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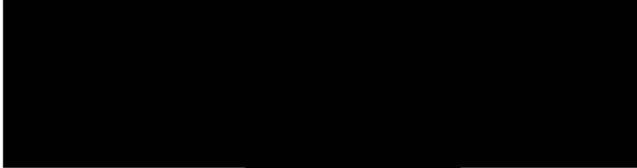
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 23 2009
SRC 07 232 51252

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:

SELF-REPRESENTED

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 and as a member of the professions holding an advanced degree. The petitioner is a soil scientist who, at the time of filing, was a postdoctoral research associate at Oak Ridge National Laboratory (ORNL) in Tennessee.¹ 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 arguments and new 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.

The director found that the petitioner qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would add nothing of substance to the record. The

¹ It is not clear whether the alien self-petitioner still works at ORNL. On February 20, 2009, the University of Oregon filed a Form I-129 nonimmigrant visa petition (receipt number WAC 09 101 51608) on the alien's behalf. The Director, California Service Center, approved that petition on March 16, 2009, valid until June 30, 2010. It seems unlikely that the University of Oregon would have pursued that petition without the alien's assurance that he intended to work at the University of Oregon.

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.

The petitioner filed the petition on July 28, 2007. The petitioner described his work:

More than 60% of DOE [Department of Energy] facilities have groundwater contaminated with metals or radionuclides such as uranium. . . .

[S]oluble radionuclides such as uranium were found to be reduced into insoluble form and removed from groundwater by soil microorganisms. Bioremediation using these metal-reducing microorganisms to transform radionuclides became potentially the most cost-effective cleanup technology. . . .

However, the application of bioremediation to contaminated sites is often complicated by the unpredictability of microbial activities under various geochemical conditions. . . .

My research projects focus on study[ing] the regulator effects of geochemical conditions on the composition and activities of uranium-reducing microbial community. . . .

I have made significant contributions to the study of environmental bioremediation both in technology development and experimental knowledge acquirement [*sic*]. I have established a cloning library method employing robotic instruments to analyze microbial community at large-scale for environmental samples. . . . The establishment of this method makes it possible to study a complicated bioremediation process by simultaneously monitoring microbial community change under various geochemical conditions. . . .

In addition, I have made ingenious designs for technology improvement. For example, I have successfully incorporated a freezing and heating step with a standard soil and groundwater DNA extraction procedure . . . , which saves tremendous efforts for the subsequent sequencing and denotation steps. . . .

To address the factors [that] regulate the uranium reduction and stabilization under different geochemical conditions, I have made several important discoveries: 1) I identified a[n] optimized bioremediation condition that the activities of microorganisms were rapidly stimulated to reduce uranium and remove it from groundwater to meet the EPA drinking water standard; 2) I discovered that several unique microbial communities were responsible for uranium bioreduction under different geochemical conditions, and identified novel microbial species from the contaminated sites; 3) I found that natural organic compounds [are] involve[d] in uranium transportation after bioreduction and therefore have to be considered for a long term stewardship of the contaminated sites. . . .

My extensive research activities have established myself [as] an indispensable figure in the field of environmental bioremediation research. . . . Therefore, if I cannot continue my research, the projects of Department of Energy will suffer seriously.

Regarding the petitioner's assertion that it is in the national interest for him to remain at ORNL, the record shows that the petitioner's immigration status is not the only obstacle to the petitioner's continued employment at ORNL. A letter from [REDACTED], Senior Program Specialist with ORNL's Postdoctoral Research Associates Program, indicated that the petitioner "is considered a full-time temporary employee of Oak Ridge Associated Universities (ORAU)." Whatever the petitioner's intentions, there is no evidence that ORNL intends to employ the petitioner long-term.

Seven witness letters accompanied the initial filing of the petition. The petitioner asserted that four of these letters "were written by . . . third-party proponents," but all of the witnesses so identified have demonstrable ties to the petitioner. Two of the witnesses are on the faculty of the University of Kentucky (UK), where the petitioner earned his doctorate.

[REDACTED] stated that the petitioner "has already distinguished himself from others in the field by being among the small number of researchers in the United State[s] who have focused on the issues and techniques of environmental molecular biology." The petitioner's choice of specialty attests to the intrinsic merit of his work, but it does not serve to distinguish him from others in the same specialty. Congress created no blanket waiver for environmental molecular biologists. [REDACTED] also asserted:

[The petitioner] has made important contributions to environmental bioremediation research by studying soil microbial community diversity, isolating and culturing novel bacteria from soils for organic pollutants biodegradation, discovering several important relationships between bioremediation strategies and microbial community changes, and developing molecular biology techniques for efficiently characterizing microbial communities at contaminated sites.

[REDACTED] Associate Professor at UK, "became familiar with [the petitioner's] research through serving as his doctoral dissertation examiner." [REDACTED] credited the petitioner with "several original contributions to our understanding of uranium bioreduction mechanisms and the microbial communities responsible for bioremediation."

[REDACTED], Senior Scientist at ORNL and the petitioner's postdoctoral advisor, stated:

[The petitioner] is an outstanding young environmental scientist that has internationally renowned research ability and significant contributions to the field of bioremediation. . . .

His insights and interdisciplinary training in soil chemistry and microbiology will be invaluable for studying uranium bioreduction and geochemical processes. In

addition, he has excellent data analysis skills . . . [that] will be very useful since large chunks of geochemical and microbiological data are going to be utilized and analyzed. . . .

[H]is strategy of coupling remediation with microbial community changes is so successful that now we decided to implement this strategy to a newly funded pH manipulation project to further explore uranium remediation and the corresponding microbial populations. We expect that [the petitioner] will play a leading role in implementing the project.

████████████████████ Distinguished Research Staff Scientist at ORNL, stated that the petitioner's "research is innovative and cutting-edge as it is directed toward development of novel bioremediation technologies. . . . In addition, [the petitioner] is a key research scientist regarding investigations on the use of pH manipulations to precipitate uranium and stabilize contaminants in the field."

████████████████████ Manager of the Oak Ridge Field Research Center, described the petitioner as "a very bright young scientist" who "is one of the key researchers in [the] DOE Environment Remediation Sciences Program at ORNL." Describing one aspect of the petitioner's work, Mr. Watson stated:

One of the challenges is to understand the microbial community in diverse environment[al] conditions encountered at [a] hazardous waste site. [The petitioner] has made substantial contributions to this area by identifying and characterizing several microbial communities in various geochemical conditions. In addition, his study on pH manipulation to immobilize uranium in sediments is particularly interesting because it potentially can be implemented in the field to remediate contaminated sites and prompt growth of microorganism[s] to accelerate bioremediation processes.

████████████████████ Assistant Professor at Texas A&M University, stated:

I started my professional communications and collaboration with [the petitioner] when I was working at Oak Ridge National Laboratory as a post-doctoral research associate. During that time [the petitioner] began work as a post-doctoral associate on the same environmental remediation project. [The petitioner] and I often worked as a team. . . .

With his Ph.D. training, [the petitioner] has developed excellent molecular biology techniques for characterizing microorganisms and microbial processes.

██████████ Senior Research Engineer at Stanford University, has “worked together with the research scientists of [the] Environmental Science Division, Oak Ridge National Laboratory for three collaborative research projects.” ██████████ stated:

[The petitioner’s] activities have been focusing on the identification and characterization of microbial communities involved in electron transfer of uranium bioreduction and biodegradation. He has established a strategy to simultaneously study the changes of microbial community and uranium reduction activity under various geochemical conditions. . . .

Currently I am collaborating with [the petitioner] on a newly funded project to investigate groundwater pH adjustment to precipitate uranium with aluminum hydroxides and its influence on microbial community in the subsurface. . . . [W]e have been able to manipulate geochemical conditions to control the concentration of uranium in groundwater at the US Department of Energy contaminated sites. We reached an unprecedented environmental remediation goal by cleaning the heavily contaminated groundwater to meet the US Environmental Protection Agency drink[ing] water standard under field conditions.

The petitioner submitted copies of his published articles and manuscripts submitted for publication. The petitioner also submitted a list of articles that cite his published work. The petitioner identified no source (such as a citation database) for the list. The list indicated that four of the petitioner’s publications had been cited one to three times each, for a total of eight citations. The petitioner’s cited articles date from between 1997 and 2002. None of the articles appears to relate directly to microbial bioremediation of contaminated soil; three of the articles relate to the petitioner’s prior agricultural work, whereas the fourth article deals with soil contamination from the production of wood pulp. Given the petitioner’s heavy – almost exclusive – emphasis on the importance of his work with uranium-tainted soil at ORNL, the lack of citations of the petitioner’s work in that area is of concern.

On September 10, 2008, the director issued a request for evidence, instructing the petitioner to distinguish his work from that of others in the specialty. In response, the petitioner submitted further documentation, including new articles, and letters “from four of the most prominent environmental scientists in the country.” ██████████, in his second letter, stated that the petitioner’s “research on environmental microbial community dynamics has provided invaluable information for uranium bioremediation and other related research issues that deal with legacy subsurface contamination.” ██████████ stated that the petitioner’s characterization of samples “places him well above most of his peers who perform research of a similar nature . . . [and] provided for the first time a comparable database of microbial dynamics as a function of various geochemical factors.” ██████████ concluded that the petitioner’s “research has contributed greatly to environmental science and the economic and human health of the United States.”

The other three witnesses indicated that they know of the petitioner only through his work. [REDACTED] of Johns Hopkins University praised the petitioner's doctoral work regarding polychlorinated biphenyl (PCB), specifically studying "the effects of naturally occurring metabolic stimulators and surfactant on PCB biodegradation and the responsible microbial communities. . . . At the time of his graduation, [the petitioner] has fully developed his professional reputation and become an experienced scientist recognized by the academic community." Prof. [REDACTED] briefly mentioned the petitioner's work with radionuclide bioremediation, but did not discuss such work in any detail, even though that work had clearly been the focus of the petitioner's initial submission.

[REDACTED] of the Ohio State University stated:

I have not personally met [the petitioner]. However, I know his PhD advisor, Dr. [REDACTED].

[The petitioner] has published several excellent scientific research reports on the dynamics of microbial communities during bioremediation of organic and radionuclide pollutants. . . . This work has led to improved understanding of the mechanisms of uranium bio-immobilization. This research led [the petitioner] to discover a new method to optimize uranium bioremediation that could significantly reduce the cost and time to remedy the severely contaminated groundwater in the United States. . . .

In my professional opinion, [the petitioner] is making significant contributions to the goals of the United State[s] in the environmental remediation and long-term stewardship of radioactive contamination, and in promoting the competitiveness of [the] U.S. nuclear industry.

[REDACTED] of the University of Maryland stated:

I am not surprised the [the petitioner] has produced excellent research results in a relatively short period of time based on his record during his PhD study. In his recent publication, [the petitioner] determined the influence of bicarbonate and sulfate on the microbial community composition and uranium bioremediation.

The director denied the petition on November 3, 2008. In the denial notice, the director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner had not persuasively shown that his accomplishments rise to a level that would justify the special benefit of a national interest waiver.

On appeal, the petitioner asserts that the director did not give sufficient consideration to "testimonial statements from . . . top scientists of the United States." Leaving aside the lack of evidence to support the petitioner's claim that the witnesses are, in fact, "top scientists" in the petitioner's

specialty or field, those statements do not persuasively show that the petitioner's work has been especially influential compared to the work of others in the specialty. The independent witnesses asserted that the petitioner's research has successfully produced high-quality results, but they did not specify how this sets the petitioner apart from other qualified researchers in his specialty. Many of the witness statements rely on speculation about possible future developments, to the effect that the petitioner's work might one day significantly affect bioremediation of contaminated sites. The record does not establish the extent, if any, to which the DOE has already implemented the petitioner's findings, or the results of that implementation. The distinction is important because the petitioner claims that his contributions lie not in the realm of theory, but in specific, real-world applications. It is premature, to say the least, to conclude that the petitioner has made major strides in bioremediation if the petitioner's work has not yet been used on a significant scale. The record seems to indicate only that researchers expect to see significant results once the petitioner's methods are eventually put to use. These expectations may prove correct, but expectations form a weak foundation for permanent immigration benefits.

The petitioner, on appeal, makes the new argument that he earns significantly more than the prevailing wage for a postdoctoral researcher. The petitioner submits a September 2007 bulletin from the Medical College of Georgia, which indicates "[t]he average annual salary for fulltime [postdoctoral] appointees is **\$35,546**" while "[t]he Postdoc prevailing wage is now \$32,448" (emphasis in original). The petitioner shows that his salary as of September 2008 was \$42,084 plus benefits. The petitioner did not indicate how his compensation compared with that of other postdoctoral researcher associates at ORNL. Furthermore, while high compensation is an indicator of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D), the statute and regulations are clear that an alien does not qualify for the waiver simply by showing exceptional ability. Aliens of exceptional ability remain presumptively subject to the job offer/labor certification requirement.

Also, the petitioner's comparison of his 2008 salary to the 2007 prevailing wage is rather misleading, as the figures are from different years. At the time he filed the petition in 2007, the petitioner's annual salary was \$40,080. Finally, the Medical College of Georgia document that the petitioner quotes on appeal indicates that, while the "average annual salary" is \$35,546, "[t]he salaries range from \$30,000 to \$51,000." The petitioner's 2007 salary fell in the lower half of that range.

The petitioner submits a September 2008 letter from [REDACTED] indicating that the 2009 edition of *Who's Who in America* will include a profile of the petitioner. Even if this were persuasive evidence, it comes more than a year after the petition's July 2007 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). That aside, the record does not establish what led to the petitioner's inclusion in *Who's Who in America*, or the significance of that publication. Directories of this type appear to exist largely for the purpose of selling copies to the individuals named therein, rather than for use as neutral or independent reference works.

The petitioner submits a copy of a new article to show that he “is productive and competitive in his field.” The standard of eligibility for the waiver, however, does not demand simply that an alien is “productive and competitive.” Throughout this proceeding, the petitioner has noted the impact factors and citation rates of various publications. This shows that the petitioner is aware that citation of published work is a widely used yardstick of the impact of a given publication. The petitioner’s own citation history, however, appears to be minimal, with no documented citations at all of his work with radionuclide bioremediation, which has been represented as his most significant work. Absent some alternative form of objective documentation, the record offers little persuasive indication that the petitioner’s work has been particularly influential when compared to others addressing the same issues in their research.

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.