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U.S. Citizenship and Immigration Services
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[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUL 17 2009
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The 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 a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate at Oregon Health and Science University (OHSU). 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 with supporting exhibits and two witness letters.

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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document (or the equivalent portion of its successor document, ETA Form 9089), and therefore the petitioner has not properly applied for the national interest waiver. The director,

however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

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 July 30, 2007. To describe and evaluate his work in the specialty of auditory science, the petitioner submitted nine witness letters. [REDACTED] of Boston University stated:

I was [the petitioner's] advisor when he was pursuing his PhD degree here at Boston University. . . .

In 2001, he began working with me in a project involving the design and construction of a biomimetic 'smart' sensor which modeled the ability of the human ear to discern sound pitch. [The petitioner's] work was an important part of that three-million-dollar project, funded by the Defense Advanced Research Projects Agency. The applications for this sensor include urban surveillance to detect meaningful sounds, like vehicular traffic. It also has application in the biomimetic sonar systems used by micro-robots. [The petitioner's] work in supporting the design and carrying out extensive behavioral testing was critical to the project. . . .

[The petitioner's] continued presence in this very specialized field of hearing research, where his activities are both productive and critically important, is vital for reasons relating to health and ageing.

[REDACTED], Program Manager at the Office of Naval Research, stated:

I was first introduced to [the petitioner] in 2001 when he started working for [REDACTED] in a project funded by my office. The project consisted of building a sensor system to mimic the mammalian auditory processing for sound localization. . . . [The petitioner] also worked on constructing a mechanical device to mimic the signal processing functionality of the mammalian cochlea. . . . [The petitioner] has made great progress since he started to work on the project and has not only solved the technical problems in measuring the responses of the device, but also composed a mathematical model for understanding its behavior, and then creatively proposed an effective method to improve its performance.

[REDACTED], Director of the Oregon Hearing Research Center at OHSU, stated:

[The petitioner] is employed as a research associate/engineer in the Cochlear Physiology Laboratory in the Oregon Hearing Research Center, and I am his advisor. The projects [the petitioner] works on deal with the development of an optical coherence tomography system designed to study the physiology of the cochlea, so that we can better understand the cellular function of the hearing organ. His work is crucial to the understand[ing] of the physiology of outer hair cells, including how and why these cells are the most vulnerable inner-ear cellular elements to all forms of damage (sound, age and toxic drugs). The work is essential to understand the causes of hearing loss that will benefit the development of new therapies to treat and prevent the hearing disorder. . . .

Before [the petitioner] joined the Center, he had already contributed significantly to the field of cochlear mechanics. He was one of the leading authors in constructing an artificial device to mimic cochlear acoustic signal processing function. . . . [B]uilding an artificial device to mimic this delicate hearing organ is a great challenge and has been a long term goal in both the biological and engineering fields. . . .

More recently, [the petitioner] has extended his research into designing and applying optical coherence tomography (OCT), a novel optical technique, to image and measure the vibration of the cells of the organ of Corti, which is the structure responsible for detecting sound.

[REDACTED] stated:

[The petitioner] has been working closely with me for two years. . . .

Our project focuses on development of optical coherence interferometry, a novel optical technique to study the mammalian hearing organ. . . . [The petitioner] has played a leading role in the development of an algorithm to achieve reliable vibration measurement within a noisy environment. This had been a major obstacle in our system development, and his elegant design has enabled us to achieve a reliable and stable measurement of the inner ear. . . .

The impact [of] our research is in the study of the cochlear mechanics [on] the cellular level, which is essential to understand how the hearing organ processes the sound. This work is of central importance to the field of hearing. . . . The recent optical technique of [the petitioner] has been a key item on the wish list of [the] cochlear mechanics community for years, according to [REDACTED].

[REDACTED] stated that the petitioner's "efforts have been instrumental in the success of [a] project" that "addresses the previously undocumented epidemic of noise induced hearing loss in children and adolescents." [REDACTED] added that the petitioner "is also an essential contributor to another project . . . investigating a novel technique to remobilize a paralyzed vocal cord for voice restoration." Describing the nature of the petitioner's contributions, [REDACTED] stated that the petitioner contributed "by helping identifying instruments, building customized circuitries, and setting up [an] instrument system in the operating room for the animal experiments."

Most of the remaining witnesses have collaborated either with [REDACTED] or [REDACTED] Assistant [REDACTED] of Columbia University, who has published with [REDACTED] and visited the petitioner's laboratory in 2006, stated that the petitioner's "novel optical technique to investigate the micro-mechanics of the mammalian inner ear . . . is a revolutionary technique."

[REDACTED] of the University of Michigan, who has collaborated with [REDACTED], stated:

While I have never directly supervised [the petitioner], I am well aware of his doctoral dissertation at Boston University and his Post-doctoral research at the Oregon Health and Sciences University. . . .

In cochlear mechanics, there is an international scientific debate regarding the nature of wave propagation in the cochlea. [The petitioner] is providing both theoretical and experimental leadership in solving this scientific debate through his work on the backward traveling wave in the cochlea. . . .

In addition, he is spearheading the development of an Optical Coherence Tomography (OCT) laser sensor for tissue displacement measurements. The development of this technique will revolutionize the manner in which physiological experiments are performed, accelerating the discovery of the fundamental workings of mammalian hearing. . . .

[The petitioner] has performed and continues to perform nationally recognized research that is of the highest quality.

1993, stated: of the University of Amsterdam, who has collaborated with since

[The petitioner] has been working on . . . the study of backward energy propagation mechanism inside the cochlea. This work . . . provides new inside [*sic*] to a basic phenomenon and a fundamental puzzle in cochlear mechanics. A good knowledge of the backward propagation mechanism is important not only for understanding cochlear physiology but also for optimally utilizing ‘otoacoustic emissions,’ signals emitted by the ear which are extremely useful for the noninvasive diagnosis of hearing disorders and for hearing screening of the new-born.

The only witness with no documented collaboration with the petitioner’s advisors is [redacted] of Stanford University, who stated:

I got to know [the petitioner] in 2003 from his work in designing and constructing an artificial smart sensor to mimic the mammalian cochlear functionalities. I know his work very well because I was also working [on] a similar project, building the artificial device with a different approach. . . .

I did not meet [the petitioner] until July, 2005, when we both attended a conference on cochlear mechanics and presented our designs. I was amazed by the beautiful results he got from his device and the excellent idea to address the technical problems we both faced.

The petitioner submitted copies of his published work and abstracts of conference presentations, but no objective evidence of the impact of this work.

On September 30, 2008, the director issued a request for evidence, instructing the petitioner to submit “[c]opies of published articles by other researchers citing or otherwise recognizing the petitioner’s research and/or publications,” or printouts from an identified citation database. The director stated: “The petitioner must demonstrate that his work has impacted or influenced the field of endeavor as a whole.”

In response, the petitioner submitted printouts from <http://scholar.google.com> (Google Scholar), showing four citations of one of the petitioner’s articles, and two citations of a second article. Regarding the article cited four times, two of the citations are in articles by initial witness [REDACTED] and his student [REDACTED]; a third citation appeared in [REDACTED] doctoral thesis. With respect to the second article, one of the two citations is a self-citation in a later article by the petitioner. The petitioner also submitted copies of previously submitted exhibits and other materials outside the scope of the director’s request.

The director denied the petition on December 1, 2008, stating that the minimal citation of the petitioner’s published work did not indicate that others in the field viewed the petitioner’s work as being particularly important or influential. The director acknowledged the witness letters, but noted that almost all of the witnesses have demonstrable ties to the petitioner or to his supervisors.

On appeal, counsel argues:

First of all, Cochlear Mechanics is a research field that is relatively small compared to fields such as breast cancer and/or computer software/hardware for obvious reasons in terms of researchers involved and journals available. Despite that, the attached materials should show that, comparatively, the citation ranking of [the petitioner’s] article was within at least 33 percentile.¹ As the attached chart shows, for the articles published in 2006, the same year[] as [the petitioner’s] above discussed article was published:

1. 523 articles were [found] with the key words;
2. Among the first 100 articles found:
 - a. *Medi[an] number of citation for such an article is 1;*
 - b. 40% of the articles did not get any citation;
 - c. 67% of the article[s] have less than four citations;
 - d. In other words, only 33% . . . of [the] articles got 4 citations or more; and
 - e. [The petitioner’s] article had four citations.

Admittedly . . . among the four citations, three citations had [the] same author, however, that did not change the fact that the [citing] articles were not by the [petitioner] only and

¹ (*Sic.*) Counsel appears to mean the 67th percentile.

the articles demonstrated different purposes and showed the most advanced degree of the research in the field.

All of counsel's figures derive from Google Scholar searches. Counsel noted that, also in 2006, 92,700 articles with the keywords "breast" and "cancer" were published, with a median of 65 citations per article. This comparison is not entirely accurate, as the topic of cochlear mechanics is considerably narrower and more specialized than the broad subject of breast cancer. The latter subject includes any number of subdivisions including genetic causes, environmental causes, diagnostic methods, treatment methods, and so on.

Also, the keyword search did not involve the phrases "cochlear mechanics" and "breast cancer," but rather the single words "cochlear" and "mechanics," and "breast" and "cancer," without regard to whether the words were grouped together. This may have skewed the results by including unrelated articles that happened to include those words in isolation.

Counsel's "67%" figure does not take into account the complete search results, but rather "the first 100 papers in the search results." A histogram of these 100 papers shows that, of all the papers showing citations, four was the second most common number of citations; the distribution of citations is almost bimodal, with nearly as many articles cited four times as were cited once. The histogram shows a significant cluster from zero to four citations, tailing off at five or more. According to the histogram submitted on appeal, an article cited four times is not the statistical outlier that counsel claims. Rather, such an article is within the main cluster on the left-hand side of the histogram.

Even then, only one of the petitioner's published articles has produced such a citation rate. Most of the petitioner's published articles appear to have no citations at all; the petitioner has documented only one independent (non-self) citation of one other article. Counsel has not explained why the four citations accorded to one non-representative example of the petitioner's work should carry more weight than the performance of all the petitioner's other articles put together.

Two witness letters, both from prior witnesses, accompany the appeal. A new letter from [REDACTED] is mostly identical to his earlier letter, with added passages listing the petitioner's articles and indicating that the petitioner will have more flexible career options as a permanent resident than as a nonimmigrant.

[REDACTED] praises the petitioner's achievements between 2005 and 2007 and states: "A minimally qualified researcher would not perform at [the petitioner's] level." As explained earlier in this decision, an alien does not qualify for the waiver simply by virtue of being above average in his or her field. A degree of expertise significantly above that ordinarily encountered in a given field is not an automatic qualifier for the waiver. That phrase is the regulatory definition of exceptional ability, and aliens of exceptional ability are typically subject to the job offer/labor certification requirement. It is for this reason that the director favored documentary evidence of the petitioner's impact above the opinions and impressions of witnesses chosen by the petitioner.

From the evidence of record, it is clear that the petitioner's work has impressed his mentors and their collaborators, who see significant promise in the petitioner's talents and accomplishments. In terms of greater impact and wider influence, however, it appears this promise has yet to bear significant fruit. At best, the petition appears to have been filed prematurely.

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 decision 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.