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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 25 2009
SRC 08 173 52605

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:

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

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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 a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral researcher at the University of Massachusetts, Amherst (UMass Amherst). 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.

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.

The petitioner filed the petition on May 6, 2008, and offered this description of his work:

[T]he type of research that I do . . . [is] in relation to computational fluid dynamics and materials science, a branch of study that looks into developing and improving the nanoparticle [*sic*] materials and their properties. The applications of my research vary widely from the parametric optimization of a metallic/polymeric process and into . . . improving the strength of materials for higher end purpose. Currently . . . [m]y research is at the front end of multi-scale, ground-breaking research into nanoparticles and their

properties and how to integrate [these] new wonderful materials into improving our lives.

Six witness letters accompanied the initial filing. [REDACTED], now Director of Axellerate Partners Ltd., LLC, which he called “an Ohio-based LLC Company involved in consulting and investing in the life sciences,” was a research and development director at Procter & Gamble Asia when he met the petitioner in the late 1990s. At that time, according to [REDACTED], the petitioner “helped develop new health care products” and “obtained consumer feedback on a new cough syrup product.”

[REDACTED] stated: “I believe [the petitioner] is an extraordinarily talented researcher in the field of fluid dynamics, materials processing, and mathematical modeling,” but the record does not establish Dr. [REDACTED]’s own training or expertise in those fields.

Three of the letters are from current or former professors at the University of Minnesota, where the petitioner earned his graduate degrees. The three letters share a number of nearly identical passages, and therefore it will suffice to quote from one illustrative example rather than all three letters. Professor [REDACTED] stated:

I was the [petitioner’s] supervisor . . . for his Ph.D. thesis work. . . . He excelled in the lecture and lab components of his classes and was one of our department’s top students. His exceptional record of success distinguishes him from his peers. . . .

[The petitioner’s] Ph.D. thesis objective was to develop rigorous, meso-scale, multi-mechanism models describing the sintering processes that are employed to produce a vast array of materials, ranging from high-value ceramics and various metals to the widely-used polymers. These models were then applied to experiment[al] and industrial cases to better understand sintering phenomena. Sintering processes are very important for the final stage of the manufacturing of the above materials. As such, sintering strongly affects strongly the microstructure of the materials and many of the material properties, including electronic, magnetic, and mechanical properties. However, . . . [m]any aspects of the sintering process remain poorly understood. . . . In [the petitioner’s] work, we studied specific sintering mechanisms including viscous flows and vacancy diffusion via volume diffusion, surface diffusion and grain boundary diffusion. . . .

Understanding sintering process poses special challenges for analysis and modeling. There are various possible mechanisms that affect the prevailing coalescence rates of the particles. . . . The finite element method of the model developed by [the petitioner] is a self-consistent model that can capture various mechanisms of the sintering with the full detail of the processes that can affect the sintering rate. . . . Successful development of the multiscale models themselves also represent a notable advance in the field of computational materials research.

... [The petitioner's] novel work illustrates the roles of various mechanisms and particle sizes on maintaining uniformity of the materials, and the absence of sintering of segregated particles and inclusions (as often occurs in melt processes) that affects materials properties and is of far-reaching impact on industries. [The petitioner's] significant work incited nation-wide interest and attracted various comments when presented at the tri-yearly, 2005 International Sintering Symposium at State College, PA.

UMass Amherst Professor [REDACTED] discussed the petitioner's present work:

I have known [the petitioner] since 2003, when I corresponded with him on the modeling of grain boundary diffusion in sintering processes. I immediately noticed [the petitioner's] unique abilities and I was particularly impressed by his computational research skills. I recruited him for a research position in my laboratory. . . .

[The petitioner] contributes to a research project that focuses on the use of state-of-the-art computational materials physics methods combined with the novel multiscale modeling techniques to analyze complex dynamical phenomena and their role in the deformation and failure of crystalline solid materials. He develops molecular dynamics (MD) simulation codes for the study of structural stability in crystalline solid materials under various conditions of mechanical loading and he implements novel numerical methods for enabling these MD simulators to perform "system-level" analysis, such as numerical bifurcation theory. Furthermore, based on the above developments, he carried out much needed parametric studies of critical phenomena, such as structural transformation and fracture, in crystalline materials. . . .

[The petitioner] is a truly outstanding researcher who has made significant contributions to the field of computational materials science & engineering.

The petitioner also submitted a letter from [REDACTED] of the University of California, Santa Barbara, a credited co-author on several of the petitioner's published articles. [REDACTED] letter contains a description of the petitioner's work that is almost identical to [REDACTED] description, quoted above.

We acknowledge that the various witnesses endorsed the letters with their signatures, but the pervasive use of shared language means that we cannot identify the true author(s) of the letters.

The initial submission identified nine published articles and conference presentations by the petitioner. The petitioner also submitted a printout from a citation database, showing one citation of one of the petitioner's articles. The printout also indicates that the citation is a self-citation, in which the petitioner, in 2007, cited an article he had published in 2006. Thus, the printout shows no independent citation of the petitioner's published work. Therefore, the printout does not demonstrate that the petitioner's work has influenced other researchers or had a particularly significant impact in the field.

Other materials provide background information about the petitioner's specialty, his employers, and the entities that have funded his research, but this information does not relate directly and specifically to the petitioner and therefore cannot establish that he, individually, qualifies for the waiver he seeks.

On July 8, 2008, the director issued a request for evidence, noting that the petitioner had not shown any independent citation of his work. The director also indicated that the petitioner had not shown that he had "been at the forefront of projects that are of an unusually high level of import in chemical engineering." The director requested letters from independent sources (as opposed to the petitioner's own mentors and collaborators).

In response, counsel asserted that the petitioner's initial submission established the importance of the petitioner's work. Counsel's arguments are not persuasive. For instance, counsel stated: "Another indicator of the importance of [the petitioner's] research is the financial support he has gained from the government of the United States. [The petitioner's] research has been supported by the National Science Foundation . . . , the American Chemical Society-Petroleum Research Fund . . . , and the Minnesota Supercomputer Institute." Only one of those three entities is affiliated with "the government of the United States." More importantly, the petitioner has not shown that his reliance on public and private grant funding is in any way unusual or a mark of distinction in his field.

The petitioner submitted four new witness letters, all from witnesses with demonstrable ties to the petitioner. Two of the witnesses had previously provided letters with the initial filing. [REDACTED] of Princeton University stated:

[The petitioner] joined the group of my collaborator, [REDACTED] at the University of Massachusetts. There he has developed an extremely strong track record in computational materials science. . . .

I had the good fortune to interact more directly with [the petitioner] through his supervisor, [REDACTED], in his excellent research work on applying the coarse molecular dynamics (CMD) approach – originally developed by myself and collaborators – to study stress-induced structural transitions in crystalline solids. . . . He has led the effort to identify the connections between the multiple stable states of a crystal . . . and determine the regions of crystal stability under high mechanical stresses, thereby providing important safe operating conditions for the material. . . . Prior to this study, efforts to quantitatively explore the stability of such materials involved excessively long/slow repeated MD simulations, falling short of providing the crisp and complete stability analysis . . . that his work has achieved.

In his second letter, [REDACTED] stated that the petitioner's "exceptional record of success distinguishes him from his peers," and that the petitioner's "work is compelling from the scientific perspective, yet has great potential for technological utilization." [REDACTED] repeated passages previously found in every letter from a University of Minnesota professor, such as the assertion that the petitioner developed

“a self-consistent model that can capture various mechanisms of the sintering with the full detail of the processes that can affect the sintering rate.” [REDACTED] repeated the claim that a 2005 presentation by the petitioner “incited nation-wide interest and attracted various comments,” but this claim lacks credibility, both because the record shows no evidence of this “nation-wide interest” from any source outside of the University of Minnesota, and because all the sources at that university apparently quoted, without attribution, the same language provided to them by an unknown third party.

The two new letters from UMass Amherst professors likewise share some language. A new letter from prior witness [REDACTED] concludes with the following paragraph:

In summary, [the petitioner] is an outstanding computational materials researcher, with a broad set of expertise in materials science and engineering and complex systems dynamics. In his postdoctoral study, he has made significant contributions to our state of knowledge of crystal stability under mechanical loading. He has also developed unique expertise in conducting stability and bifurcation analyses based on atomic-scale simulations, a powerful background in the nonlinear study of complex systems with atomic/molecular degrees of freedom. He is an excellent team player who collaborates efficiently and productively and a mature and kind individual who is very easy to interact with. I give him my strongest possible recommendation without any reservation.

A letter from [REDACTED] includes a shortened version of the same paragraph:

In summary, [the petitioner] is an outstanding computational materials researcher, with expertise in complex systems and dynamics of crystalline solids. In his time at UMass Amherst, he has made significant breakthroughs in our state of knowledge of crystal stability under mechanical loading. He has also developed a powerful knowledge in the nonlinear study of complex systems with atomic/molecular degrees of freedom. He is an excellent member of our Department who collaborates and interacts efficiently and productively with others. I give him my strongest possible recommendation.

Both witnesses at UMass Amherst described the petitioner’s work in technical detail, without clearly explaining why this work is especially significant compared to the work of others in the specialty.

The director denied the petition on September 8, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner’s work, but found that the petitioner failed to document any wider impact on his field of endeavor. On appeal, counsel contended that the decision was “based on a misreading and misapplication of the facts and evidence as presented, and that the reviewing officer was inconsistent in the underlying review of the material that was presented in support of” the petition.

Counsel notes that the petitioner filed two petitions – the present petition, and a second petition seeking classification as an alien of extraordinary ability under section 203(b)(1)(A) of the Act. The director denied both petitions, but the petitioner appealed only one of the denials. Counsel claims that the

decisions are inconsistent because the director made apparent concessions in the extraordinary ability denial that are not evident in the national interest waiver denial.

The extraordinary ability denial is not before the AAO. The scope of our review is limited to the proceeding at hand. In that context, there is nothing internally inconsistent about the director's findings. Furthermore, even if we grant, for the sake of argument, that the two decisions are mutually inconsistent in some respects, this would not force us to resolve the inconsistency in the manner that is most favorable to the petitioner. It may be that the director's concessions in the other decision were too lenient. Therefore, the claims of inconsistency do not demonstrate or imply that the director erred by denying the present petition.

Counsel states: "The officer has failed to acknowledge that we have provided independent and specific documentation that has been attested to by the above referenced individuals as well as the letters of support that corroborate the said documentation" (counsel's emphasis). It is not clear who "the above referenced individuals" are; the appellate brief contains no prior reference to any particular individuals other than the petitioner himself. From counsel's wording, it is clear that these individuals are distinct from the authors of "the letters of support," or else the reference to those letters would be redundant.

With respect to the witness letters, counsel argues that these letters offer greater support for the petition than the director acknowledged. Without a doubt, the letters contain high praise for the petitioner's skill and the importance of the work. The record, however, lacks independent documentation to show that these opinions are not confined to the petitioner's professors and their collaborators. Counsel asserts that the record contains documentation to corroborate the witnesses' claims, but counsel does not identify this documentation or explain how it supports those claims.

Counsel protests that the director relied solely on citations as an objective measure of the impact of the petitioner's work. It is certainly true that other types of evidence can show this impact, but we find nothing in the record that meets this description.

Counsel mentions that the petitioner "has published evidence of his work in Physical Review Letters" and "has been invited to review scientific work for The Journal of Physics and Chemistry of Solids." It is not self-evident that this work demonstrates eligibility for the waiver, no matter what the reputations of those publications. Similarly, counsel repeats the assertion that the petitioner has received grant funding from the federal government and other sources, but counsel submits nothing to prove that such funding is anything but routine in the petitioner's field. The petitioner's research grants are identified by seven-digit numbers, which implies the existence of a very large number of such grants.

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.