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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 02 2009
SRC 07 270 54410

IN RE: Petitioner:
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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the petition cannot yet be approved, however, the AAO will remand the matter to the director for further consideration and action.

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 an assistant professor at the University of Texas Health Science Center (UTHSC), Houston. He has also worked as an adjunct assistant professor at the University of Minnesota (UM), Minneapolis. 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 and copies of previously submitted 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. 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] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

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

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

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

The petitioner filed the petition on July 20, 2007. In a statement accompanying the initial filing, counsel stated that the petitioner "has conducted pioneering research in the field of public health research related to smoking and obesity-related problems." Counsel deemed the petitioner "a top researcher in his field." With regard to the petitioner's specific role in these research projects, counsel referred to the petitioner as "the project statistician."

The petitioner's initial submission included several witness letters from individuals who have worked with the petitioner in Minnesota or Texas. , whom the petitioner had previously served as a research assistant, stated that the petitioner "is a very gifted methodologist. He has expertise in a wide range of advanced statistical techniques."

stated:

> During his time at the University of Minnesota, [the petitioner] was responsible for helping to design methodologically sound research studies and developing and implementing analytical strategies for multiple research projects. . . .
>
> High quality research projects are dependent on individuals who bring a wide range of methodological and statistical expertise. [The petitioner] has served in this important role on many large research projects . . . and will continue to make significant contributions to the public health field through his continued work in the U.S.

stated that the petitioner "played a central role . . . [in] the most rigorous [studies] to date to demonstrate that local tobacco policies not directed at youth can significantly [a]ffect youth smoking rates." asserted that the petitioner's "work has led to national recognition," but did not elaborate except to state that the petitioner has published his work in journals and presented it at conferences.

of the Center for Health Statistics at the Minnesota Department of Health and an adjunct associate professor at UM, stated:

> I have worked closely with [the petitioner] and have become very familiar with his technical and professional skills. . . .
>
> I have found [the petitioner] to have excellent abilities in the practical application of his health research skills. . . .
>
> [The petitioner's] work puts him among the leading public health research professionals in the country.

at HealthPartners Research Foundation, stated:

> I have worked with [the petitioner] for the past several years, engaging in face-to-face meetings on a semiannual basis to review and discuss issues of participant safety and data integrity for my research project. In addition to providing excellent statistical advice as a member of the DSMB [data safety and monitoring board], [the petitioner] has also demonstrated his high ethical standards by raising questions where appropriate that clearly demonstrate his interest in the safety and well-being of the participants in the study. . . .

> It is clear that [the petitioner] has substantial education and research experience and is a respected researcher whose work is addressing some of the largest public health threats facing the United States today.

of the UTHSC School of Public Health, stated:

> We were delighted when [the petitioner] decided to accept our offer to become a member of our faculty and we plan to reclassify his rank to Assistant Professor on the tenure track after the immigration issues have been resolved. . . .
>
> [The petitioner] has acquired an excellent and successful track record on grant writing, particularly as author of research methods sections. He is a strong self-motivator and self-learner, always keeping up with new developments in the statistical field. . . .
>
> Since arrival, he has shown that he is continuing his track record in research and teaching. . . .
>
> [The petitioner] is a well-trained scientist who has unique and valuable skills which are being used to further understand national public health issues such as tobacco use, obesity, physical inactivity, and other health risk behaviors.

The petitioner submitted copies of his published and presented work, as well as documentation of citation of that work. The exhibit list submitted with the petition did not specify the number of such citations. The initial submission in the record contains one independent citation.

On September 25, 2008, the director requested further evidence to show "how the beneficiary's research is greater/different from [that of his] peers who have conducted similar research." In response, the petitioner submitted updated citation information, showing 44 citations of his work, and new witness letters, all from UTHSC faculty members.

stated:

> [The petitioner] has played an important role in collaborating with principal investigators [PIs] on numerous NIH [National Institutes of Health]-funded research projects and has contributed to their success. He works in partnership with the PI during the entire application process, from brainstorming and defining research questions, to developing hypotheses, designing the study, and proposing the analysis plan. . . .
>
> He is unique and different from his statistician peers in ways which make him very much sought after by his colleagues when contemplating a grant application and implementing the study. [The petitioner] is capable of making statistics understandable to his non-statistician colleagues (and students).

Other UTHSC faculty members praise the petitioner's abilities as a statistician, author of successful grant proposals, and instructor. The petitioner accepted a tenure-track assistant professorship at that institution on March 3, 2008.

The director denied the petition on November 6, 2008. The director acknowledged the petitioner's submission of witness letters, but noted that the "letters were submitted from individuals who have worked with or personally know the beneficiary." Regarding the citation of the petitioner's published work, the director stated "this is not unusual or different from other researchers who have had their work referenced or cited." The director concluded that "the record does not persuasively establish that [the petitioner's] accomplishments are of such unique significance that the labor certification requirement can be waived."

On appeal, counsel argues that the director did not give sufficient weight to the petitioner's "long list of accolades." Counsel describes the director's dismissal of the petitioner's citation record as "preposterous." Review of the record supports a finding in the petitioner's favor. While it is true that the witness letters represent the petitioner's close collaborators rather than independent witnesses, the petitioner's extensive citation record is direct evidence of the wider impact and influence of the petitioner's work. The witness letters are of value because they establish the petitioner's central role in the research projects that led to the cited articles. The director did not explain why the petitioner's documented citations received so little weight in the director's decision.

Some of the witnesses' assertions are not particularly persuasive. For example, the petitioner's stated ability to write successful grant applications is not a strong factor in favor of granting the waiver. The funding was earmarked for grants in any case; the petitioner simply ensured that the funds went to his employer rather than to some other United States educational or research institution. Thus, this local benefit to one institution is offset by the unavailability of those funds to other institutions seeking the same limited funding. On balance, however, the petitioner has presented a persuasive case for approval of the waiver. For procedural reasons, however, we cannot grant the waiver outright at this time.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or equivalent sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue in any communication with the petitioner. Under 8 C.F.R. § 103.2(b)(8), the director must allow the petitioner a reasonable opportunity to provide this required documentation.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of his position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the above and entry of a new decision which, if unfavorable to the petitioner, is to be certified to the Administrative Appeals Office for review.