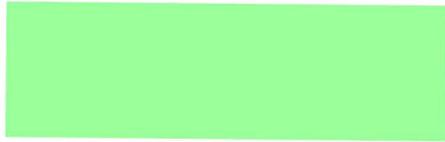




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 18 2014** OFFICE: NEBRASKA SERVICE CENTER FILE # [REDACTED]
LIN # [REDACTED]

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
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 under 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 a biochemistry researcher. At the time he filed the petition, the petitioner was a postdoctoral research associate at [REDACTED]. The petitioner now works for [REDACTED] in Athens, Ohio. 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, submits a statement and supporting exhibits, including published articles and electronic mail messages from [REDACTED] officials.

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 regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (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.

In re New York State Dep’t of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm’r 1998) (NYSDOT), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish 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.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien’s past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner’s assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term “prospective” is included 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.*

The USCIS 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 Form I-140, Immigrant Petition for Alien Worker, on June 27, 2012. On Part 6, line 3 of the petition form, the petitioner provided the following description of his job: “understanding the mechanism by which body fat is stored and broken down in relation to obesity, heart disease, cancer and diabetes.”

The petitioner's initial submission included a letter from Dr. [REDACTED], assistant professor at [REDACTED], who stated:

I recruited [the petitioner] into my laboratory . . . because of his research experience and expertise in different biochemical and molecular biology techniques. In my laboratory, [the petitioner's] research focuses on establishing the lipid binding motifs of the lipid droplet protein ADRP (adipose differentiation-related protein). . . . His research is very important because body cells store excess lipids in cellular organelles called lipid droplets and ADRP is a protein that associates with these organelles to regulate the storage of lipids. Excessive amounts of lipids in the body can lead to serious health conditions resulting in other diseases like obesity, type II diabetes and heart disease. . . . [The petitioner] is a co-author in our paper entitled: [REDACTED]

[REDACTED] . . . This paper was submitted to and accepted by the *American Journal of Physiology, Cell Physiology*. Other work by [the petitioner] has led to major discoveries in mapping out the lipid binding motifs of ADRP. We have written a manuscript of this work and are currently in the process of submitting the paper to the journal *Biochemistry* for publication.

The petitioner submitted a manuscript copy of "[REDACTED] . . ." and copies of electronic mail messages from an associate editor at the journal (*AJP-Cell Physiology*). A message dated January 15, 2012 indicated that peer reviewers "raise[d] some concerns that [the authors] will need to address before a final decision can be made. . . . The revision is due by 23rd Jul 2012." A second message, dated June 9, 2012, is nearly identical to the first, except to state that revisions were due on December 12, 2012. An addendum to the message stated "this paper is basically accepted" once the authors address "very minor . . . additional concerns/issues." Nevertheless, this second message indicates that, less than three weeks before the petition's filing date, the journal's editors found the manuscript in need of further revision. The evidence submitted does not establish that the journal had accepted the paper for publication prior to the filing date, or that the research described in the paper had otherwise influenced the petitioner's field. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 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 (Reg'l Comm'r 1971).

The petitioner's *curriculum vitae* listed three conference presentations (from 2007 to 2009) and five "manuscripts accepted, submitted or in preparation," but no existing published work.

The director issued a request for evidence (RFE) on December 21, 2012. The director requested "copies of any published articles by other researchers citing or otherwise recognizing [the petitioner's] research and/or contributions," or database printouts identifying citing articles. The director instructed the petitioner to establish his "influence on [his] field of employment as a whole."

In response, the petitioner stated that, in addition to his previously described work with Dr. [REDACTED] he has “an on-going project with Professor [REDACTED] . . . studying pili formation in *Yersinia Pseudotuberculosis*,” and that a paper based on that work is “in preparation.” The petitioner indicated that the paper would appear in *Protein Science* in 2013, but he submitted no evidence to show that *Protein Science* had accepted the paper or set a publication date.

In a letter, Prof. [REDACTED] stated that he served on the petitioner’s doctoral committee and collaborated with his research group, and “remained in touch with [the petitioner] after he finished his doctoral research.” Prof. [REDACTED] stated that the petitioner “is very valuable, highly trained, professional and a great resource to our field,” and that “[h]is skills are far above those of others possessing merely the minimum qualifications in one of the fields, such as microbiology or biochemistry.” By statute, exceptional ability in the sciences is not a sufficient basis for the waiver. Neither is specialized training in methods developed by others. *See NYS DOT* at 221.

The petitioner submitted evidence that *AJP-Cell Physiology* published his co-authored paper (with a minor change of title) on [REDACTED], the petition’s filing date. A commentary in the [REDACTED] 2012 issue of the same journal stated: [REDACTED]

[REDACTED] The petitioner did not submit evidence to show how his work had influenced the field prior to the filing date.

The remainder of the petitioner’s response to the RFE consisted of copies of diplomas and certificates documenting the petitioner’s graduate studies and his activities during that period, including training activities completed and positions held.

The director denied the petition on June 17, 2013. The director acknowledged the intrinsic merit and national scope of biochemistry research, but concluded that the petitioner had not shown the impact or influence of his work. The director noted that the petitioner’s initial submission included no evidence of existing published work, and that the petitioner had documented minimal citation of his published work.

On appeal, the petitioner quotes the instructions for Form I-140, indicating that the petitioner “must meet at least three of the criteria below and demonstrate that it is in the national interest that [he] work permanently in the United States.” There followed a list of evidentiary standards, such as “Letters documenting at least 10 years of full-time experience.” The petitioner states that he “submitted all the documents necessary to prove the point above.” The listed standards are not the criteria for the national interest waiver. Rather, they are the criteria for exceptional ability, as set forth in the USCIS regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) through (F). A foreign worker who meets three or more of those criteria must separately establish eligibility for the waiver.

The petitioner states:

When you requested . . . additional evidence . . . , you asked for copies of any published articles citing or otherwise recognizing my work. I submitted one such publication, but there were more. You did not mention the total number of citations you needed from me even though you used that as one of the reasons to deny my application. I have included more citations of my work in this appeal.

The appeal includes partial copies of two new citing articles. Their respective publication dates are April 18 and 19, 2013. Both articles appeared more than six weeks after USCIS received the petitioner's response to the RFE on March 4, 2013. The articles, therefore, do not support the claim that "there were more" citing articles at the time the petitioner responded to the RFE.

The evidence of record shows that the petitioner had no publication history at the time he prepared the petition; his first article was published on the date of filing; one citation existed when the petitioner responded to the RFE; and two more citations appeared later. The petitioner must be eligible for the benefit sought on the date of filing. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 49. The chronology of the petitioner's publication history does not show that his published work had had any impact at the time of filing, and the petitioner has documented minimal citations since that time. Furthermore, the petitioner claimed to have five papers in various stages of preparation at the time of filing, but there is no evidence that the petitioner continued to produce work for publication after leaving [REDACTED]

The petitioner states: "I worked for [REDACTED] – Fabric and Home Care Innovation Center from 04/29/2013 – 05/31/2013. . . . My job involved monitoring [REDACTED] global enzyme hygiene systems in 30 countries." Regarding his most recent employment, the petitioner identifies his current employer as two "sister companies, [REDACTED] based in Athens Ohio and [REDACTED] based in Columbus Ohio," but provides no details about the nature of his work. Printouts of electronic mail messages from [REDACTED] officials dealt with the recruitment and interview process, rather than the specific nature of the petitioner's intended work for [REDACTED]

When the petitioner filed the petition, he based the waiver request on the assertion that his intended work involved "understanding the mechanism by which body fat is stored and broken down in relation to obesity, heart disease, cancer and diabetes." The petitioner has not established that he has continued working in that area. The record indicates that the research described is the focus of Dr. [REDACTED] research group, which the petitioner has left, rather than the focus of the petitioner's own ongoing work. The petitioner did not establish that his work with "global enzyme hygiene systems" at [REDACTED] Fabric and Home Care Innovation Center involved body fat metabolism, and the record does not describe his subsequent work for [REDACTED]

The petitioner states: "My employer is able and willing to get for me a labor certification if necessary." An employer's claimed willingness to pursue labor certification is not grounds for waiving labor certification.

The petitioner states: “All the 3 employers mentioned above hired me because they needed my expertise and I was the best match for those positions after several candidates were interviewed.” The petitioner does not claim that his reputation in the field led to job offers. Rather, he states: “the employers did not know me and only found out about my skills after reading my work and interviewing me.” Being the best qualified applicant for a particular job is grounds for an employer to hire that applicant, but it does not warrant special immigration benefits in the form of the national interest waiver. The statutory language includes a job offer requirement, which necessarily applies to those whose qualifications are sufficient to secure job offers from employers.

The petitioner has established that his graduate studies and postdoctoral training have equipped him for employment in biochemistry. The record, however, does not show that the petitioner, at the time of filing, had any impact or influence on the field as a whole that would set him apart from his peers in that field of endeavor.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that his influence be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner “must clearly present a significant benefit to the field of endeavor.” *Id.* at 218. *See also id.* at 219, n.6 (the alien must have “a past history of demonstrable achievement with some degree of influence on the field as a whole.”).

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 labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.