



U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

AUG 10 2009

SRC 08 030 52786

IN RE:

Petitioner:

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)

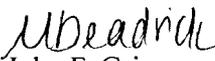
ON BEHALF OF PETITIONER:

[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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 laboratory manager at Rice University, Houston, Texas. 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 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 additional exhibits.

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.

As we shall explain further below, the petitioner has not shown that he qualifies for classification as an alien of exceptional ability in the sciences or as a member of the professions holding an advanced degree. Therefore, he cannot qualify for the national interest waiver. Because the director’s decision concerned only the waiver, however, we will begin by discussing the merits of the waiver request.

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] 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.

The petitioner filed the petition on November 1, 2007. In an introductory statement, counsel described the importance of laboratory managers and technicians, and discussed the growing field of nanotechnology. These undisputed observations attest to the intrinsic merit of the petitioner’s work, but there is no blanket waiver for laboratory managers involved with nanotechnology. The petitioner must distinguish himself from others in his occupation. To that end, counsel stated:

If nanotechnology and nanomedicine laboratories were forced to employ a U.S. worker possessing minimum requirements rather than [the petitioner], they would

lose [the petitioner's] expertise and so research and advancements currently taking place in nanomedicine and nanotechnology could be delayed. This field of study is extremely specialized, and attempting to replace [the petitioner], who has more than 23 years of experience, would be detrimental to the continued advancements in nanomedicine and nanotechnology.

(Counsel's emphasis.) The above assertions create the false impression that the petitioner "has more than 23 years of experience . . . in nanomedicine and nanotechnology." The petitioner claims 23 years of experience as a laboratory technician and manager, but the majority of that experience did not involve nanotechnology. The petitioner's prior claimed experience involved other laboratory work including drug studies and synthesis of explosive compounds.

Four witness letters accompanied the initial filing. Three of the letters were from Rice University professors. [REDACTED], who also holds a professorship at the University of Texas, stated:

[The petitioner] has visited my research group to discuss collaborations on nanomedicine research. I and many of my researchers in my group were truly impressed by [the petitioner's] experience, expertise and dedication to translational research to bring nanotechnology to the benefit of patients.

. . . [The petitioner's] training and research experience in biomedical nanotechnology, in my opinion, is very valuable for the United States to keep the leadership in biomedical nanotechnology. In addition to this, his training of research scientists and laboratory workers in advanced safety techniques for handling biohazardous and radioactive materials is very much in the national interest.

[REDACTED] praised the importance of the petitioner's work without specifically describing that work.

Director of Rice University's Center for Biological and Environmental Nanotechnology (CBEN), stated:

I first met [the petitioner] when he was working in tissue culture research at Rice University's Center for Excellence in Tissue Engineering (CETE). There he was providing technical assistance for research projects focused on developing and producing specialized implants for bone and peripheral nerve regeneration, as well as in the production of nanoparticles for new methods of drug delivery. I was quite impressed with his work there, and invited him to come work at CBEN. Here he has been working in research involving the use of sterile cell cultures and chemical processing of nanoparticles for cell culture studies of nanomaterials interacting with cells for biomedical and environmental applications.

Like [REDACTED], Prof. [REDACTED] did not describe the petitioner's actual duties, and like [REDACTED] Prof. [REDACTED] stated: "In addition to this, his training of research scientists and laboratory workers in

advanced safety techniques for handling biohazardous and radioactive materials is very much in the national interest.”

The letter from [REDACTED] Director of Rice University’s Institute of Biosciences and Bioengineering, makes the same basic points as the two letters discussed above, including praise for the petitioner’s “ability to train research scientists and laboratory workers in advanced techniques regarding the proper handling of radioactive and biohazardous materials.”

[REDACTED] a Senior Scientist and Group Leader at the Johnson Space Center, Houston, Texas, stated:

[The petitioner] has been working on development and modification of nanoparticles to respond to a myriad of conditions such as contact with a toxin, light or other conditions to detect their presence. . . . [H]e has developed a number of cell culture based studies of nanomaterials to assess their toxicological profile. The goal of the program is [to] develop safe nanomaterials which can be used for biomedical and environmental applications.

The petitioner submitted copies of several published articles and conference papers identifying him as a co-author. All of the articles were presented or submitted for publication between 1998 and 2000, corresponding to the period when the petitioner worked under the supervision of [REDACTED] (who is a co-author of all the submitted papers). The petitioner did not explain why, over the course of a 23-year career, he produced published work only while in [REDACTED] laboratory.

An exhibit list submitted with the petition referred to citations, but the petitioner did not submit copies of articles that cited his work. Rather, the petitioner submitted copies of articles whose authors thanked the petitioner for technical assistance.

On January 24, 2008, the director instructed the petitioner to submit evidence to establish that he will “serve the national interest to a substantially greater degree tha[n] other individuals in the field.” Most of the petitioner’s response consists of general information about nanotechnology research.

The petitioner also submitted two new letters from witnesses at Rice University. Dr. [REDACTED], a Research Scientist at CBEN, provided details about the petitioner’s recent work. Excerpts follow:

Project #1: Cytotoxicity studies of nanoparticles in “in-vitro” cell culture

One of the first programs to which [the petitioner] contributed was an extensive series of studies on the cytotoxicity (poisonous nature) of nanoparticles. . . . [The petitioner] performed the delicate task of monitoring and maintaining the physiological characteristics and nutrient levels for the fluid media in which the cell cultures were growing. . . . [H]e handled the complex transfers of the cultures to different media and growth environments. Once the cell cultures had been full[y] exposed to the

nanoparticles, he carried out fluorescent microscopy studies on the exposed cells, prepared microphotographs, and conducted computer analyses on the micro photographic cell images for determination and evaluation of the cytotoxicity effects of the nanoparticles. . . .

Project #2: . . . Migration of Intradermally Injected Quantum Dots to Sentinel Organs in Mice

For this program, [the petitioner] ensured proper handling of the quantum dots (fluorescent nanoparticles) samples and emulsion processing. He conducted characterization studies for the properties of the nanoparticles using ultraviolet spectroscopy, determined the light absorbance, and analyzed the relative concentrations of nanoparticles. [The petitioner] also utilized fluorescence spectroscopy to analyze the emission spectra, and determined the quantum yield of each experiment. . . . [H]e also analyzed computer data results of the ultra microscopy analyses on the nanoparticles. . . . Moreover, he assisted with the ultra microscopy studies of the quantum dot emulsions containing nanomaterials.

██████████ indicated that the projects he described “resulted in several major scientific advances in the field of nanotechnology, which were reported in two internationally-published papers.” The petitioner is not identified as an author of either paper.

Director of Rice University’s Environmental Health and Safety Department, stated that the petitioner possesses the “combination of duties and experience in several different scientific disciplines” required to work in a nanotechnology laboratory. Ms. ██████████ provided a list of “[r]esearch papers resulting from scientific research programs in which [the petitioner] has participated.” The petitioner did not receive author’s credit for any of these papers. One listed paper is not a research article at all, but a “meeting report” describing a 2006 workshop in Washington, D.C., between representatives of 16 different institutions. The report identifies 19 authors and nine “participants in the workshop [who] did not contribute to the authorship of this report”; the petitioner’s name does not appear, and there is no evidence that he participated in the workshop.

██████████ asserted:

[The petitioner’s] extensive training in safety, anti-terrorism and emergency response, intimate knowledge of the hazardous chemicals and reaction products in laboratory research activities, and his unique experience in the armed forces dealing directly with these issues make him an extremely valuable resource for the evaluation of laboratory safety concerns and the development of realistic, effective protocols for laboratory activities.

██████████ stated that the petitioner “is conducting a review of the safety procedures and protocols for all the laboratories at Rice University” and “is also collaborating on the development of safety

procedures and protocols for the new Collaborative Research Center” to be shared by Rice and two other local universities, but she did not indicate that the petitioner’s work in this area extends beyond the local Houston area.

The director denied the petition on September 23, 2008, stating that the petitioner had not established eligibility for the waiver. On appeal, counsel notes that two of the petitioner’s co-authored articles “have been cited more than 100 times each in esteemed research journals.” The petitioner had not previously mentioned or claimed these citations. More significantly, as we have already noted, the record does not indicate that the petitioner is a researcher as that term is usually understood; he is, rather, a highly trained member of the laboratory support staff working with researchers. He holds no degree in chemistry, having instead earned a certificate as a “chemical technician.” During more than two decades of claimed work in the field, the petitioner’s credits as a co-author began and ended with his work in [REDACTED] laboratory. Witness testimony consistently indicates that the petitioner is a laboratory technician rather than a researcher in his own right; without so much as a bachelor’s degree, it is far from clear that Rice University would consider him to be qualified as a researcher.

The petitioner submits three letters, all from Rice University researchers. The claim that the petitioner has been nationally influential in his field is poorly served when nearly all of the witnesses represent the same university. [REDACTED] asserts that the petitioner’s “work with tissue cultures . . . was key to research that is an integral part of a nationwide, federally-funded effort to establish toxicity standards in nanotechnology research.” The record is devoid of evidence that this opinion is shared outside of the Houston area.

[REDACTED] asserts that the petitioner has expertise in laboratory techniques that are “absolutely essential.” If the techniques are in fact essential to do the job properly, then those techniques are minimum requirements for the job and anyone lacking such skills is not minimally qualified for the position. The scarcity of such skills is not grounds for a waiver, because the labor certification process does not compel the hiring of unqualified workers. A shortage of qualified workers is a factor in obtaining rather than waiving a labor certification. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 220-221.

[REDACTED], who supervised the petitioner from 1997 to 2005, praised the petitioner’s “outstanding work with my research groups” but did not describe that work. He focused instead on the general goals of the projects.

The petitioner submits additional background materials about the importance of nanotechnology research. The intrinsic merit and national scope of nanotechnology research are not in dispute here, and the emphasis on these factors is misplaced. The record does not indicate that the petitioner can accurately be described as a nanotechnology researcher. Rather, he appears to be a laboratory technician who performs various tasks on behalf of researchers who, in turn, happen to perform nanotechnology research. The petitioner has not shown that the national scope of nanotechnology translates to his work preparing and analyzing samples and performing similar tasks. The petitioner’s

work on behalf of a small group of researchers in one laboratory, or a handful of laboratories, appears to be local in scope. The same can be said of the petitioner's work in safety training. There is no evidence that the petitioner has developed safety protocols or procedures that are now in widespread use. Rather, he provides training to individuals in certain laboratories at one university.

The intrinsic merit and national scope of scientific research do not imply that every alien aiding such research qualifies for a national interest waiver. 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. Furthermore, the direct impact of the petitioner's work appears to have been almost exclusively confined to Rice University. 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.

Beyond the issue of the national interest waiver is a more basic factor that we cannot ignore in this decision. The waiver is only available to aliens classified under section 203(b)(2) of the Act, either as members of the professions holding an advanced degree, or as aliens of exceptional ability in the sciences, arts, or business.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)

8 C.F.R. § 204.5(k)(2) provides the following definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In a cover letter accompanying the initial filing of the petition, counsel asserted that the petitioner "is a member of the professions with exceptional ability." This term is a combination of the two distinct

classifications established by section 203(b)(2) of the Act. Elsewhere in the same letter, counsel asserted that the petitioner “meets and exceeds the criteria . . . for classification as an individual with exceptional ability in the sciences.” Counsel did not claim that the petitioner holds an advanced degree or its defined equivalent. Rather, counsel cited a credential evaluation in the record as indicating that the petitioner’s “education has been evaluated to be the equivalent of an Associate Degree of Applied Science in Chemical Laboratory Technology.” This is an accurate description of the evaluation. On Form ETA-750B, Statement of Qualifications, the petitioner listed three items under “Degrees or Certificates Received”: an “upper secondary vocational qualification” certificate as a “Chemical Technician” that he received at the age of 19; a “Certificate of Handling Radioactive Materials” from a “Radiation Protection” course that lasted no longer than two months; and a “Radioactive Isotope Safety” certificate from a “Radioactive Isotope Usage” course that lasted no longer than one month.

The petitioner does not hold, or claim to hold, an advanced degree. His work experience cannot establish the equivalent of such a degree, because, by regulation, only post-baccalaureate experience can be counted as the equivalent of a master’s degree. The petitioner does not hold a baccalaureate degree, and therefore by definition he has no post-baccalaureate experience.

Furthermore, on the Form I-140 petition, the petitioner identified his occupation’s SOC (Standard Occupational Code) as 19-4021, which is the code for “Biological Technician.” According to the Bureau of Labor Statistics’ O*NET database, the educational background for workers in that SOC is as follows:

Percentage of Respondents	Educational Level Attained
60	Bachelor’s degree or higher
26	Some college
14	High school or less ¹

If 40% of individuals in the petitioner’s occupation (including the petitioner himself) do not hold bachelor’s degrees, then we cannot reasonably conclude that a bachelor’s degree is the minimum requirement for entry into the occupation. Therefore, the petitioner’s occupation does not meet the regulatory definition of a profession.

For the above reasons, the petitioner does not qualify as a member of the professions holding an advanced degree.

We now turn to the question of exceptional ability. Under 8 C.F.R. § 204.5(k)(3)(ii), to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

¹ Source: <http://online.onetcenter.org/link/details/19-4021.00#Education> (printout added to record August 4, 2009).

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

We 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. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.” For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows “exceptional” traits.

In an introductory statement, counsel cited the petitioner’s education and vocational training; years of experience; and original contributions. Below, we compare the petitioner’s submissions with the regulatory requirements.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A)

The petitioner submitted no official academic record as the regulation requires. Therefore, the petitioner has not complied with the plain language of the regulation.

Also, as noted above, the petitioner claims a “Certificate of Capability, upper secondary vocational qualification” as a “Chemical Technician,” earned over a three-year course of study. An evaluator has concluded that the petitioner’s education is equivalent to a United States associate’s degree. As we also noted previously, the O*NET database indicates that 60% of biological technicians hold a

bachelor's degree or a higher degree. If three out of five biological technicians hold degrees higher than the petitioner, then we cannot conclude that the petitioner's level of education is exceptional in his field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B)

The petitioner claims 23 years of experience, including more than ten years at Rice University. Three Rice researchers attest to the petitioner's employment there; two of them were already at Rice when the petitioner began working there. The petitioner meets the experience requirement.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F)

Counsel stated that the petitioner "has made **original contributions** to the field that significantly distinguish[] him from other laboratory managers and technologists. He has **co-authored numerous publications** on the advancement of bone tissue engineering, particularly nerve regeneration, through nanotechnology and nanomedicine" (counsel's emphasis). The requirement, however, is "[e]vidence of recognition for achievements and significant contributions"; it cannot suffice simply to list one's accomplishments and declare them to be significant. The regulatory standards listed at 8 C.F.R. § 203.5(k)(3)(ii) are designed to provide objective ways to distinguish the exceptional from others in the field. Evidence of recognition establishes that others in the field, of their own initiative, have found that the recognized work stands out.

The petitioner's co-authorship of published articles is not recognition for achievements and significant contributions; it is, rather, the anticipated result of participation in research. Citation of those articles demonstrates the influence of the cited works, and we take such citation into consideration in the context of the national interest waiver, but citation, as a practice, is so commonplace that we cannot find that citations represent recognition for achievements or significant contributions. Furthermore, the sources of the citations are individual research teams, rather than governmental entities or professional organizations. We construe the reference to "recognition by . . . peers" to be a collective reference (applying, for instance, to recognition awarded through voting). We do not take the term to mean that an alien need only locate a colleague who personally believes the alien's work to be an achievement or significant contribution to the field. Witness letters describing the petitioner as "exceptional" cannot and do not take the place of the objective documentary evidence required by the regulations.

For the reasons discussed above, the petitioner has not met any of the requirements for exceptional ability except for the requirement relating to length of experience. Also, as we previously noted, the petitioner is not a member of the professions holding an advanced degree. As such, the petitioner has not established that he qualifies for classification under section 203(b)(2) of the Act and the petition cannot be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

ORDER: The appeal is dismissed.