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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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FILE: [REDACTED]
SRC 08 800 02983

Office: TEXAS SERVICE CENTER Date: JAN 08 2010

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).

UDeadndc
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 postdoctoral associate. 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 additional evidence, some of which postdates the filing of the petition. As will be discussed in more detail below, the petitioner must establish his eligibility as of that date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). For the reasons discussed below, we uphold the director's decision.

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.

In the initial cover letter, counsel asserts that, in addition to holding an advanced degree, the petitioner has exceptional ability. The issue of whether the petitioner qualifies as an alien of exceptional ability, however, is moot because the record establishes that the petitioner holds a Ph.D. degree in Pharmacology from the University of Louisiana. 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, hypoglycemia research, and that the proposed benefits of his work, improved understanding and treatment of diabetes, 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. *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 nine published articles reporting his Ph.D. research; evidence of citation, including one article with moderate citation, and reference letters. In supplementing the electronically filed petition, the petitioner included additional citations and evidence that he has received a two-year grant from the Juvenile Diabetes Research Foundation. The new citations and grant postdate the filing of the petition.

The petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. In this matter, that means that he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; *see also Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his research will subsequently prove influential. 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).

Regardless, the vast majority of research, if not all research, is funded by government or private foundation grants. While the approval of a grant application reveals that the grant-awarding entity finds the proposed research promising, a grant does not set the petitioner's research apart from other research in his field. Even if we accepted counsel's characterization of a grant as some of type of recognition for past accomplishments, recognition for achievements from an organization is merely one criterion for establishing eligibility as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(F). As this classification normally requires an approved alien employment certification, we cannot conclude that meeting one

criterion for the classification, or even the requisite three criteria, warrants a waiver of that requirement in the national interest. *NYS DOT*, 22 I&N Dec. at 218, 222.

We will consider the letters below. 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 containing mere assertions of a positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive.

Although the petitioner's only published work resulted from his Ph.D. research, the petitioner did not submit letters from his professors and collaborators at the University of Louisiana. Rather, the letters are all from colleagues at Yale University, where the petitioner is currently employed as a postdoctoral associate in the laboratory of [REDACTED], or from independent colleagues.

[REDACTED] explains the seriousness of hypoglycemia in diabetes patients and the importance of understanding how the brain activates hypoglycemia defense mechanisms to more effectively prevent hypoglycemia in diabetic patients treated with insulin. [REDACTED] asserts that the petitioner focused on understanding the mechanism underlying hypoglycemia associated autonomic failure in diabetes, demonstrating that neurons become habituated by repeated bouts of hypoglycemia which is also accompanied by a blunting of counterregulatory responses. [REDACTED] concludes that this work is "of great importance and [the petitioner] is among the first to show that neuronal activation involved in glucose sensing and maintenance of glucose homeostasis is adversely affected by antecedent hypoglycemia and that this may be one of the mechanisms behind the clinically observed phenomenon of hypoglycemia unawareness." [REDACTED] notes that his own laboratory and a collaborating laboratory "have conducted further studies in transgenic animals with a knockdown of glutamate transporter continuing on [the petitioner's] findings." While notable, the continuation of the petitioner's work at the laboratory where he now works does not demonstrate his wider influence.

[REDACTED], a research career scientist/research professor at Yale University, asserts that the petitioner's doctoral dissertation research suggest that maintenance of neuronal activation may possibly alleviate the deleterious effects of recurrent hypoglycemia on counterregulatory responses. [REDACTED]

further asserts that this work is significant for understanding the counterregulatory deficits observed in diabetic patients to recurrent hypoglycemia and improves our understanding of the mechanisms of hypoglycemia associated autonomic failure in diabetes. [REDACTED] states that the petitioner also demonstrated that a particular population of neurons in the lateral hypothalamic area, the Orexin neurons, respond to the stimulus of hypoglycemia and that these neurons may be involved in the activation of parasympathetic outflow via the activation of preganglionic neurons in the dorsal vagal nucleus. Finally, the petitioner demonstrated that the activation of Orexin neurons is negatively affected by recurrent hypoglycemia. [REDACTED] does not, however, explain how this work is already influencing the field.

[REDACTED] an assistant professor at Yale University, explains that the petitioner's doctoral research has "shown that that neural circuitry involved in the acute and chronic monitoring of glucose homeostasis, shows reduced activation in the fact of repeated hypoglycemia." [REDACTED] asserts that this research has "pointed the way for many subsequent studies to focus on these nuclei in the brain that respond to and whose responses are impaired by hypoglycemia." [REDACTED] an associate research scientist at Yale University, advances a similar claim. Neither [REDACTED] nor [REDACTED] identifies any of these subsequent studies.

[REDACTED] also discusses the petitioner's work at Yale University. [REDACTED] explains that the petitioner is currently "investigating the role of insulin signaling in the central nervous system on metabolism and the feedback control of insulin and glucagon secretion." [REDACTED] further explains this laboratory had previously established the important role of the ventromedial nucleus of the hypothalamus in glucose sensing and counterregulation. [REDACTED] continues:

[The petitioner] has shown that insulin action in the brain is critical for the generation of the glucagon response to hypoglycemia. His recent work has also revealed that brain glucose levels also influence this response. These results are unique and challenge the existing belief of the mechanisms involved in this important defense mechanism. These studies suggest that the reduction in islet insulin secretion might not be the only mechanism leading to the disinhibition of glucagon secretion. These observations are unique and significantly change our current understanding of the role of the brain in pancreatic function. He is also working to understand the novel role of sodium glucose cotransporters (SGLT's) in brain and beta cell glucose sensing. These research projects are extremely unique and have the potential to radically challenge our current thinking of the mechanisms underlying the control of insulin secretion from the pancreas, hypoglycemia counterregulation and insulin resistance associated with diabetes.

The record contains no evidence that the petitioner had published any of his research at Yale University as of the date of filing. While we do not question [REDACTED] assessment of the originality of the research, any 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 whose work does not duplicate work that was done by others qualifies for a waiver of the alien employment certification in the national interest. In addition, while we do not question [REDACTED] expertise

and sincerity in characterizing the petitioner's results as important, the petitioner must provide evidence of his influence in the field beyond the laboratory where he works. [REDACTED] speculates that the petitioner novel observation showing the importance of brain insulin on glucagon secretion "will surely have a significant impact in the field of diabetes research." [REDACTED] however, provides no examples of how this work is already influencing the field.

On appeal, the petitioner submits a new letter from [REDACTED], who asserts that he hired the petitioner after attending a presentation by the petitioner and recognizing his "enormous potential for a career in research." [REDACTED] goes on to discuss the petitioner's work at Yale University, which [REDACTED] asserts was conducted "almost entirely on his own." [REDACTED] concludes that the selection of the petitioner to give oral presentations in 2008 and 2009, after the date of filing, demonstrates recognition for the petitioner's work. We cannot conclude that work disseminated after the date of filing can demonstrate the petitioner's influence prior to that date. As discussed above, the petitioner must demonstrate his eligibility, and, thus, his influence, as of that date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The petitioner did submit letters from references who appear to be independent, although the record does not include their curriculum vitae. [REDACTED] Associate Dean for Clinical and Translational Research at the Albert Einstein College of Medicine at Yeshiva University, provides similar information to that discussed above. [REDACTED] does not explain how he came to be familiar with the petitioner's work and does not suggest that he has personally applied the petitioner's work in his own research.

[REDACTED], an associate professor at the University of Pennsylvania School of Nursing, characterizes the petitioner's findings as "important" with "important implications in understanding the very basic functioning of the body's homeostatic machinery" that "can have a significant effect on developing therapeutic strategies to improve counterregulatory defenses in patients." She provides no examples of the petitioner's influence in the field and does not claim to have applied the petitioner's work in her own laboratory.

[REDACTED] an associate professor at the New Jersey Medical School, asserts that the petitioner's work "has fundamentally altered the understanding of how glucagon is released from the pancreas and has [a] direct and significant impact on our current understanding of not only normal physiology but also the development of diabetes and its complications." She further asserts that the petitioner's findings have closely matched and impacted her own research, "albeit in a different setting." She then explains how she produced findings that are "completely analogous to [the petitioner's] work" and discusses how their findings in the aggregate enable them "to begin to understand how insulin therapy may impair the ability of the brain to defend against hypoglycemia." As this letter was submitted on appeal, it is not clear that [REDACTED] was utilizing the petitioner's research as of the date of filing. Moreover, [REDACTED] does not explain how she has built on the petitioner's research as opposed to producing similar results with her own methodology. Once again, all research must be original and useful to be accepted for graduation, publication or funding. It does not follow any research that produces new and useful information warrants a waiver of the alien employment certification in the national interest.

█ of the Department of Neurosciences at the New Jersey Medical School, asserts that he met the petitioner at a conference and has been following his research since that time. █. █ provides information similar to that discussed above and notes that the petitioner's articles have appeared in prestigious journals, such as *Neuroscience*. We will not presume the influence of an article from the journal in which it appears. Rather, it is the petitioner's burden to demonstrate the influence of the individual article.

The petitioner initially submitted evidence that his Ph.D. research has been cited, mostly one or two times per article. Only one article had been moderately cited. The petitioner did not, however, provide a list of the citing articles. As such, the record does not reflect how many of the citations are from independent researchers. Subsequently and again on appeal, the petitioner has submitted evidence of additional citations, although most of his articles remain minimally cited with only one article producing moderate citation. We are not persuaded that the petitioner's citation record, in the context of the record as a whole, demonstrates his past achievements at a level such that we can conclude that he will prospectively benefit the national interest to an extent that warrants a waiver of the alien employment certification.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. As discussed above, however, it can be argued that most research, in order to be accepted for publication or funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge 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.