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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

FEB 05 2009

SRC 07 221 50446

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

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.

Mai Johnson

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 appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research fellow at the Massachusetts Eye and Ear Infirmary, Boston, a teaching hospital of Harvard Medical School. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, a witness letter, and copies of articles and manuscripts.

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 the 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.

In a statement accompanying the initial filing of the petition, counsel stated that the petitioner “has devoted all his life to neuroscience and related fields, especially in areas of research related to major health issues such as hearing and balance disorders.” Regarding the petitioner’s current work, counsel stated:

[The petitioner's] ongoing postdoctoral work mainly involves the study of physiological properties of hair cells using genetic, biochemical, and electrophysiological approaches. He is currently focusing on investigating how the differences in hair cell morphology can be further related to the electrical signaling in hair cells after mechanotransduction of sounds, especially how the ion channels modify firing rates of nervous fibers that send information to the brain. This study will shed valuable insights into the mechanism of hearing at molecular and cellular level, with significant implications for the development of more rational and effective treatments for hearing and balance disorders.

Counsel identified four published articles (two in English, two in Chinese) co-authored by the petitioner. Counsel stated that the petitioner's "exceptional expertise is highly valued by the scientific community as shown by the citations of his published research in the works of other scientists in the field such as the following." Counsel then identified one article that contained a citation of the petitioner's work. The implication seems to be that even a single citation demonstrates that a researcher's "exceptional expertise is highly valued by the scientific community." The AAO rejects this argument. The petitioner himself, in his own published articles, cited the work of dozens of researchers. It does not follow that the petitioner highly values the exceptional expertise of every one of these cited authors. Independent citations are a valuable gauge of the scientific community's reaction to a given article, but we must also look at the frequency of such citations. The AAO will not automatically infer eligibility from the mere existence of a single citation. While a low number of citations is not necessarily or automatically fatal to a national interest waiver petition, it is certainly not a factor in a given petitioner's favor. (As we shall discuss later in this decision, the single documented citation is a self-citation by one of the petitioner's collaborators.)

Several witness letters accompanied the initial filing of the petition. Two of the witnesses are at Ohio University, where the petitioner earned his doctorate. [REDACTED] who supervised the petitioner's doctoral studies, stated:

In the past six years [the petitioner's] research contributions have been outstanding, well exceeding the normal expectations of Ph.D. dissertation work. The research he has published has made a significant impact on the field, is highly cited and regarded, and the concepts developed from his work have influenced the current course of hearing research. The insight that his work has provided in understanding the fundamental aspects of hearing and vestibular function, and the immediate promise of this understanding being translated into practical solutions to hearing and balance-related problems, make the contributing of his research of undeniable importance to the national interest. . . .

During his PhD work in my lab, he studied the morphology and biophysics of hair cells, which are the basic elements for hearing and vestibular function. . . . Hair cells . . . detect sound and other mechanical vibrations. Hair cell bundles sit on top of the hair cells and are covered by otoconial membranes. . . . Neuronal fibers differ in their morphophysiological properties and these differences are strongly correlated with the

location of their terminals on the neuroepithelium. This raises the possibility that differences in neural fibers originate in part from spatial differences in peripheral mechanics, i.e., the otoconial membranes, and hair cell bundles. In [the petitioner's] study, he quantified the dimensions of the otoconial membranes, bundle heights, and the coupling between them. He found that all of them change systematically as functions of location and cell type. The patterns he observed resemble spatial patterns in neural fiber physiology and help explain them. This is the first study ever to quantify the morphology of hair cell bundles, otoconial membranes and the coupling between them. His results provide an experimental foundation for models of hearing and vestibular mechanics, and they will contribute to our understanding of signal processing in hearing research.

. . . His study sets up the framework for other researchers to model the biophysics of hair cells, which reflects how the cells will respond to mechanical stimulus.

Ohio University Professor [REDACTED] stated that the petitioner's "findings demonstrated that the structure of the peripheral components of hearing end-organs is important for hearing and vestibular function, which is a significant new finding in the field." [REDACTED] added: "Based on his work, the goal of developing computer models that could mimic the responses of hair cell to sound or other mechanical stimulus has largely been realized and is the basis of ongoing research in a number of labs."

Associate Professor [REDACTED], who supervises the petitioner's current work at the Massachusetts Eye and Ear Infirmary, stated:

[The petitioner] has developed new methods to analyze the structures of the inner ear that respond to head movements. . . . The structural differences that he has elucidated between zones are likely to be responsible for different kinds of signals produced by the sensory cells. [The petitioner's] work both helps to explain already known differences in signals carried by vestibular nerve fibers from the inner ear to the brain, and products some new differences that can be tested for. . . .

[The petitioner] has acquired, through doctoral training in this country and his ongoing postdoctoral research, deep and unmatched expertise in important aspects of vestibular ear function.

The remaining witnesses did not specify their connection, if any, to the petitioner. Associate Professor [REDACTED] of Mount Sinai School of Medicine, New York, New York, credited the petitioner with "significant contributions to understanding the biomechanics, structural biology and signal transduction in the inner ear" and making "major progress in the quantification of hair cell morphology, which is essential for understanding hair cell biomechanics."

Adjunct Associate Professor [REDACTED] of the University of California, Davis, deemed the petitioner "among the most talented young investigators in our field," and stated that the petitioner's

“study has had and will continue to have significant impact on understanding the mechanism of hearing and balance and their dysfunction.”

Associate Professor Leonard stated: “Among [the petitioner’s] most remarkable achievements has been the development of new techniques to document specific biomechanical properties of hair cells that are correlated with morphological differences between functional groups.” [REDACTED] contended that the petitioner has “had and will continue to have . . . a profound influence on hearing research on a national scale.” [REDACTED] asserted that “many other laboratories” have adopted the petitioner’s techniques, and claimed that [REDACTED],¹ Professor and Director of the Virginia Tech School of Biomechanical Engineering and Sciences, one of the world’s authorities on the hair cell mechanics, is using [the petitioner’s] results” in his own work. The petitioner’s initial submission showed that [REDACTED]’s research group cited the petitioner’s work. The citation is a self-citation, because the petitioner’s mentor Prof. Peterson was a co-author of both the cited article and the citing article.

On December 17, 2007, the director issued a request for evidence, instructing the petitioner to provide “evidence that the beneficiary’s research is the basis of ongoing research in a number of labs” and to “[s]ubmit a citation index of the beneficiary’s publications.”

In response, counsel listed four “[c]itations by other researchers.” The accompanying documentation shows that two of the four listed citations are self-citations by [REDACTED]. Counsel stated that these four citations “are merely examples and are by no means exhaustive. . . . [I]t is safe to say that there are very likely other citations not recorded by any of the databases, and that the number of citations is increasing as we speak.” We are limited to considering the evidence provided; the assertion that other citations probably exist, but are unobtainable, has no weight in this proceeding. 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).

Several new letters accompanied the petitioner’s response to the director’s request for evidence. [REDACTED] and [REDACTED] all asserted that they have not taught or collaborated with the petitioner, and that they know him only through familiarity with his work in their shared area of research.

[REDACTED] of Virginia Polytechnic Institute and State University stated: “I have known [the petitioner] for more than 8 years, during which time we have been collaborating on two NIH RO1 research projects.” [REDACTED] use of the petitioner’s model is clearly a result of this collaboration rather than the petitioner’s greater influence in the field. [REDACTED] stated that the petitioner’s findings “have been outstanding and have revolutionized our concepts about the frequency tuning in the utricular hair cells,” and that “several labs in the world use his results,” including “at least one other hearing research lab in Germany.”

¹ The record indicates that [REDACTED]’s name is [REDACTED] not [REDACTED]

██████████ of the Massachusetts Eye and Ear Infirmary stated that the petitioner's "work has completely revolutionized our thinking about balance disorders caused by malfunction of vestibular sensory end-organs," and thereby "put the path of our research back on course."

██████████ stated that the petitioner's "work was used by a laboratory at Virginia Tech to develop the *first* biological realistic computational models of the hair bundles and the extracellular matrix" (emphasis in original). As discussed above, ██████████ and the petitioner both collaborated with ██████████ in matters relating to that research. ██████████ added: "These computational models, *which are based on [the petitioner's] doctoral research*, were singled out in a recent review . . . as an example of particularly promising future directions in multiscale modeling of mechanosensation" (emphasis in original). The petitioner did not submit a copy of the review article mentioned by Prof. ██████████. Also uncorroborated is ██████████'s claim that "[t]he hair bundle model that was developed from [the petitioner's] research has now been used to model hair bundles on auditory hair cells by the highly respected laboratory of ██████████ at the University of Wisconsin, Madison."

██████████ of the University of Illinois at Chicago, who has "known [the petitioner] for about 4 years" but has not collaborated with him, stated that the petitioner's "work is of very high quality and is essential to keeping progress in our field advancing."

██████████ of Washington University in St. Louis, Missouri, credited the petitioner's work with "a measurable impact on the broad field of sensory neuroscience and specifically vestibular system function." ██████████ stated:

[The petitioner] has won . . . national recognition for his outstanding research and individual contributions of major significance in the field of neuroscience. In particular, [the petitioner] developed a very unique measuring and modeling approach with which to study balance receptor function. His seminal work on this topic is quite novel and unprecedented. In addition, [the petitioner] invented a method of analysis upon which to quantify his measurements. . . . His work is providing valuable and essential basic information regarding how the system responsible for motion detection, balance, and spatial orientation are formed. . . . [The petitioner's] work on this topic is extremely important.

The director denied the petition on April 7, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's field of research, but found that the record did not support several of the petitioner's claims (such as ██████████'s assertions regarding third-party use of the petitioner's work and counsel's assertion that other citations of the petitioner's work "very likely" exist). The director also noted that two of the four documented citations were self-citations by a collaborator.

As we discuss the petitioner's submission on appeal, it is important that we emphasize elements of the appeal that did not lead to or support the decision to sustain the appeal and approve the petition. On appeal, counsel asserts that the petitioner had submitted ample evidence of eligibility, and only "total ignorance of [the petitioner's] area of expertise" and a preconceived intention to deny the petition can explain the denial. With respect to the allegation of "ignorance of [the petitioner's] area of expertise," the AAO readily acknowledges that the area of expertise of USCIS adjudicators is immigration law rather than the anatomy of microscopic ear structures. Nevertheless, USCIS adjudicates all claims by applying the immigration laws of the United States to the unique facts of each proceeding, rather than relying on specialized expertise in a given subject area.

Counsel cites no evidence to support the serious accusation that the Service Center adjudicator acted from a preconceived and unalterable intention to deny the petition. The denial itself, even if overturned by the AAO, is not *prima facie* evidence of bad faith at the initial adjudicative stage. While the AAO disagrees with the initial outcome of the petition, the AAO does not question the integrity or motivations of the previous adjudicator. The AAO's reversal of that decision is not in any way motivated, influenced, or affected by counsel's unwarranted attack on the adjudicator's honesty, and should not be construed to mean that the AAO in any way agrees with counsel's accusations.

Shortly after impugning the integrity and competence of the adjudicating officer, counsel turns to the director's observation that some of [REDACTED]'s claims are unsupported. Counsel states: "It bothers me that . . . there would be people implying that she is a liar," adding: "It makes me sad that you would discount the value of her statements as evidence, and outraged at your suggestion to question her professional integrity by doubting the truthfulness of the information she gave to a federal government agency."

The director did not "imply[] that [REDACTED] is a liar." Rather, the director properly adhered to the principle that unsupported claims lack evidentiary weight. The director did not state that Prof. [REDACTED] claims were false or incorrect; the director only stated, logically and correctly, that the petitioner did not submit evidence to support [REDACTED]'s assertions. Counsel appears to imply that unsupported claims should suffice in place of evidence, but counsel cites no legal basis for this position because there is none to be had. Section 291 of the Act clearly places the burden of proof on the party seeking immigration benefits. The petitioner does not meet this burden by providing third-party claims (whatever their source). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Neither the director nor the AAO assumes [REDACTED]'s claims to be true or false; we simply withhold judgment about those statements unless and until evidence is provided to either confirm or contradict them. This is not a comment on [REDACTED]'s integrity, but rather a factual finding regarding the absence of evidence in the record.

The petitioner submits a new letter from [REDACTED], intended to address the director's concerns. [REDACTED] states: "Evidently your concerns arose because I did not supply sufficient detail in my previous letter." Lack of detail was an issue, but not the only issue. More fundamentally, Prof.

is not in a position to speak for other laboratories on the question of whether those other laboratories have relied on the petitioner's work.

identifies two "reviews, which cite the Virginia Tech models as examples of promising new directions or as providing 'new insights' into hair cell function." One review appeared in the *Journal of Membrane Biology* in 2006; the other in *Briefings in Bioinformatics* the following year. asserts that "the Virginia Tech models," developed by , are directly based on the petitioner's work, and therefore serve as evidence of the petitioner's impact on the field. The record does not contain the two review articles mentioned by and therefore it is not possible to ascertain, from the evidence provided, the extent or context of the relevant comments in the review articles.

asserts that s papers that have relied on the petitioner's work have, in turn, "been cited a total of 18 times (*excluding* self citations)" (emphasis in original). The petitioner does not support this claim by submitting copies of the citing articles or a printout from a citation database. Even if such evidence had been provided, the AAO is hesitant to rely on secondary citations in this manner. The burden of proof would be on the petitioner to establish that the citing researchers cited work only because had, in turn, relied on the petitioner's work.

At the time provided this letter, the director had already advised the petitioner that simply mentioning evidence cannot suffice in place of submitting the evidence itself. Neither USCIS in general, nor the AAO in particular, is required to purchase or otherwise obtain the articles identified by . It is the petitioner's responsibility to provide the necessary evidence, and the petitioner cannot abdicate this responsibility simply by telling USCIS where such evidence can be obtained.

It may very well be the case that every claim makes is entirely true; the AAO has no basis to suspect that has been either honestly mistaken or willfully untruthful. Without corroborating evidence, however, the AAO will not make the assumption that assertions are true, or that they have the same weight as primary documentary evidence.

The petitioner submits documentation showing that he co-authored several journal articles that were published, or accepted for publication, after the petition's July 13, 2007 filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing, rather than become eligible at a later date owing to new developments. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The AAO duly notes the articles as evidence that the petitioner has continued to work productively in the same field, but beyond that the articles, manuscripts, and related materials carry little weight in this proceeding.

Having dispensed with the more flawed elements of the appeal, we turn to the more persuasive elements of the appeal. Counsel states that the record contains "plentiful of evidence" (*sic*) to establish the petitioner's eligibility for the waiver, including several strong letters from independent witnesses. While the director was correct that "[f]requent citation is often evidence that other researchers in the field are applying and relying upon [one's] work," citations are not the only such evidence. A number

of researchers at a variety of institutions, who claimed no working relationship with the petitioner, have asserted that they rely on the petitioner's work. Furthermore, these witnesses have indicated that the petitioner's contributions are fundamental rather than incremental. Independent witness letters do not invariably compel the approval of a petition, but in this instance the letters, in conjunction with the rest of the record, establish a preponderance of evidence in favor of approval of the waiver request and the underlying petition.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

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