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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 25 2009
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office 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 research technologist. 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, submits a brief and additional evidence in addition to resubmitting all of the previously submitted evidence that is already a part of the record of proceeding. For the reasons discussed below, we uphold the director's findings that the petitioner's accomplishments, especially as of the date of filing, do not warrant a waiver of the job offer requirement in the national interest.

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.

The petitioner holds a Master's degree in Chemical Engineering from Wayne State University. 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, medical research, and that the proposed benefits of his work, improved cancer detection (especially of prostate and pancreatic cancer), 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, while the record includes ample evidence of the need for earlier detection of pancreatic cancer, 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. *NYS DOT*, 22 I&N Dec. 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 he 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.

Initially, the petitioner submitted two unpublished manuscripts, evidence that the petitioner had been acknowledged in three published articles by his collaborators, three presentations at professional conferences, his supervisor's grant, evidence of academic recognition, and several reference letters from the petitioner's immediate circle of colleagues. In response to the director's request for additional evidence, the petitioner submitted evidence that his now published articles have been minimally cited and referenced in medical research reviews, a general newspaper and a few medical journals. The petitioner also documented citations of the articles that merely acknowledge the petitioner's assistance and new letters, some of which are from independent sources.

The director noted that publication is expected in the petitioner's field, even among postdoctoral trainees; that the petitioner's publications appeared after the date of filing; that the citations of the petitioner's work were minimal; that the online medical research reviews do not mention the petitioner by name; that the record lacked evidence of the influence of the petitioner's presentations, that the petitioner's recognition was limited to academic awards and that the letters did not establish the "widespread implementation" of the petitioner's work. Thus, the director concluded that the record did not establish that the petitioner's accomplishments were indicative of a prospective national benefit sufficient to warrant a waiver of the job offer in the national interest.

On appeal, counsel reviews the petitioner's research projects and the petitioner's contributions to these projects as explained by the petitioner's references. Counsel then reviews the independent letters and notes the distinguished nature of the journals that eventually published the petitioner's articles and carried the articles acknowledging the petitioner's assistance in less than an authorship role. Counsel further asserts that the director improperly discounted the petitioner's articles by discounting the citations (which have increased since the director's decision) but also placed too much reliance on citation. In addition, counsel asserts that the director erred by failing to consider the originality of the work reported, assuming that the expected nature of publications diminishes the significance of the act of publishing rather than evaluating the individual articles and referencing the expectations for postdoctoral researches when the petitioner only possesses a Master's degree. Counsel then asserts that

the director erred in failing to consider the impact of articles that were published after the date of filing, noting that the work reported in these articles had been completed as of the date of filing. Regarding the references to the petitioner's work in medical research reviews and a newspaper, counsel notes that they referenced articles for which the petitioner is a listed author. Finally, counsel asserts that the director applied too high of a standard, instead of considering only whether the petitioner is "better than the majority of his minimally qualified peers." Counsel concludes that it "would be very difficult to replace [the petitioner] with another Master's degree candidate who will be unable to match his level of advanced knowledge, ingenuity, experiences, productivity shown in conducting some of the most recognized advances in cancer research through publications in leading journals, presentations, citations, and recognition."

On appeal, the petitioner submits materials about his prior supervisor's current projects; additional citations, some of which are self-citations by a coauthor; evidence regarding the prestige of the journals that have carried the petitioner's work, and additional evidence regarding the importance of the petitioner's area of research, an issue not in contention.

We will consider the petitioner's publication record, presentations and the reference letters below. At the outset, however, we affirm the director's holding that articles published after the date of filing cannot be considered even if the work on which those articles are based predates the filing of the petition. As discussed above, the petitioner must demonstrate a track record of success with some degree of influence on the field as a whole. The petitioner has not explained how an article that has yet to be disseminated could have already influenced the field.

The regulations, precedent decisions and other case law are extremely clear that the petitioner must demonstrate eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). *Matter of Katigbak* provides:

If the petition is approved, he has established a priority date for visa number assignment as of the date that petition was filed. A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

Section 204 of the Act requires the filing of a visa petition for classification under section 203(a)(3). The latter section states, in pertinent part: "Visas shall next be made available to *qualified immigrants who are members* of the professions." (Emphasis added.) It is clear that it was the intent of Congress that an alien be a recognized and fully qualified member of the professions at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary

may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

14 I&N Dec. at 49.

The Regional Commissioner continued this reasoning in *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977). That decision reemphasizes the importance of not obtaining a priority date prior to being eligible based on future experience. In fact, this principle has been extended beyond the alien's eligibility for the classification sought. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Reg'l. Comm'r. 1977). That decision provides that a petition should not become approvable under a new set of facts. Recognizing that *Matter of Katigbak*, 14 I&N Dec. at 49 was not "foursquare with the instant case" in that it dealt with the beneficiary's eligibility, *Matter of Great Wall*, 16 I&N Dec. at 145 still applies the reasoning. The decision provides:

In sixth-preference visa petition proceedings the Service must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily. It follows that such consideration by the Service would necessarily be focused on the circumstances at the *time of filing* of the petition. The petitioner in the instant case cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer.

Id. (Emphasis in original.) Finally, when evaluating revisions to a partnership agreement submitted in support of a petition seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Act, this office relied on *Matter of Katigbak*, 14 I&N Dec. at 49 for the proposition that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

While citations published after the date of filing may serve as evidence of the continued relevance of an alien's work that had already been well cited as of the filing date, they cannot be considered evidence that the alien was already influential as of that date. Moreover, articles by the alien that were not published as of the date of filing and, thus, had not been subject to peer review and disseminated in the field as of that date, cannot establish eligibility for the waiver as of the date of filing. To hold otherwise would have the untenable result of an alien securing a priority date based on the speculation that his work might prove influential while the petition is pending.

The petitioner obtained his Master's degree from Wayne State University in December 2004. In January 2005, the petitioner joined the Center for Molecular Imaging Research (CMIR) at Massachusetts General Hospital and Harvard Medical School where he remained as of the date of filing. The response to the director's request for additional evidence reveals that the petitioner joined Biogen Idec in an unspecified research position.

As of the date of filing, the petitioner's work had been presented at three conferences. Two of the presentations involved his research while at Wayne State University and the third presentation, given by the petitioner's supervisor, reported on his research completed at CMIR. The petitioner had also been acknowledged in three articles by the director of CMIR. In response to the director's request for additional evidence, the petitioner submitted evidence that one of the articles in which the petitioner was acknowledged had been cited twelve times, at least five of which are cites by researchers at CMIR; another of the articles had been cited three times and the final article had been cited 14 times, at least one of which is a self-citation by the director of CMIR. While the petitioner's colleagues attest to the petitioner's involvement in these projects in letters that will be addressed below, we cannot ignore that acknowledgements denote participation at a level below that sufficient for full authorship credit. Thus, these articles necessarily carry less weight than articles giving the petitioner full authorship credit.

the petitioner's Master's thesis advisor at Wayne State University, asserts that the petitioner's thesis project was to develop a perfusion bioreactor for long-term culture of cord blood hematopoietic progenitors within porous microcarriers composed of various biologically active polysaccharides. explains that this project required that the petitioner improve the microcarrier fabrication and derivatization procedures, design and fabricate the perfusion bioreactor and develop a reliable procedure for harvesting the cultured cells from within the microcarriers. Dr. Matthew states that the petitioner's subsequent 4-week cultures of cord blood progenitors produced "a number of interesting findings beyond demonstrating high-yield expansion of multiple lineages in the perfusion bioreactor." Specifically, according to the petitioner identified temporal variations in the expansion of various hematopoietic lineages and demonstrated that the timing of these variations was a function of the microcarrier composition and also identified certain polysaccharides as being able to support superior expansion/growth and higher cellular diversity compared to the other macrocarrier formulations."

speculates that the above work "will be of particular use in designing bioreactors for the expansion of certain high value hematopoietic lineages such as megakaryocytes," work that is already proceeding in laboratory and would not, according to be possible without the petitioner's "development work and high quality results." also speculates that the petitioner's work would be useful to tissue engineer researchers but provides no examples of any independent laboratory using the results of the petitioner's work. That continues to build upon earlier results of his students does not necessarily distinguish the petitioner from other graduate science students. Any research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge.

another member of the petitioner's thesis advisory committee at Wayne State University, focuses on the petitioner's work after leaving that institution. While [REDACTED] asserts that the petitioner has "provided a reliable early diagnostic method for prostate cancer," the record reveals only that the petitioner worked on a project pursuing this goal. The record lacks evidence that the petitioner is responsible for a new prostate cancer diagnostic tool that is now in use, as implied by [REDACTED]. While [REDACTED] refers to the distinguished nature of the journals that eventually published this work after the date of filing, we will not presume the significance of an article from the journal in which it appeared. Rather, the petitioner must demonstrate the significance of the individual article.

[REDACTED] asserts that the petitioner "developed and optimized many of the standard screening protocols used" at CMIR. [REDACTED] further asserts that the petitioner "has now generated imaging agents through the use of these approaches that have been able to detect colon cancer, pancreatic and prostate cancer as well as specific targets in atherosclerosis in living mice." While [REDACTED] asserts that this work "has been published in prestigious peer reviewed journals," the petitioner was not fully credited as an author in any article published prior to the date of filing. Finally, [REDACTED] states that the petitioner is "irreplaceable" at CMIR and that [REDACTED] would be "concerned" if the petitioner could not continue at CMIR. The petitioner, however, no longer works at CMIR.

[REDACTED] the petitioner's immediate supervisor at CMIR under the Molecular Libraries of Imaging Agents (MLIA) program, explains that she spearheads the development of the next generation of targeted, amplifiable, multimodal imaging agents and reporters. [REDACTED] explains that the petitioner, using powerful combinatorial chemistry approaches, "has been instrumental in generating imaging agents capable of early detection in vivo of colon, pancreatic, lung and prostate cancers as well as specific targets in atherosclerosis and inflammation." According to [REDACTED], the petitioner's work on these projects is highlighted in two articles. Both articles, however, were unpublished as of the date of filing. [REDACTED] provides no examples of independent laboratories influenced by the petitioner's work.

[REDACTED], a staff physician and postdoctoral research fellow at Children's Hospital, Boston, discusses her collaboration with the petitioner to select and identify unique bacteriophage clones that bind specifically to different zebrafish blood cell types. While [REDACTED] affirms the future importance of this work and the petitioner's technical involvement, she does not explain how this work has already produced influential results.

[REDACTED] of the Cellular Imaging Program at CMIR, discusses the petitioner's work on early detection methods for prostate cancer. [REDACTED] explains that the petitioner "used an iterative phage display selection approach to develop targeted imaging agents as a net prostate cancer biomarker to improve prostate cancer detection at an early stage." While [REDACTED] works at CMIR where the petitioner performed his prostate cancer detection research, he claims that he learned of the

petitioner's work through the petitioner's publications, which postdate the filing of the petition. Ultimately, however, [REDACTED] concludes only that the petitioner's work is "extremely promising" and "brings us one step closer to solving the puzzle for the cure of prostate cancer." [REDACTED] provides no examples of hospitals using an early detection tool that the petitioner helped develop or even independent laboratories that are pursuing such a tool, using the petitioner's research as their foundation.

[REDACTED] an assistant professor at Harvard Medical School, discusses his collaboration with the petitioner in developing a screening test for pancreatic cancer. [REDACTED] explains that the petitioner's work "was instrumental in the development of novel molecularly targeted imaging agents" and "led to the identification of membrane-localized plectin-1 as a potential new biomarker for pancreatic cancer." [REDACTED] further asserts that the petitioner "successfully generated a multimodal nanoparticle-based targeted imaging agent" which has magnetic and fluorescent properties which homes specifically to cancer cells, enabling detection against the background of normal pancreas tissue or damaged but non-cancerous pancreas tissue.

As of the date of filing, however, this work was unpublished. Upon publication, an article in the *Pittsburgh Post-Gazette* mentions [REDACTED] work among other ongoing work on pancreatic cancer in a larger article on this cancer. The online medical research review service *Genome Technology* also covered this work as utilizing proteomics to detect cancer. In addition, *Nature Reviews Cancer* also notes the potential of this research. As of the response to the director's request for evidence, the petitioner's work on pancreatic cancer detection had been cited in one article in addition to the *Nature Reviews* article. On appeal, the petitioner submits three additional citations, two of which are self-citations by [REDACTED]. The independent citation provided cites the petitioner's article only for the following proposition: "The use of antibodies to target interesting changes in molecular imaging is limited because of pharmacokinetics, background noise, and difficulties attaching agents that are visible with magnetic resonance."

The director's concern that the record lacked evidence of "widespread implementation" may be somewhat above what is required in this matter. Nevertheless, we find that the petitioner's publication and citation record, even considering the newer evidence, is not indicative of the petitioner's influence in the field to any significant degree. Counsel's concern that citations should not be the only evidence that can demonstrate an influence is valid. That said, other evidence of the petitioner's influence beyond his immediate circle of colleagues is lacking in this matter.

The petitioner submitted letters from independent references. [REDACTED] a professor at the University of Missouri, praises the petitioner's novel use of iterative phage display to distinguish normal pancreatic cells from cancerous pancreatic cells using mouse models. She speculates that this work "will be developed into a sensitive non-invasive detection and diagnosis tool for pancreatic cancer at benign stages." [REDACTED] notes that this work was highlighted in *Nature Reviews Cancer*. That review, however, while finding the work promising, concluded that it still needs to be refined so that it can be tested in patients. Discussing this work in the article in *Genome Technology*,

██████████ acknowledges that "it's still a long way off from being in clinical trials." ██████████ does not claim to be influenced by the petitioner's work or provide examples of any independent laboratories pursuing cancer detection tools using the petitioner's research as their foundation. In fact, ██████████ does not claim to have heard of the petitioner's work prior to the date of filing.

██████████ an associate professor at the University of Virginia, asserts that he became acquainted with the petitioner's work through the petitioner's published articles, which postdate the filing of the petition. ██████████ asserts that he found the petitioner's publications "particularly enlightening, not only from the standpoint of phage display technology, but also from the perspective of application in the biomedical sciences." ██████████ concludes that the impact of the petitioner's work is evident from the fact that it was reviewed in *Nature Reviews Cancer*. That review article, however, is indicative of the promising nature of this work. The review article does not suggest that the petitioner's pancreatic cancer diagnostic review had already influenced the field.

██████████ of the Molecular Imaging and Diagnostic Advanced Technology Program at the GE Global Research Center in Niskayuna, New York, asserts that the significance of the petitioner's research on a prostate cancer detection tool is evident from its publication in the *Cancer Research Journal*. As stated above, we will not infer the significance of an article from the journal in which it appeared. Significantly, while ██████████ concludes that the petitioner's research benefits cancer researchers nationally and internationally, she does not imply that she or anyone else at GE Global Research Center is pursuing new diagnostic tools based on the petitioner's techniques.

Finally, ██████████ the Associate Director of Chemistry at Infinity Pharmaceuticals, asserts that the petitioner has "spearheaded new avenues toward early detection of prostate cancer." ██████████ describes the petitioner's work and concludes that it resulted in a "promising early diagnostic method for prostate cancer that may have application in the clinic in the future." ██████████ does not suggest that she or anyone else at Infinity Pharmaceuticals is pursuing diagnostic tools based on iterative phase display or any other technique utilized by the petitioner.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that any scientific research, in order to be accepted for publication, must present some potential benefit to the general pool of scientific knowledge. It does not follow that every researcher who has contributed to research that is eventually published after the date of filing 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.