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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: NEBRASKA SERVICE CENTER

Date OCT 26 2009

SRC 07 800 25111

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.

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*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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. At the time she filed the petition, the petitioner was a doctoral student at Johns Hopkins Bloomberg School of Public Health (JHBSPH), Baltimore, Maryland, and, as a contractor through Sabre Systems, Inc., a subject matter specialist at the International Programs Center of the Population Division, United States Census Bureau (USCB), Suitland, Maryland. 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 has 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 documents already in the record.

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.

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 appear to contain this required

document, in which case the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

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 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 28, 2007. The petitioner submitted copies of seven research papers, only one of which had actually been published (the rest were listed as in preparation, under revision, or submitted for review). Her one published article, entitled "Analyzing Related Issues on U.S. Not-For-Profit and For-Profit Hospitals and Inspirations for China," appeared in *Chinese Hospital Management* in 2005.

The petitioner's initial submission included six witness letters. [REDACTED] stated:

Since 2003, [the petitioner] and I have been collaborating on a project entitled "Births Averted due to Contraception." This project aims to estimate the impact of contraceptive use as estimated by births averted in the major countries around [the] world. . . . [The petitioner] obtained and analyzed information such as contraceptive use and major demographic indicators from 156 countries around the world. . . . [The petitioner] then presented our preliminary results in the 2004 Annual Meeting of the Population Association of America, the most scientifically rigorous conference in demography in the US. At the conference, she stood out from the crowd, as the youngest presenter in the session. . . . [The petitioner's] presence on the project has been, and will continue to be, invaluable.

As a member of her proposal committee, I enjoy watching [the petitioner's] progress on her nearly-completed dissertation, "Desire for HIV Testing and Counseling in Kenya." . . . In light of increased government and philanthropic interest in public health research, [the petitioner's] thesis contributes to a better understanding of how funding can be wisely spent. Specifically, [the petitioner] provides evidence that the scaling-up of HIV/AIDS treatment and care has a great impact on peoples' lives around the world. . . . [The petitioner's] results will directly benefit American policy-makers by providing scientifically sound evidence that the benefits of scaling-up antiretroviral treatment goes beyond treating the infected people and helps the general population of AIDS-stricken countries.

Counsel referred to [REDACTED] at the Center for Global Development, as an independent witness, but [REDACTED] stated: "I am acquainted with [the petitioner] from her participation in a program for developing country health scientists that I directed at the Population Reference Bureau. . . . I have maintained contact with her since then." [REDACTED] also stated that the petitioner belonged to "the small working group that I led." [REDACTED] stated that the petitioner's "work on biases in the estimation of HIV prevalence stood out for its importance to U.S. policy."

[REDACTED] stated:

[The petitioner] was a Population Reference Bureau (PRB) Population Policy Communication Fellow during the year 2006 and 2007. Over the course of that year, I had the opportunity to meet her and discuss with her the details of her research work. . . .

I was greatly impressed with [the petitioner's] profound knowledge and the significance and depth of her scientific work. [The petitioner] is dedicated to studying the intention and behaviors of utilizing HIV testing and counseling – an established intervention to prevent HIV infections and treat AIDS. [The petitioner's] dissertation work specifically focuses on Kenya, one major participant countr[y] of the President's Emergency Plan for Aid Relief (PEPFAR). HIV testing is the entry point for AIDS treatment. Hence knowledge about HIV testing is essential to the premise of . . . scaling up antiretroviral treatment, which is the main component of PEPFAR. However, after years of effort to expand HIV testing in many provinces, the overall HIV testing rate still stays low in Kenya. [The petitioner's] thesis work seeks to examine the problem by looking at the ground-breaking topic of desire for HIV testing among individuals, couples, and communities. It is [the petitioner's] hypothesis that the availability of antiretroviral treatment in the community increases individuals' desire for HIV testing and counseling.

Her unique background in medicine, biostatistics and population studies provides [the petitioner] several scientifically rigorous approaches to study this important topic with fundamental policy implications. As a policy-maker, I can testify to the necessity of information about HIV testing. The kind of knowledge and information that [the petitioner's] work provides enables me and my colleagues to make better, more informed decisions about potential legislation. As a congressman, I have a desire to increase AIDS treatment and to help combat the disease. [The petitioner's] work will help me – and other congressmen – to make decisions that are in the best interests of the nation as a whole. I consider the retaining of [the petitioner] here to be in the best interests of the United States because of her ability to provide crucial information on valuable topics.

According to his official biography in the record, [REDACTED] is "[m]arried to [REDACTED],

[REDACTED] of the USCB Health Studies Branch where the petitioner has worked since 2006, deemed the petitioner "an indispensable member of the Health Studies Branch" and "a critical member of the Health Studies Branch." [REDACTED] described the petitioner's work there:

[The petitioner] has been working on the country profiles of the 15 countries addressed by the President's Emergency Plan for Aid Relief (PEPFAR). . . . [The petitioner] is in charge of the HIV/AIDS information compilation for China and contributes to the HIV/AIDS surveillance database. . . . [The petitioner] is involved in determining HIV prevalence and incidence, and reviewing information on the AIDS pandemic. [The petitioner] collects and codes information from all Chinese journals and reports. Her exceptional bilingual skills in both English and Chinese, together with her solid

knowledge in the HIV/AIDS prevention and treatment area, make her the *only* person that is qualified for this position.

(Emphasis in original.) Counsel referred to the letter from [REDACTED] as an “Independent Recommendation,” although [REDACTED] is the Chief of USCB’s International Programs Center and was directly involved in hiring the petitioner as a contractor there. [REDACTED] stated:

In addition to her work on the Chinese HIV/AIDS epidemic, [the petitioner] has been tasked with updating . . . the country profiles for the 15 PEPFAR countries, which had become seriously out of date. These documents serve as one of the major information tools to evaluate the progress of PEPFAR. . . .

[The petitioner’s] innovative study on the association between the availability of antiretroviral treatment (ART) and the desire for HIV testing contributes to the design of projects for scaling-up ART, such as those funded by PEPFAR, and provides more evidence to justify the reauthorization of PEPFAR. . . .

With [the petitioner’s] demonstrated qualifications, I am confident that she will grow into an outstanding scientist in the area of HIV prevention and treatment.

[REDACTED] at the Fogarty International Center at the National Institutes of Health, became aware of the petitioner’s work upon reading a “book . . . that systematically reviewed the available measures of burden of disease (BOD).” [REDACTED] continued:

Measures of BOD are important tools to measure the mortality and morbidity burden of a specific disease or a spectrum of diseases in a population. They serve as the key instruments to monitor the epidemic of a disease, to evaluate the inventions for the disease control, and to determine the allocation of health care resources and policy making. . . . To manage and review seven independent studies on BOD and come up with insightful policy implications from these review[s], [the petitioner] demonstrates outstanding research capacity that exceed[s] her peers. . . .

[The petitioner] is one of the most talented researchers who have the special combination of interdisciplinary knowledge and skills that enable her to make contributions in two unique public health areas that very few others can.

On September 26, 2008, the director instructed the petitioner to submit further independent evidence to establish that the petitioner qualified for a national interest waiver at the time of filing. In response, counsel discussed the petitioner’s initial submission. Counsel particularly emphasized the letter from [REDACTED] “who does not know” the petitioner (counsel’s emphasis), ignoring [REDACTED] own statement that he had met the petitioner, as well as evidence that [REDACTED]’s spouse worked closely with the petitioner.

Counsel stated: “other researchers have relied upon petitioner’s findings as is proven by the frequent citations to [the petitioner’s] work by independent researchers.” Counsel identified four exhibits as citations, all to an article that was not published until after the filing date. We note that the cited article from *Population Studies* (counsel erroneously stated that the article appeared in *Population Research*) does not relate to HIV/AIDS research, which counsel has otherwise represented as a cornerstone of the petitioner’s waiver claim.

Some of the submissions identified as citations do not mention the petitioner’s work at all, and all of them somewhat stretch the definition of “citation.” [REDACTED] wrote a book review in which he asserted “the use of modern contraceptives averts more births in the developing world, around 195 million per year, than actually take place, roughly 125 million.” [REDACTED] identified no source for this statistic.

The second identified citation is in an electronic slide presentation by the petitioner’s co-author, [REDACTED], referring to her own work with the petitioner. (Without using the words “citation” or “cited,” counsel also stated that the petitioner’s article “was submitted by the Gates Institute” as evidence for a British Parliamentary report. The Bill and Melinda Gates Institute for Population and Reproductive Health is located at JHBSPH.)

The third identified citation is an entry in the Popline database maintained by JHBSPH’s INFO Project. This is not a “citation”; it does not report new research, based in part on the petitioner’s work. Rather, the record identifies Popline as a “connection to the world’s reproductive health literature,” essentially a catalog of existing articles.

The fourth identified citation is a press release from The Pop Reporter, which shows the JHBSPH insignia at the top of the document. The document appears to be a listing of recently published articles, and as such is no more of a “citation” than the Popline database. None of the identified “citations” show that “other researchers have relied upon petitioner’s findings” as counsel claimed; they show only JHBSPH’s efforts to promote and publicize that work.

Four new letters accompanied the petitioner’s response to the request for evidence. [REDACTED] Executive Secretary of Health Metrics Network, stated:

Although I have never met [the petitioner] in person, I am deeply impressed by her work on burden of disease studies in developing countries. She has written a seminal book on the subject. . . .

[The petitioner’s] work has had a major impact in the field of BOD study internationally.

[The petitioner] has also made major contributions to a research project on “Reproductive Health Life Expectancy.” . . . The study is slated for presentation at the 2009 Annual Meeting of the Population Association of America.

██████████ is the Director of the Demographic and Health Survey (DHS) Project of Macro International, Inc. ██████████ stated: "I have never met [the petitioner], and have not worked directly with her," but she also indicated that the petitioner has "served as an external consultant on several studies DHS has conducted." ██████████ considered the petitioner to be "truly an exceptional researcher with enormous promise." The record does not reveal whether ██████████ is related in any way to prior witness ██████████. Both individuals work in or near Washington, D.C., and ██████████ *curriculum vitae*, in the record, shows that he and ██████████ collaborated on a presentation at a 1996 workshop in Belgium.

██████████ of *Population Studies*, praised the petitioner's article that appeared in that journal in mid-2008. He stated: "I have no doubt that the paper will be frequently cited," although, as we have noted, the paper seems to have no citation history outside of the school where the beneficiary earned her doctorate.

██████████ discussed various papers that the petitioner had not yet published at the time of filing, and predicted that the petitioner's "work will draw heavy citations in the near future." This prediction may eventually prove true, but speculation about what might happen in the future cannot have the same weight as documentary evidence of what has already occurred.

The director denied the petition on March 6, 2009. The director found that the petitioner had not shown her work to have been especially influential in her field. The director acknowledged the submission of several witness letters, but found that these letters failed to demonstrate the impact (as opposed to expected future impact) of the petitioner's body of work as it existed on the filing date. The director also noted that the reception of the petitioner's subsequent work cannot retroactively show that the petitioner was already eligible for the waiver as of the filing date. The regulations, as well as published precedent, support this position. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

On appeal, counsel argues that the petitioner "does have evidence of [qualifying] past achievements" (counsel's emphasis), and then lists the petitioner's achievements prior to the filing date. Simply listing the petitioner's accomplishments begs the question of how significant they are. Counsel attempts to address this by stating that the petitioner's work has "provid[ed] a unique methodology of studying desirability of HIV testing" and "significantly advanced public health objectives in the US." The record, however, lacks objective, documentary evidence to support these vague statements. Counsel does not identify any specific, active initiative that had been created or substantially modified as a direct result of the petitioner's work prior to the filing date.

Counsel contends that the director did not give due consideration to letters from "independent and objective" witnesses. We have already shown that a number of these witnesses actually have close ties to the petitioner. For instance, on appeal counsel refers to "**independent referee**, ██████████



and then quotes from the very letter in which [REDACTED] made it clear that she personally worked with the petitioner in a “small working group.” Counsel’s persistently erroneous claims about these witnesses do not inspire confidence in the accuracy of counsel’s other assertions. In any event, the assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel does not dispute the director’s finding that there are few citations of the petitioner’s work, but asserts that the director “failed to review the quality of these citations versus just the number. Some of the citations were made . . . in order to advance public policy objectives. Such citations, certainly demonstrate that [the petitioner’s] work has been influential over that of her peers.” This argument is not persuasive. The petitioner has not shown that her work has influenced public policy; she has only shown that a small number of individuals have mentioned her work while attempting to influence public policy. Furthermore, there are policy implications in the very nature of her work, which relate to the intrinsic merit and national scope of her specialty rather than any special traits specific to the petitioner alone. Counsel, therefore, fails to show that the petitioner’s work has been particularly influential.

Counsel notes that the petitioner has received prizes in the past. The record does not establish the significance of these prizes. Under 8 C.F.R. § 204.5(k)(3)(ii)(F), prizes and comparable recognition can form part, but not all, of a successful claim of exceptional ability in the sciences. Because exceptional ability in the sciences is not an automatic basis for the waiver, it is clear that a partial claim of exceptional ability is, likewise, insufficient.

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. Comments about the petitioner’s work after the filing date, and expectations about the impact that the petitioner’s work might eventually have, indicate that the petition was, at best, filed prematurely. On the basis of the evidence submitted, the petitioner has not 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 not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.