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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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FILE:

Office: TEXAS SERVICE CENTER Date: OCT 06 2009

SRC 07 800 23016

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.

*Ubeadndk*

Perry Rhew

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 sustain the appeal and approve the petition.

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 Department of Forestry at Michigan State University (MSU). 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 further evidence and a brief from counsel. Counsel argues that the director should have issued a request for evidence under U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.2(b)(8) and its subsections. Those regulations, however, only indicate that USCIS has the option of issuing a request for evidence if the original filing of the petition lacks required initial evidence. If, in the director's opinion, the initial filing is complete and does not establish eligibility, then the director is not required to issue an intermediate notice before denying the petition. This is a procedural point, rather than a finding that the director's findings were correct. We will reverse the director's decision, but not because the director failed to issue a request for evidence.

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 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.

The petitioner filed the petition on July 26, 2007. The initial submission included a 14-page introductory statement from counsel, describing the evidence and setting forth legal arguments. On page 3 of the statement, four phrases have been underlined in purple ink, apparently by a service center adjudicator: “candidate genes,” “contributes to the basic knowledge of wood formation,” “is anticipated to be used in future applications” and “will lead to a technology.”

Several witness letters accompanied the initial filing. For example, [REDACTED] stated:

When [the petitioner] was working as a principal investigator in an emerging Korean biotechnology company, I recruited him to work on the biosynthesis of natural rubber. . . . [The petitioner] carried out the project very successfully, resulting in better understanding of how natural rubber is produced *in planta*. . . . In addition, he also worked on another project . . . aimed at elucidating the molecular mechanisms underlying wood formation. . . . In this research, [the petitioner] developed a novel experimental system to study wood formation in a herbaceous species, resulting in a landmark publication in the field. He has subsequently identified and painstakingly characterized candidate genes as regulators of wood formation. These genes will serve as a means to biotechnologically modify the structure and biochemistry of wood for value-added wood products and bio-energy feedstock. [The petitioner] played a critical role in the efforts to unravel the regulatory mechanisms that control active growth-dormancy cycle in trees . . . which will lead to a technology that can resolve the dilemma of achieving greater environmental protection of forest ecosystems while meeting the increasing demand for forest utilization.

stated that the petitioner also continues to make contributions relating to “bio-fuel development” and “the development of drought tolerant system for agricultural and forest crops.”

[REDACTED] stated that the petitioner “is one of the world authorities on the changes in gene expression that occur in the formation and maturation of wood in trees and other woody plants.”

[REDACTED] of Michigan Technological University, who described [REDACTED] as her “research colleague,” stated that the petitioner’s findings regarding “a novel group of genes probably functioning in the wood formation process . . . are readily applicable to improve the quality and quantity of wood-biofuel.”

The other witnesses represent a variety of institutions. [REDACTED] of North Carolina State University credited the petitioner with “significant contribution[s] to our understanding of wood formation,” which are significant because “[f]uels derived from cellulosic biomass” such as wood “offer [an] alternative to conventional energy sources.”

██████████ of the U.S. Department of Agriculture Forest Research Service stated that the petitioner “has also contributed to the study of disease resistance, and to tolerance to abiotic stress including salt tolerance.” ██████████ concluded that the petitioner’s “critical . . . work lays the foundations of plant research and paves the road for future studies that might lead to the mitigation of global warming and alternative energy applications of vital importance.”

██████████ of the U.S. Forest Service’s Hardwood Tree Improvement and Regeneration Center stated:

[The petitioner] discovered that a gene called ANAC012 is an important master switch regulating wood development. [The petitioner’s] results will have immediate and profound impacts on the study of wood formation and the use of plants as biofuels. . . .

There is no doubt that [the petitioner] has already made original contributions with major significance to research into plant molecular biology in general, and specifically in the field of wood biology and the genetic regulation of wood formation.

The petitioner submitted copies of several of his published articles, along with documentation of 74 independent citations of his published work. The most heavily cited article showed 45 independent citations.

The director denied the petition on November 5, 2008, stating:

A review of the evidence submitted does not indicate a broad implementation of the beneficiary’s research into the field. Most of the evidence indicates possible future advantages of such research instead of significant discoveries that have been implemented into the field. The evidence is filled with phrases such as candidate, contributes to the general knowledge pool, contributes to the basic knowledge, is anticipated to be used in the future, will lead to technology, etc.

Nearly all of the phrases quoted above match, or resemble, the underlined passages on page 3 of counsel’s introductory letter. The director’s conclusion, therefore, seems to be based not on a review of the entire record, but on one page of a letter from counsel. The director’s decision contains no other discussion of the materials submitted by the petitioner except for a sentence that listed, in general terms, the types of documentation included with the petition.

On appeal, counsel protests that the petitioner submitted ample evidence of his accomplishments and influence on the field, and that the director erred in failing to consider that evidence. We are strongly inclined to agree with this assessment of the director’s decision.

The petitioner submits documentation of patent applications that arose from the petitioner’s work. These applications show that the petitioner’s work has been productive, but a patent (let alone a pending

patent application) is not, on its face, evidence of eligibility. *See Matter of New York State Dept. of Transportation* at 221, n.7. A patent is evidence only of originality, not of significance.

More persuasive is the evidence that the petitioner's work has attracted the attention of independent researchers. That evidence has taken the form of credible and persuasive witness letters, and in the form of heavy citation of the petitioner's published work. The initial filing showed several dozen such citations, and by the time of the appeal that number had swollen into the hundreds. These citations are objective evidence that other researchers have taken notice of the petitioner's work, and built upon it in their own efforts. Simply being cited is not irrefutable proof of eligibility; a researcher who produced a handful of articles cited three or five times each generally cannot claim to be an influential figure in his or her field. But the sheer volume of citation evidence presented in this proceeding demands consideration, and the arbitrary quotation of sentence fragments from one page of an attorney's letter does not outweigh such evidence.

We agree with counsel that the petitioner submitted credible and consistent evidence of the petitioner's eligibility for the waiver, and that the director does not appear to have given sufficient consideration to that evidence in rendering the decision.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

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