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U.S. Citizenship  
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Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: FEB 05 2009

IN RE:

Petitioner:

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:

**INSTRUCTIONS:**

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

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

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research associate at Tulane University, New Orleans, Louisiana. He subsequently began working at New College of Florida, Sarasota. The record does not establish his current title or position. 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 what appears to be a proof copy of a book chapter containing a citation of the petitioner's work.

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] 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.

Four witness letters accompanied the petitioner’s initial submission.  
supervised the petitioner’s doctoral research at Wesleyan University, stated:

who

[The petitioner] is one of the top scientists in the use of spectroscopy which is defined to be the production, measurement, and analysis of frequency spectrum produced as a result of the emission or absorption of energy by molecules. . . .

The projects [the petitioner] carried out when he was in my research group mainly involved the study of rotational spectra of various molecules. The projects in which he was involved were two-fold: a) transient molecules and b) the study of very weakly bound complexes known as van der Waals complexes. . . .

Transient molecules are highly reactive molecules which are important in the field of chemistry of the Interstellar Medium (i.e. space). . . .

To produce the transient molecules, [the petitioner] implemented the technology of the pyrolysis nozzle. . . . Only a few scientists in the world, including [the petitioner], have the expertise to implement this technique and are well-versed in the technical aspects of this technology. . . . The technology implemented by [the petitioner] has had wide-ranging implications in the production and characterization of new, never before produced, unstable molecules. [The petitioner's] unique ability to discover means to generate transient molecules will have a significant impact on the field of material sciences because the methods used to create unstable transient molecules can be used to develop new materials for commercial uses. . . .

An example of van der Waals complexes in nature is the interactions present between water molecules in the upper atmosphere which lead to cluster growth and eventually droplet and cloud formation. . . . Understanding van der Waals complexes [is] important since such interactions play an important role between molecules in nano-scale and micro-scale materials. Nano/micro-scale materials represent a miniaturization of basic materials and have many practical applications. For example, understanding van der Waals complexes is an important part of the development of prototype nano/micro-scale built-in car tire pressure sensors.

It is extremely difficult to determine the structure of weakly bound molecules/van der Waals complexes. . . . A major part of the research undertaken by [the petitioner] at Wesleyan was the measurement and assignment of a large amount of spectra using a special spectrometer used by only thirty laboratories in the world including ours. During these projects, [the petitioner] achieved a unique skill set of maintaining this spectrometer, analyzing the data collected from experiments, and deriving important molecular properties through data analysis. . . .

One of [the petitioner's] most important achievements is that he was able to successfully assign the spectrum of the molecule 2-butyne within the resolution of the spectrometer instrument for the first time for such a class of molecules. . . . [The petitioner's] discovery of how to study such molecules at the high resolution of the spectrometer leads to an improved understanding of intramolecular long range interactions.

[REDACTED], who supervises the petitioner's current work at Tulane University, stated:

What is noteworthy is the very wide *range* of research skills [the petitioner] has practiced. . . .

Using these skills, [the petitioner] has made new research accomplishments in his previous graduate and postdoctoral research situations. . . .

[The petitioner's] current work involves carrying out gas phase chemistry . . . of novel organometallic compounds (chemical compounds that contain bonds between carbon and a metal atom) which must be custom synthesized. . . . Using his past experience, he is now completing construction of a new pyrolysis nozzle that will be used in some of our upcoming experiments. It would be impossible to undertake some project experiments without his new development. The objective of these experiments is to understand structural properties of novel compounds. These novel compounds have applications in the field of optical switches and in the field of materials science. . . .

People with even a subset of his skills are essential to sustaining and furthering basic chemistry research in the United States.

The remaining two witnesses, [REDACTED] and [REDACTED] are both professors at Washington University in St. Louis, Missouri, who asserted that they know the petitioner "through a common colleague" or "mutual colleague" whom they did not name. The two letters contain nearly identical passages, consistent with common origin. For example, this passage is from [REDACTED] letter:

[The petitioner] is recognized for his fundamental research on combining the technique of pyrolysis nozzle and Fourier Transform Microwave Spectroscopy. [The petitioner] is the first person to work with combining two such techniques. The importance of this work cannot be stressed enough since it lays the foundation for other people in the field of interstellar chemistry to follow.

Compare the above passage to the following excerpt from [REDACTED] letter:

[The petitioner] is recognized for his fundamental research on combining the techniques of flow pyrolysis nozzles and Fourier Transform Microwave Spectroscopy. [The petitioner] is the first person to have successfully combined these two techniques. The importance of this work cannot be stressed enough, since it lays the foundation for other people in the field of interstellar chemistry to follow.

Both letters deemed the petitioner to be "an authority in gas-phase chemistry, molecular beam spectroscopic techniques, and in basic chemistry." We will give due consideration to these witnesses'

endorsements, but we cannot conclude that the letters were written independently or that the respective signers personally chose the wording of those letters.

The petitioner submitted copies of his published work, and a printout from a citation index showing two independent citations of one of the petitioner's articles in the *Journal of Molecular Spectroscopy*. The petitioner did not establish that this citation rate distinguished him from other published researchers in his field.

On February 12, 2008, the director issued a request for evidence, instructing the petitioner to "submit updated documentation of the total current number of citations of [the petitioner's] work by others," and to corroborate the assertion that the petitioner's work "lays the foundation for other people in the field of interstellar chemistry to follow."

In response, counsel stated that the petitioner "is one of only a few scientists in the world that have ever developed pyrolysis nozzle techniques." Assuming this claim to be true, its importance is debatable. It could be that many scientists have attempted to develop such techniques, but "only a few have succeeded." On the other hand, it may be that the petitioner works in a subspecialty that is so narrow that "only a few scientists" ever attempt such techniques in the first place. The record does not clarify this question, and the AAO will not presume that the rarity of a skill is in direct proportion to its importance. Furthermore, there is no indication that the petitioner invented the pyrolysis nozzle. Rather, the claim is that the petitioner has mastered existing pyrolysis nozzle technology. *Matter of New York State Dept. of Transportation* directly addressed the issue of an alien with training in important technology developed by others. *Id.* at 221 and 221 n.7. The claim that few researchers share the petitioner's specialized expertise can be tested through the labor certification process. If labor certification is not possible because the position is inherently temporary, and the alien already holds valid nonimmigrant status to work in that temporary position, then permanent immigration benefits are not required for the alien to continue in that short-term work.

Counsel stated that the petitioner's "research publications have been cited a total of 6 times by others around the world," and the petitioner submitted documentation to support this assertion. Counsel claimed that the petitioner's "research is in a basic science field where publications do not generate a high number of citations by others and [therefore] 6 citations is a significant number for this field of research." **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).

The petitioner submitted partial copies of six articles independently citing his published work. Five of the articles, published in 2006 and 2007, cited a 2004 article that the petitioner published in *The Journal of Physical Chemistry*. The sixth article, from 2006, cited a 2003 article from *The Journal of Molecular Spectroscopy*. The petitioner submitted no evidence to show that these citation rates were unusually high for the respective source journals. The petitioner's evidence showed the impact factor (a statistic relating to citation rate) for only one journal, *The Journal of Chemical Physics* (not to be confused with *The Journal of Physical Chemistry*), and the record contains no evidence of citations of the petitioner's

2007 article in *The Journal of Chemical Physics*. There is, therefore, no empirical support for counsel's claim that the petitioner's work is cited at an unusually high rate. (Witness statements about citation rates do not have the same evidentiary weight as actual citation data.)

The petitioner submitted several additional witness letters. Three of these witnesses have, themselves, cited the petitioner's past work. [REDACTED] of the University of Bologna, Italy, stated that the petitioner's "study was found to be of major importance in the field of gas phase structural determination and we discussed it in our publication."

Using very similar language, [REDACTED] of Heinrich Heine University, Düsseldorf, Germany, stated: "we found the above mentioned study conducted by [the petitioner] to be of major significance in the field of gas phase structural determination and therefore we discussed it in our publication."

[REDACTED] of Aachen University, Germany, stated that the petitioner's "paper is a valuable source of information for anybody who is involved in microwave spectroscopy studies on low barrier internal rotation."

Two witnesses who did not specify how they became aware of the petitioner's work are [REDACTED] of the University of Connecticut and [REDACTED] of Gottfried Wilhelm Leibniz University, Hannover, Germany. [REDACTED] stated:

[The petitioner] is known for his research in producing transient molecules by combining the techniques of flow pyrolysis nozzle and Fourier Transform Microwave Spectroscopy. The combination of these two techniques by [the petitioner] is completely novel and groundbreaking and sets him apart from all others in the field. [The petitioner's] technique allows scientists to produce molecules of interstellar importance (or of other fields) that cannot be accessed and/or produced by using any other techniques. . . .

[The petitioner's] work is well known to have significantly advanced molecular spectroscopy. His research has led to an understanding of some of the principles that will reveal more fundamental details on the effects of interactions in understanding the base-pair interactions in DNA. . . .

[The petitioner] is an outstanding and internationally recognized researcher in the field of molecular spectroscopy, to which he has contributed a history of demonstrable achievement.

[REDACTED] stated:

[The petitioner's] work has led to the development of novel molecular species and will ultimately result in furthering the basic scientific understanding of such molecular system[s].

. . . His field of research falls under the category of basic science. Since this line of science is mostly devoted to research fields of an early stage of development, it often does not get as much attention as one might imagine. Therefore the vitality of such a line of research directly becomes evident from its acceptance for publication in high profile journals as well as the fact that these projects are funded internationally and nationally by different granting agencies.

The petitioner provided nothing from the publishers and granting agencies themselves to corroborate the witnesses' third-party claims about the significance of publication and grant funding.

The remaining witnesses have demonstrable ties to the petitioner, either through direct collaboration or through [REDACTED] k. The witnesses asserted that the petitioner's skill set is very rare in his field, and that the value of the petitioner's work is evident from its publication in prestigious journals. Two letters, respectively attributed to Georgia Southern University Associate [REDACTED] (who previously worked in [REDACTED] laboratory) and Associate [REDACTED] of the New College of Florida (which hired the petitioner in 2007), each contain the following passage:

[The petitioner] has implemented a pyrolysis nozzle to produce unstable radicals and transient molecules and then characterized the structure of these transient molecules by spectroscopic techniques. He cleverly combined the flow pyrolysis nozzle technique with Fourier Transform Microwave Spectroscopy.

The director denied the petition on June 10, 2008, stating that the petitioner's occupation possesses intrinsic merit and national scope, but that the petitioner has not produced objective documentation to support claims that the petitioner has significantly influenced his field. On appeal, the petitioner submits what appears to be a proof copy of a book chapter, "Microwave Rotational Spectroscopy," which contains previously unclaimed citations of two of the petitioner's articles from 2005.

In an accompanying brief, counsel states:

One of the primary factors distinguishing Petitioner from others in his field is that his accomplishments are the result of the application of his combined knowledge from the disparate fields of chemistry and physics. . . . The record establishes that Petitioner's accomplishments are significant and distinguish him from others because they required his ability to apply knowledge of other fields in order to make significant advances within his specific field that minimally qualified U.S. applicants, lacking such knowledge, would be unable to make.



It cannot suffice to state that the alien possesses useful skills, or a “unique background.” As noted above, regardless of the alien’s particular experience or skills, even assuming they are unique, the benefit the alien’s skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *Matter of New York State Dept. of Transportation* at 221.

Beyond the case law cited above, the record documents the existence of not only *The Journal of Chemical Physics*, but also *The Journal of Physical Chemistry*. This indicates the crossover between physics and chemistry is hardly unique to the petitioner. Furthermore, if the petitioner’s work “requires knowledge in physics and chemistry,” as counsel quotes Prof. Gross on appeal, then an applicant who lacks knowledge in physics and chemistry is unqualified, not “minimally qualified,” for that work. The term “minimally qualified” refers to the minimum qualifications that would prepare a worker for a given position; by definition, the term excludes workers unable to perform the tasks of that position.

Counsel maintains that “independent experts in his field” have attested to the petitioner’s “significant findings” and “past history of demonstrable achievement.” The independence of the witness statements is very much in doubt, given multiple documented instances of shared language, indicating common authorship of the letters, at least in part. Indeed, counsel offers identical quotations from different witnesses when discussing the witness letters in the appellate brief.

The petitioner has established that some of his principal skills are highly specialized, but possession of highly specialized skills is not *prima facie* evidence of eligibility for the waiver. Other assertions are equally tenuous. Counsel maintains that the petitioner’s receipt of a grant with a 27% application approval rate, and his approval for telescope time at an observatory that approves 40% of requests for such time, demonstrate the petitioner’s superiority. The petitioner submits nothing from the granting entity or observatory to establish that the approvals are as significant as counsel argues. Access to scarce resources is not an automatic indicator of eligibility for the waiver.

Counsel claims that the director made “the completely unfounded assumption that all areas of science are equal in terms of the quantity of publication and therefore, frequency of citations.” The burden lies with the petitioner to establish the quantity of publication and frequency of citations in his specialty. The petitioner submitted a document regarding one journal’s citation index (*i.e.*, frequency of citations), so clearly the petitioner is able to obtain and submit such materials, but the petitioner did not submit such evidence for the publications in which the petitioner’s cited work has appeared. Letters claiming that the petitioner’s field has a low citation rate cannot have the same weight as documentary evidence, particularly in the face of evidence that those letters were written for, rather than by, the witnesses.

The petitioner’s reputation and impact are clearly not limited entirely to his own circle of collaborators, but the extent of the petitioner’s wider impact is in doubt. Letters specifically created for the express purpose of supporting this petition are highly complimentary toward the petitioner, but this is to be expected given the acknowledged purpose of those letters (and the evident circumstances of their creation). First-hand documentary evidence, which exists independent of the petition, fails to establish the level of impact and influence claimed in the letters.

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.