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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: NOV 19 2009
SRC 08 800 31553

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).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a mechanical engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment 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, counsel submits a brief and evidence, most of which was already part of the record of proceeding. For the reasons discussed below, we uphold the director's conclusion that the petitioner has not established her eligibility for the benefit sought.

Section 203(b) of the Act states in pertinent part that:

(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.

On appeal, counsel asserts that the petitioner is an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. degree from the Stevens Institute of Technology. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

The Service 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

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. *Id.* at 219. 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. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, mechanical engineering, and that the proposed benefits of her work, improved modeling of composite materials, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at

218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

On appeal, counsel asserts that the director failed to consider the reference letters and cites an unpublished district court decision, *Mnayer v. INS*, 1995 LEXIS 29832 (S. D. Fla. June 20, 1995). In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value. Regardless, we do not contest that the reference letters carry evidentiary weight.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters, we note that letters concluding, with little explanation, that the petitioner meets the requirements set forth at *NYSDOT*, 22 I&N Dec. at 217-18, are insufficient. Similarly, letters that simply praise the petitioner's talent or the novelty and potential significance of the petitioner's research are less persuasive than letters that provide specific examples of how the petitioner has already influenced the field. In addition, letters from independent references who were previously aware of the petitioner through her reputation and who have applied her work are the most persuasive.

The petitioner received her Master's degree and her Ph.D. from the Stevens Institute of Technology. Her Ph.D. was awarded in May 2007, 15 months before the petition was filed. The petitioner then began a postdoctoral position with the same institute and continued in that position as of the date of filing.

the petitioner's supervisor while working towards her Master's degree, discusses their collaboration on developing a robot for power plant steam pipe inspection in cooperation with ABB Group. Specifically, [REDACTED] explains that vertical pipe runs are difficult for robots and asserts that the petitioner "was a critical part of a team to design the structure of a miniature robot vehicle that can climb a vertical pipe and inspect it for failure." [REDACTED] further asserts that the robot was a success and strengthened ABB Group's leading position in power generation technologies. The record contains no evidence that the petitioner is credited with this innovation, such as a patent, and the record lacks evidence of ABB's marketing or use of this robot. Finally, neither [REDACTED] nor any of the petitioner's other references explain how this work relates to the petitioner's current modeling work.

The petitioner's Ph.D. advisor and mentor, [REDACTED] explains the petitioner's work at the Stevens Institute of Technology. [REDACTED] notes the importance of accurate prediction of material performance to the development of new materials and asserts that the petitioner's multidisciplinary background in polymer science, molecular dynamics, materials science and micromechanical methods as well as her training in both basic research and modeling projects have contributed to her success. While [REDACTED] asserts that the petitioner's combination of experience is "rarely found in many of her peers," as stated above, special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

More specifically, [REDACTED] discusses the petitioner's work explaining how three-dimensional composites react to certain changes, including oxidation and/or moisture diffusion which take place over several years. According to [REDACTED] the petitioner utilized the Galerkin Finite Element Method (GFEM) with Jacobi Conjugate Gradient (JCG) iterative methods to "effectively solve the thermal and moisture diffusion process." While [REDACTED] notes that this work was published, he does not provide examples of how the petitioner's models are being used by independent researchers in academia or industry. Rather, he states generally that the petitioner's models "have brought substantial accuracy in performance predictions."

Given the reference to the petitioner's use of "a" GFEM in a letter from [REDACTED] of Engineering at the University of Delaware, as well as other evidence of record, it is clear that GFEM is not the petitioner's own invention. Notably, the petitioner's 2004 article in *Finite Elements in Analysis and Design* cites a 1996 article coauthored by [REDACTED] for the proposition that a Galerkin methodology is suitable "for solving large meshes using element-free and iterate solution techniques for increased computational efficiency when dealing with large mesh sizes." This 1996

article by [REDACTED] reveals that he has been using Galerkin methodology to develop three dimensional models since 1996, before the petitioner joined his laboratory.

[REDACTED] of Academic Administration at the Stevens Institute of Technology, notes that the petitioner's doctoral and postdoctoral research was and is sponsored by the Air Force Office of Scientific Research (AFOSR) and the Air Force Research Laboratory (AFRL). The vast majority of academic research, if not all academic research, is supported by grants. Any research, in order to be accepted for funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is working pursuant to a grant from the military inherently serves the national interest to an extent that justifies a waiver of the job offer requirement, especially when that researcher is not the principal investigator. As stated above, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218.

[REDACTED] further asserts that the petitioner conducted "pioneering work in the development of [the] next generation of composite materials and is a critical member of two ongoing projects." The first project [REDACTED] discusses is the petitioner's work with "the weakening of fiber-reinforced composites due to reaction with the constituent gases in ambient air, such as oxygen and nitrogen than can migrate into composites." [REDACTED] explains that the petitioner analyzed whether an aircraft's speed and ambience would create a migration-based reaction to weaken composite materials increasingly used in aircraft. [REDACTED] does not provide the results of this research or provide examples of how it is being used by independent laboratories in academia or industry. Second, [REDACTED] discusses the petitioner's examination of the extent to which moisture and temperature can affect different types of composite materials, including the development of a multi-parameter model. Once again, [REDACTED] does not identify any laboratory or company using this model or even expressing an interest in this model. Rather, he concludes that these two projects represent novel work that has "the *potential* for successful mitigation of failure of composites, especially in applications related to aircraft structures." (Emphasis added.) Finally, [REDACTED] speculates that the software currently being developed by the petitioner "will allow the designers to narrow down the candidate materials for aircraft components." As this project appears to be ongoing without having already produced influential results, it cannot serve as evidence that a waiver of the job offer in the national interest is warranted.

[REDACTED] a senior materials engineer with AFRL, discusses his collaboration with the petitioner on her Ph.D. project, noting that this work led to publications and presentations at prestigious conferences. While the publications and presentations confirm that the petitioner's work has been disseminated widely, at issue is whether this work ultimately impacted the field as a whole. [REDACTED] asserts that the petitioner developed several models for the analysis of Polymer Matrix Composites (PMCs), which have a limited lifespan as a result of constant environmental degradation. As PMCs are prevalently used in turbine engines and engine-exhaust washed structures, their performance and durability are important for aerospace applications. [REDACTED] asserts that prior models, which use classical lamination theory and one dimensional

solutions, lack adequate capacity to deal with complicated three-dimensional shape and other complications presented by highly coupled material aging, damage evolution and thermo-oxidation processes. As such, according to [REDACTED] the petitioner's models are superior because they can predict long term effects of moisture and oxygen interaction with polymeric resin. Dr. [REDACTED] concludes that the resulting three dimensional Galerkin finite element methodology is probably one of the most widely accepted models used for modeling the diffusion processes at the constituent, lamina and laminate/structural scales.

[REDACTED] next discusses the petitioner's development of a method for predicting composite behavior from constituent and interphase behaviors, which will explain the best way to coat the key parts that require PMCs. Specifically, [REDACTED] explains that the petitioner's work "is a key component of a systematic effort to provide a methodology for accurately modeling both short-term and long-term environmental effects on composite laminates to facilitate their designs and to better predict their life expectancy. [REDACTED] asserts that the petitioner's work on this project allows for a more thorough investigation on one of the representative composite materials, PMR15, widely used in aggressive environments and notes that it was published. Continuing with the same composite material, the petitioner, according to [REDACTED], used the homogenization method to develop a predictive model that establishes that influence of damage evolution on moisture diffusivity and vice-versa. While [REDACTED] asserts that this model "will indicate at what point a polymer will start to degrade or be structurally affected" and notes that it has been published, he does not provide examples of this model being currently used in the aerospace industry.

Finally, [REDACTED] discusses the petitioner's work with the high temperature polymeric matrix composites (HTPMC). While he concludes that the petitioner and her group "are among the selected few making progress in developing [a] predictive model to establish the influence of damage by gas diffusion for HTPMC," he does not assert that this project has already produced results that have impacted the field as a whole.

[REDACTED] of Engineering at the University of Delaware, explains that he knows the petitioner through his "interaction" with [REDACTED]. Dr. [REDACTED] discusses the petitioner's work with resin transfer molding (RTM). [REDACTED] asserts that the petitioner's work addresses the internal heat generation resulting from the exothermic polymer cure reaction that complicates simulating the RTM process. [REDACTED] further states that it is his "understanding" that the petitioner created a realistic three-dimensional simulation model to study RTM. [REDACTED] does not imply that he has adopted this method in his own work. [REDACTED] further notes that the petitioner "created models at multiple length-scales that are capable of characterizing the effects of diffusion, oxidation, and potentially the stress and strain induced due to the microstructural changes in the composite" but merely speculates that this work "will be able [to] unify previous studies conducted at various length scales and broaden our ability to understand composite property evolution with time."

a professor at the University of Texas, asserts that he came to know of the petitioner's work through her presentations and published articles. [REDACTED] discusses the importance of the petitioner's area of research, which is not contested. [REDACTED] concludes that the petitioner's research results "establish one of the most systematic and comprehensive ways to establish the influence of environmental degradation on composite damage evolution and vice-versa." [REDACTED] does not claim to be using the petitioner's models and provides no examples of any independent laboratories doing so in academia or industry.

Finally, [REDACTED] notes the petitioner's professional memberships and work on a project sponsored by the AFOSR. Even if the petitioner's memberships were indicative of a degree of expertise significantly above that ordinarily encountered in the field, those memberships would satisfy one criterion for aliens of exceptional ability pursuant to section 203(b)(2) of the Act. 8 C.F.R. § 204.5(k)(3)(ii)(E). By statute, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. *NYS DOT*, 22 I&N Dec. at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id.*; see also *id.* at 222. As such, we cannot conclude that meeting one criterion towards exceptional ability, which requires that an alien meet at least three criteria,¹ is evidence that the alien's job offer and employment certification should be waived in the national interest. Moreover, as stated above, simply working on a project that is supported by a government grant is insufficient grounds for a national interest waiver.

a distinguished research scientist at the University of Dayton Research Institute, an on-site contractor for AFRL and a coauthor of articles with [REDACTED] and [REDACTED], asserts that he is familiar with the petitioner's work through reading her publications. [REDACTED] asserts that the petitioner's work "constitutes one of the first exhaustive explanations of how the three degradation factors, namely, physical creep, thermo-oxidative behavior, and damage kinetics factors, are intricately linked together to affect material properties." [REDACTED] further asserts that the petitioner's creation of models using multiple scales "brings much desired advantages including the ability to track concentration fields and the material oxidation and other chemical conversion states at the microstructural level." While [REDACTED] concludes that this work demonstrates the petitioner's "motivation and a much needed vision to deliver new technological developments in simulating long-term damage evolution in given materials," he does not provide examples of the petitioner's models being used or even tested in the field.

an associate professor in the mechanical engineering department at the National Chiao Tung University in Taiwan, discusses the importance of composite materials. Once again, we do not contest the substantial intrinsic merit of the petitioner's area of research. More specifically, [REDACTED] explains that the diffusivity of gas molecules plays a critical role in determining the degradation mechanisms and durability of high temperature polymeric matrix composites. [REDACTED] notes that the petitioner developed a unique model that "combines characterizing parameters of diffusivity, oxidation

¹ 8 C.F.R. § 204.5(k)(3)(ii).

states, and stress and strain states in a very ideal way." [REDACTED] concludes that the petitioner's model provides "perhaps one of the greatest level[s] of consistency and precision today" and is "practical" in [REDACTED] routine research. [REDACTED] does not, however, explain how he has utilized the petitioner's models and provides no examples of other laboratories using or even testing the petitioner's models. The citations submitted to the record do not include any articles by [REDACTED]

[REDACTED], a senior engineer scientist for an unidentified company or institution, asserts that he has over 20 years of experience in the aerospace industry. His letter is not on letterhead and he does not identify his employer. The petitioner did not submit [REDACTED] curriculum vitae. As such, his precise credentials and independence from the petitioner cannot be evaluated. That said, [REDACTED] claims not to have met the petitioner and to have become aware of her work through her publications. [REDACTED] notes that in one of the petitioner's papers "brought to [his] attention," the petitioner "described the use of three-dimensional micromechanical analysis to obtain the effective diffusivities for composite materials with periodic structure." [REDACTED] asserts that this work places the petitioner among the "select few" to make progress in this area and provided "affirmative answers left open by other researchers that mark [a] major advancement in aerospace material performance simulations." [REDACTED] further states that the petitioner's work "is directly implicated and amplifies" his own research but provides no examples of how he has utilized the petitioner's work, such as through use of her models. He does not suggest that the petitioner's models have been formally adopted by his employer. The citations submitted to the record do not include any articles by [REDACTED].

Both [REDACTED] and [REDACTED] assert that the petitioner will contribute to the national interest more than a "minimally competent researcher" or "someone with minimal education and experience." *NYS DOT* states that a 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. 22 I&N Dec. at 217-18. While the language used in *NYS DOT*, 22 I&N Dec. at 217-18 is similar to that used by [REDACTED] and [REDACTED], the ultimate meaning is far different. The language in *NYS DOT*, 22 I&N Dec. at 217-18, does not suggest that the petitioner need only demonstrate that she will serve the national interest to a greater extent than someone who is minimally competent or who has such minimal education and experience as to possibly be ineligible for the position. Rather, that decision states that the petitioner must establish that she will benefit the national interest to a substantially great degree than an available U.S. worker who is fully qualified for the position. The purpose behind this reasoning is that the alien employment certification process already exists to determine whether qualified U.S. workers are available.

While the record contains the independent letters discussed above, the authors do not clearly explain the petitioner's influence on their own work or the work of others in the field. Significantly, the record does not contain letters from aircraft or parts manufacturers affirming their use of or even their interest in the petitioner's models.

In addition to the above letters, the petitioner has submitted evidence that the journals which carried her articles are prestigious. We will not presume the influence of a given article from the journal in which

it appeared. Rather it is the petitioner's burden to demonstrate the influence of her articles. In response to the director's request for additional evidence, the petitioner submitted evidence that her 2004 article coauthored with [REDACTED] and another coauthor had been cited four times and another article coauthored by the petitioner had been cited once. The only two citations that predate the filing of the petition are two citations of the petitioner's 2004 article. The petitioner must establish eligibility as of the date the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Even considering those citations that postdate the filing of the petition, this rate of citation is not indicative of the petitioner's influence on the field as a whole.

Moreover, the citations themselves reveal that the citing authors were not applying the petitioner's models to new problems or materials. The 2006 article in *Composites Science and Technology* cites the petitioner's work among other work in the field analyzing *synthetic* fiber composites but goes on to report the authors' own three-dimensional model for *natural* fiber thermoset polymer composites. They do not single out the petitioner's work as fundamental to their own model. The 2006 article in the *International Journal of Advanced Manufacturing Technology* cites the petitioner's article as one of five articles exemplifying the use of phenomenological models used to describe the curing kinetics. In the 2008 article in the *Journal of Zhejiang University*, the petitioner's article is cited as one of three articles utilizing the finite element method, a method that is "widely used," to numerically simulate part of the polymer process in an efficient and low-cost way. The 2008 article from an American Institute of Aeronautics and Astronautics conference cites the petitioner's work but goes on to describe a new model developed by the authors. Finally, the 2009 article in the *Journal of Composite Materials* discusses several diffusion models and states that the petitioner has "used finite element modeling to achieve similar results." None of these articles suggest that the citing authors are using the petitioner's models or methodology to produce new results or single out the petitioner's work from others working with the "widely used" finite element method.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who produces novel results inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

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 alien employment 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 an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.