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**U.S. Citizenship
and Immigration
Services**

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FILE:

SRC 08 155 52115

Office: VERMONT SERVICE CENTER

Date: **MAR 12 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.

3 John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist at New York University (NYU), where he is currently employed under an H-1B nonimmigrant visa. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, as well as new letters and 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 did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would be of no benefit to the petitioner, and therefore we need not discuss the merits of that claim. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Counsel stated that the petitioner “has written more than 20 articles” since 1992, and that the petitioner’s “works were cited [*sic*] more than 80 times by the world leading experts in the area of molecular dynamics and nonlinear optics.” The petitioner submitted printouts from a citation database, indicating an aggregate total of 78 citations of the petitioner’s articles, including self-citations. The exact number of self-citations is not clear from the record, because the printouts include only partial lists of the citing articles, but other materials in the record show that a substantial majority of the citations

are independent. The petitioner submitted copies of 20 articles that contain independent citations of the petitioner's work. Many of these articles cite more than one of the petitioner's prior publications; one 2007 article from the *Journal of Physical Chemistry A* cited five of the petitioner's articles.

Several letters accompanied the petition. [REDACTED] stated:

[The petitioner] is already recognized nationally and internationally as an outstanding young scientist in the field of theoretical and computational chemistry. His studies have yielded very significant and highly visible results regarding the structures, energetics, and dynamics of molecule-doped rare gas clusters, and of molecular hydrogen inside the clathrate hydrates and nanostructured carbon materials. . . .

I was [the petitioner's] adviser during his Ph.D. studies at the NYU Chemistry Department, 1997-2001. After getting his doctorate . . . he continued to collaborate with my group. [The petitioner] has continuously been one of my most valuable and most productive co-authors and, quite amazingly, accomplished in his spare time more in terms of research than many full-time associates. Therefore, the moment that a suitable appointment became available in my group late last year, I did not hesitate to offer it to [the petitioner]. Thus, since December 1, 2007, he has been an Assistant Research Scientist in the NYU Chemistry Department. . . .

In the course of his Ph.D. thesis research, [the petitioner] made significant and original contributions to several very difficult problems of considerable current interest. . . .

At the present time, [the petitioner] is playing the key, leading role in the exciting new research conducted by my group, on the fundamental properties of molecular hydrogen inside two classes of novel materials, clathrate hydrates and nanostructured carbon materials (fullerenes, nanotubes, and nanohorns). Both show great promise for high-capacity hydrogen storage under relatively mild conditions. This topic has . . . potentially huge impact on how energy is produced and stored; it represents the key for the transition to a hydrogen-based economy. In the series of ground-breaking papers published within the past year and a half, [the petitioner] has for the first time treated rigorously and elucidated the quantum dynamics of one and more hydrogen molecules in the interior of the clathrate hydrates and fullerenes, in particular C₆₀.

[REDACTED] is a member of the National Academy of Sciences (NAS) and winner of the 1957 Nobel Prize for Physics. Prof. [REDACTED] in his brief letter, focused mostly on the intrinsic merit of the petitioner's field of research; he deems the petitioner "an exceptionally brilliant young mind" but offers no details about the petitioner's work. Professor [REDACTED] of the University of Washington, also a member of the NAS, likewise stressed the importance of the petitioner's specialty without saying much about the petitioner's specific work within that specialty.

A third NAS member, [REDACTED], offered somewhat more specific information about the petitioner (with whom he has collaborated). He stated:

I noticed [the petitioner] by his recent first-author publications of molecular dynamics of clathrate hydrates in 2006. Those studies are closely related to the hydrogen battery economy and energy industry, which are greatly related with the national interest of the United States. In his research works, [the petitioner] developed and used the unique theoretical methods to predict the ro-vibrational modes of hydrogen molecules in the clathrate hydrates. Some predictions in his papers were soon confirmed and widely cited by several famous experimental groups around the world afterwards. In July, 2007, my research group invited [the petitioner] and [REDACTED] to give a talk on the research results. Since then, we have launched and have been actively cooperating on the new project of molecular dynamics in C_{60}

[The petitioner's] research works on molecular dynamics are novel and very important for us to understand the interactions between molecules. Therefore, they are very helpful and illustrative for the experimentalists such as my group to develop new materials in the nano and energy industry.

[REDACTED] of Durham University in the United Kingdom stated:

[The petitioner] has a sustained record of excellent publications in the field of physical chemistry. He has made influential contributions to the study of molecular clusters, as well as to the field of opto-physics. I collaborated with him on a number of papers in the field of molecular clusters between 2001 and 2005, and am quite familiar with his accomplishments.

[The petitioner's] work has produced important new insights into the behavior of molecular clusters, which are species that bridge the gap between gases, liquids and solids. He has developed unique theoretical methods to handle the quantum motion of molecules inside solvent cages, which has important implications for our understanding of how compounds dissolve. These are central issues in physical chemistry and [the petitioner's] rigorous methods have had a considerable impact on our understanding of them.

[REDACTED], one of the researchers who cited the petitioner's published work, stated:

I am familiar with [the petitioner's] published theoretical research on nonlinear optics and have found it to be outstanding. In 2005 I recommended for publication two of his papers on nonlinear optics for The Journal of Chemical Physics, a leading journal in my field, and I have reviewed other papers by [the petitioner] since then. [The petitioner]

decisively resolved an important problem between two theoretical methods that were widely thought to be equivalent. . . .

[The petitioner's] contributions to the development of new mathematical models that can predict more accurate values of nonlinear optical coefficients have been very illuminating and helpful to my group's work.

of the University of Rochester stated:

I have recently taken notice of [the petitioner's] work in nonlinear optics, especially after his publication earlier this year of two definitive papers in the Journal of Chemical Physics (JCP) on the role of Kleinian symmetry in nonlinear optics. [The petitioner] and I have been in touch by email on this topic for more than half a year. From our communication and from my reading of his publications, I believe that [the petitioner] is a talented chemical physicist who possesses exceptional mathematical skills and sharp physical insight. . . . His work challenges long-held theories in our field. By means of his exceptional scientific skills, he has marshaled strong evidence in support of his new interpretation. In one particular work, [the petitioner] challenges a fundamental symmetry that has been widely accepted in the nonlinear optics field and has been written into textbooks since the 1960s. [The petitioner] has used his skillful analysis to predict theoretically a breakdown of this symmetry under certain physical conditions. This is a novel piece of work that impressed me personally and has given our community much to think about. He also presents suggestions on how to test this prediction in the laboratory. If experiments confirm this prediction, it is [a] breakthrough in the nonlinear optics field and could have very wide importance both scientifically and technologically. . . . It is also noteworthy that in his 1999 Journal of Physics paper, [the petitioner] pointed out the important nonequivalence of two conventional gauge approaches that many in the optics community thought would lead to equivalent predictions. My co-worker and I confirmed this conclusion by means of an entirely different calculation which we published in J. Modern Optics (2004).

During the past five years, [the petitioner] has made significant research contributions. . . . As these research works address issues of fundamental scientific principles on nonlinear optics, they hold promise of significant impact on the scientific community.

On June 11, 2008, the director denied the petition. The director acknowledged the intrinsic merit and national scope of the petitioner's research field, but found that "[n]one of the evidence of record establishes that the self-petitioner has accomplished anything more significant than other capable members of their profession holding similar credentials and conducting similar work." The director asserted that the petitioner's "achievements are notable, but as a whole the record does not persuasively establish that these accomplishments are of such unique significance that the labor certification requirement can be waived."

On appeal, counsel contends that the petitioner's initial evidence, including the letters and citations discussed above, should have sufficed to establish the petitioner's eligibility for the waiver. The petitioner submits additional letters, most of them from initial witnesses. Prof. [REDACTED] states: "I am aware of just a few scientists who have the same qualifications as [the petitioner]. The nation needs scientists with [the petitioner's] talents immediately. . . . To ask him to wait for a labor certification amounts to the failure to exploit an available resource that is vital to the national interest." Prof. [REDACTED] argument rests on the false assumption that the petitioner would be unable to work in the United States while "wait[ing] for a labor certification." The petitioner is employed in the United States already, as an H-1B nonimmigrant, and efforts to secure immigration benefits through labor certification would not invalidate the petitioner's existing H-1B status. *See* 8 C.F.R. § 214.2(h)(16)(i).

Prof. Soos asserts that the petitioner's "field is less active now than a decade ago" because "available researchers see greater potential in [other] areas," leaving fewer researchers to study the specific issues in which the petitioner specializes. This argument rests not on the particular merits of the petitioner's work, but on the general proposition that researchers are needed in the petitioner's field. This argument attests to the intrinsic merit of the petitioner's specialty, but does not demonstrate that the petitioner, in particular, qualifies for special benefits unavailable to others in that same specialty. While the AAO does not dispute the importance of the petitioner's specialty, it is the position of USCIS to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dept. of Transportation* at 217.

The letters discussed above are not particularly persuasive, for reasons already discussed. Eligibility for the waiver must ultimately rest not only on the importance of the petitioner's field, but on the importance of the petitioner's work within that field. The latter factor is addressed in a new letter from Prof. Bačić, who states:

[The petitioner's] impressive research productivity and creativity, and the high visibility and impact of the papers that he has published, testify that his abilities are indeed very rare and substantially greater than those of the vast majority of his peers in this country or abroad. . . .

A series of his ground-breaking papers has illuminated the fundamental properties of molecular hydrogen inside two types of novel materials, clathrate hydrates and nanostructured carbon materials . . . , both of which show great promise for high-capacity hydrogen storage. Safe and economical hydrogen storage is the key for the transition to a hydrogen-based economy.

The only new witness on appeal is [REDACTED] of Brown University, who has recently collaborated with the petitioner through [REDACTED] laboratory. Prof. [REDACTED] states:

[The petitioner's] most recent work on encapsulated molecules is especially relevant to the design and evaluation of materials of possible value for hydrogen storage and release, or sequestration of pollutants such as CO and CO₂. His ability to manage the

daunting challenge of many-body quantum calculations on dynamically complex systems has been developed over the past several years and, in my opinion, positions him as one of a very small group leading practitioners of the art and science of extracting and evaluating useful information from model potential energy surfaces.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

While the AAO has waived the job offer requirement in this proceeding, we emphasize that the waiver of the job offer requirement is only a waiver of specific technical requirements such as labor certification, and the requirement that the petitioner identify a specific position with a specific employer. It remains the case that the petitioner has sought an employment-based immigrant classification based on his work in a particular field of scientific research. Therefore, the approval of the waiver implies the expectation that the petitioner will continue to engage in similar research. The waiver of the requirement of a specific job offer does not relieve the petitioner from this expectation that he will continue to be employed as a scientific researcher in his stated area of expertise.

The AAO includes this caveat because the petitioner's initial submission included a copy of an August 10, 1995 letter from [REDACTED] of Immigrant Branch Adjudications of what was then the Immigration and Naturalization Service. The letter answered an inquiry concerning an alien whose employer had ceased operations after the alien had received a national interest waiver based on his work for that company. The petitioner emphasized the following portion of [REDACTED] letter:

When a service center approves a petition based on a national interest waiver, the job offer requirement is waived, regardless of whether an employer signed the I-140 petition. In determining the validity of an approved petition filed under the national interest waiver provision, the primary issue is whether the alien still intends to be performing the activity or work which was the basis for the national interest waiver.

Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely

indicate the writer's analysis of an issue. See Memorandum from [REDACTED] Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Furthermore, even if the letter were binding, the AAO notes that, after the above-quoted passage, [REDACTED] went on to state that "the petition may remain valid" if "the basis for the national interest waiver was the alien's contributions to an industry which can be utilized by another employer." This reference to an "employer" is fully consistent with the AAO's position that if an alien seeks a classification defined by statute as employment-based, then the alien's continued eligibility for that classification is contingent on the alien's continued employment (as that term is commonly understood) in the same field through which the alien obtained that classification. If an alien has no good faith intention of continuing to be employed in a given field, but obtains a waiver through temporary employment in that field, then it would be entirely appropriate for USCIS to revisit and reconsider its prior approval of the petition.

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