNTs at the desired sites, but also to control the type of CNTs at that site, because different types of CNTs serve different purposes. . . . His knowledge in the

integration of concepts in electron beam writing, surface chemistry, ultra-high vacuum, metal-assisted self-assembly led to the development of SWNTs [single-walled CNTs] in forest arrays. . . .

In addition, [the petitioner] has been performing original research on solid freeform fabrication (SFF) of SiC [silicon carbide] and its composites addressing the delamination and excess deposits issues between adjacent layers. These high performance materials can meet the performance demands of armor protection systems and turbine engines for aircraft and nav[a] vessels.

Researchers elsewhere offered praise for the petitioner's work. [redacted] of the Lawrence Livermore National Laboratory, California, stated that the petitioner's "extraordinary research led to the successful development of CNT-AFM nanoneedle biosensors for revolutionary research in medicine. . . . His research in CNT patterns and nanoneedles is invaluable to the development of ultra-sensitive CNT-nano-biosensors."

[redacted] a post-doctoral researcher at the Swiss Federal Institute of Technology, Lausanne, stated that the petitioner's "extraordinary findings were published in *Chemistry of Materials*, an internationally recognized high quality scientific journal. From his publication, I have been aware that this achievement and contributions in this area are seminal and original."

[redacted] of Northwestern University, Evanston, Illinois, is a member of the National Academy of Engineering who participated in the Manhattan Project in 1944-1945. [redacted] stated:

[The petitioner's] advisor, [redacted] was one of my former graduate students at Northwestern University and I am primarily familiar with [the petitioner's] accomplishments through [redacted]. In my opinion, he has made significant advances in the field of carbon nanotube (CNT) patterns and nanoprobes. . . . [The petitioner] was able to modify the surface hydrophilicity (*i.e.*, the affinity to Fe^{3+} cations), which, to my knowledge, no one has accomplished before. . . . [The petitioner's] findings are remarkable since self-assembled CNT forests could be purified and separated according to electrical conductivity before deposition, eliminating the serious mixing problems in the traditional CVD method, especially for electronics devices.

. . . [The petitioner] is indispensable in producing novel and state-of-the-art biochemical sensors based on CNT forests. . . .

In addition, [the petitioner] also made outstanding contributions to the CNT nanoneedle biosensors used in single-cell operation in biological and medical research. He innovatively assembled CNTs onto atomic force microscopy probes using advanced dielectrophoresis with controlled stiffness and spatial functionality. The

stiffness is a very important parameter that can keep the nanoneedles straight for successful cellular membrane penetration. . . . He is the first to be able to produce heterogeneous CNT nano-needles by spatially attaching functionalized CNTs at desire[d] places on the predecessors.

Counsel indicated that the petitioner's "research has been cited by many other researchers," but the supporting documentation included only "a representative sample of citing articles." The initial submission documented some 13 citations. Because not all the citing articles were identified, it is not clear how many of these citations are independent rather than self-citations by the petitioner and/or his collaborators.

The only other indications of interest in the petitioner's work took the form of a "[r]equest from a researcher in Russia for" a copy of one of the petitioner's articles, and a "[r]equest from a researcher in Switzerland [redacted] for [the petitioner's] carbon nanotube nano-sensor probes." The record does not show that such requests are anything but routine within academia.

On March 19, 2008, the director issued a request for evidence (RFE), instructing the petitioner to "submit updated current documentation of the total current number of citations" of the petitioner's published works, along with "copies of three or four articles by others which cited your work and which demonstrate the significance which the citing authors placed on your findings." In response, the petitioner submitted additional letters and documentation.

[redacted] of the University of Texas at Austin stated:

[The petitioner] successfully demonstrated the controlled functionalization of [CNT] nanoneedles with desired chemical and biological entities, which is especially crucial for the investigation of cell electrochemical activity[,] a fundamental mechanism in living cells. As a result, [the petitioner's] technique would provide a viable method that can interrogate living cells through membrane penetration without affecting their physiology.

[redacted] Staff Scientist at Los Alamos National Laboratory, stated:

I know [the petitioner] only through my reading of his research publications. [The petitioner's] research endeavors deeply impress in terms of innovation, quality and in the way his [*sic*] is contributing to the development of cutting edge technologies applied in the national security and energy arenas. . . .

Many [defense] applications, such as the detection of missile [*sic*] during the boos phase, require sensing in at least two parts of the electromagnetic spectrum to achieve positive identification. However, current materials are effective only a one [*sic*] specific wavelength, thus multiple sensors (thus cumbersome) are required in the monitoring devices.

To address these shortcomings . . . [the petitioner] was able to show that silver/Teflon nanocomposites can be specifically tuned to absorb multiple sections of the electromagnetic spectrum simultaneously. In addition, [the petitioner's] nanocomposite materials do not require cryogenic cooling detectors, which eliminates additional expenses, cumbersome handling, and maintenance. This concept has garnered significant interest from the Army Research Office (ARO) and Office of Naval Research (ONR).

The record contains no documentation from the ARO or the ONR to corroborate the above assertions, and no explanation as to how [redacted] is aware of the named entities' purported interest in the petitioner's work.

Counsel stated that the petitioner's articles had "been internationally cited 14 times" by "27 authors from 12 institutions" (counsel's emphasis), indicating a very small increase in the number of citations compared to the initial submission.

Counsel's assertions, while technically correct, are exaggerated with regard to their significance. Of the fourteen articles identified as citing the petitioner's work, the petitioner submitted copies of eleven. (The petitioner is the first author of the remaining three articles.) Examination of these eleven articles diminishes the significance of what is already a fairly small collection of articles. Three of the articles are by [redacted]' research group, citing the earlier work of that same group. The petitioner himself is a co-author of one of these three articles.

Of the eight remaining articles, three of them are self-citing articles by the petitioner's former collaborators at the Beijing University of Aeronautics and Astronautics. We note that, while the record contains a copy of the 2001 *Acta Metallurgica Sinica* article that identifies the petitioner as one of the authors, for some reason the bibliographical references in the citing articles do not credit the petitioner as an author of that paper.

Three of the remaining five papers are in the Chinese language with no certified English translation as required by 8 C.F.R. § 103.2(b)(3). A cover page bearing a partial, unattested translation cannot suffice in this regard. One of these papers lists its sources in English, and shows one of the petitioner's articles among its sources. The others list their sources only in Chinese.

After the above discussion, there remain three articles that show independent citation of the petitioner's work, only two of which meet USCIS evidentiary requirements. Two of the three articles were by research groups in the petitioner's native China, and the third is by a research group in the United States where the petitioner now works. The petitioner has highlighted the sections of the articles that mention the petitioner's work, but these passages are simply descriptive. There is no indication that the citing authors considered the petitioner's work to be any more unique or significant than the dozens of other articles similarly cited.

Taking all the above factors into consideration, we do not find the minimal independent citation of the petitioner's work to be especially persuasive in the petitioner's favor.

Counsel asserted that the petitioner's **"work has been reported by the leading nanotechnology news publisher (Nanowerk LLC), featured in Research & Development Magazine (R&D Magazine) and cited on the internet by 2 websites"** (counsel's emphasis).

The record shows that the Nanowerk and R&D Magazine articles are one and the same. The article indicates that the scanning surface potential microscope has been "markedly improve[d]" through the use of CNTs. The article quotes researcher [REDACTED], identified as a former "postdoc in [REDACTED] Group," but does not mention the petitioner.

Regarding the other two online articles, counsel stated that one of the petitioner's articles "was collected by the Castle Island Co. into its Worldwide Guide to Rapid Prototyping." The record does not address Castle Island's criteria for inclusion in general, or the reasons for the inclusion of the petitioner's article in particular. It appears that the Worldwide Guide includes the petitioner's article simply because the article relates to the subject of rapid prototyping.

Counsel also asserted that one of the petitioner's articles "was featured in its **Nano highlights** by the Nano Science and Technology World . . . <http://usa.nanost.net>." The petitioner's article is one of several articles listed under "Nano Highlights from ACS Publications (20080329)." The eight-digit number is a reference to the date, as shown by the legend "Web Release Date: Sat. 29 Mar 2008." All of the referenced articles are dated March 28, 2008, the day before the "Web Release Date." Sidebars show similar "Highlights" entries for several days in late March 2008 and almost daily between April 3 and April 12, 2008, with only April 4 missing. The record contains no information about the nanost.net web site (which is partly in English, partly in Chinese) or the criteria by which it selects its almost-daily "Nano Highlights."

The petitioner submitted copies of independent reviewers' comments, compiled during peer review of the petitioner's articles. One set of comments was highly complimentary, calling an article "a noteworthy advance on growing nanotubes." Other comments, while positive, were less emphatic. Counsel observed that one commenter stated that the paper addressed "a very hot topic," but this is a comment on the overall subject matter, rather than the petitioner's work in particular. The same reviewer called the paper "a nice extension of their previous efforts." Another reviewer, commenting on the same paper, deemed it "a useful paper" that "should be suitable for publication." Reviewers commenting on another paper called it "interesting" and "well written." These attestations fail to persuade the AAO that the petitioner's work stands out in his field.

The director denied the petition on July 29, 2008. In the denial decision, the director acknowledged the witness letters and other evidence submitted, but found that the petitioner's objective evidence did not match witnesses' claims. The director stated:

[E]xcluding self-citations or citations by teams of researchers which included a co-author of his article, the evidence indicates only ten citations of the petitioner's articles or conference proceedings which had been disseminated as of that date. Of those ten, only one was of work which the petitioner presented since 2001. . . .

The evidence indicates that [as of late 2006] the petitioner had published only one article since 2001. . . . The petitioner's findings had not been presented in any conference proceedings since 2001. He had presented his work at a number of meetings, but that is slim basis upon which to find that he had made groundbreaking contributions and achievements which made an impact.

On appeal, counsel takes issue with the director's assertions, but review of the record shows many of counsel's objections to be baseless. For example, counsel states:

[The director stated] "the evidence indicates *only ten citations* of the petitioner's articles or conference proceedings . . . only one was of work which the petitioner presented since 2001" when in fact, Petitioner/ Appellant submitted evidence of at least 14 citations.

(Counsel's emphasis.) The director clearly stated that the "ten citations" figure was "excluding self-citations" by the petitioner and his collaborators. Even then, as we have shown, the "ten citations" figure is, itself, inflated, as the director had undercounted the self-citations in the record. Elsewhere in the appeal, counsel refers to "over 14 non-self citations," an untenable assertion based on the available evidence. Counsel has also repeatedly stretched the definition of a "citation" to encompass not only bibliographic references in scholarly articles, but inclusion in electronic databases and the like – indeed, seemingly every publicly available reference to the petitioner's work or mention of its existence.

Counsel adds that, in response to the RFE, the petitioner "submitted proof of more than 14 citations (not 'three or four'). . . . USCIS dismisses such evidence as 'meager' and as 'only ten citations' when it has requested for [*sic*] 'three or four' in its RFE." Here again, counsel has misread the RFE. The director had instructed the petitioner to "submit updated current documentation of the total current number of citations" in order to show how many citations existed; the director also, separately, requested "copies of three or four articles" as examples of how the citing authors discussed the petitioner's work. The director did not state or imply that the petitioner would automatically establish eligibility simply by submitting "copies of three or four [citing] articles."

Counsel contends that "only few of those citations are from [the petitioner's] work done in 2001." Of the eleven citing articles in the record, seven cite the petitioner's work from 2001 or earlier. Three of the remaining four articles contain self-citations by the petitioner or his collaborators. In terms of sheer numbers, there are indeed "few" citations of the petitioner's 2001 work, but they represent a substantial fraction of the documented citations of the petitioner's work.

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). From the above discussion, it is evident that, in this instance, the assertions of counsel are also not a reliable guide to either the contents of the record or the director's findings. The appellate brief contains exaggerations and misreadings bordering on distortion of the record.

Counsel claims that the director contradicted himself in the denial notice, when the director stated “[t]he petitioner’s findings had not been presented in any conference proceedings since 2001,” but then immediately stated that the petitioner “had presented his work at a number of meetings.” There is no contradiction. **“Conference proceedings” are not the same as “conferences.”** Rather, “conference proceedings,” as the director used the term, are the published records of conferences. Thus, the director simply stated that, while the petitioner had participated in conferences in recent years, his work appeared in no printed conference proceedings after 2001. The date used by the director may not be correct, as the record appears to indicate that the petitioner’s abstracts may have been published in 2002 and 2003 – the photocopied exhibits are not always clearly discernible as having been published – but subsequent abstracts exist in the record only in manuscript form.

We agree with counsel that the petitioner has submitted independent witness letters that praise the petitioner’s work as innovative and important, and we do not question the sincerity of the witnesses, but the objective evidence of record simply does not support the witnesses’ claims or show that the opinions of those witnesses represent any sort of consensus in the petitioner’s specialty.

When we consider the record in its entirety, we find that the petitioner has conducted original work in a meritorious area of inquiry. We also find, however, that counsel’s claims regarding the importance of the petitioner’s work, and others’ response to that work, do not accurately reflect reality. The petitioner’s application for a national interest waiver some four months after he completed his doctorate appears to be premature at best. The record does not even show that the petitioner’s work with CNTs continued after he left UConn for Washington State University. (This is not a definitive finding that the petitioner stopped working with CNTs. Rather, it is an observation that the record is silent on this point.)

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.