

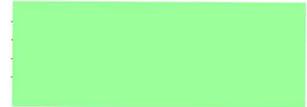


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 04 2014 OFFICE: NEBRASKA SERVICE CENTER



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:

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,

Σ 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 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 an alien of exceptional ability in business and as a member of the professions holding an advanced degree. The petitioner seeks employment as a medical researcher and president of [REDACTED]. Since June 2011, the petitioner has worked as a researcher at [REDACTED] where he previously studied for a master's degree from August 2010 to April 2011. [REDACTED] facilities currently host [REDACTED]. 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 statement and supporting exhibits.

Before the filing of the appeal, attorney [REDACTED] represented the petitioner. On appeal, the petitioner states: "I have prepared this appeal without the help of any attorney. I believe that my former attorney was not able to explain my diverse and multi-disciplinary background in an effective way and I would like to use this opportunity to present the case myself." Therefore, the petitioner is self-represented, and the term "former counsel" in this decision shall refer to [REDACTED].

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 petitioner claims eligibility for classification as a member of the professions holding an advanced degree, and as an alien of exceptional ability in the sciences. The record readily establishes that the

petitioner qualifies as a member of the professions holding an advanced degree. The director determined that an additional determination regarding the petitioner's claim of exceptional ability would be moot, and the petitioner does not contest this determination on appeal. The sole issue under consideration 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 November 16, 2011. On Part 6, line 3 of that form, the petitioner described himself as a “[m]edical researcher in the field of developing diagnostic technologies for the accurate and early detection of Chronic Kidney Disease (‘CKD’), as well as a person who is uniquely qualified to bring this technology to market.”

Former counsel noted: “[s]ince [the petitioner] is the entrepreneur and owner, it is impossible for his company to obtain a labor certification.” The standard for waiving the job offer requirement is whether the waiver serves the national interest, not whether labor certification is unavailable. The *NYSDOT* precedent decision addresses this situation, stating:

there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Id. at 218 n.5. An entrepreneur can qualify for the national interest waiver, but he or she must meet the *NYSDOT* criteria. The act of starting a new business is not, itself, a qualifying event for the waiver. Entrepreneurship can be a route to eligibility, but it is not a shortcut; an otherwise ineligible foreign worker does not become eligible by starting a business. Under the plain wording of section 203(b)(2)(A) of the Act, aliens of exceptional ability in business are subject to the statutory job offer requirement; the statute does not distinguish between entrepreneurs and other foreign workers. The statutory language still applies, and *NYSDOT* remains binding precedent; there has been no change to the law that would entitle entrepreneurs to a lower standard. The three-pronged *NYSDOT* national interest test applies to self-employed aliens.

Former counsel stated that the petitioner “has invented the composition, methods and kits for detecting CKD by using vitamin transporter proteins. This invention is being licensed-out to [REDACTED] and has been granted a provisional patent by USPTO [the U.S. Patent and Trademark Office].” The record includes USPTO documentation, dated August 25, 2011, less than three months before the petition’s filing date. The documentation does not indicate that the petitioner’s invention “has been granted a provisional patent.” Rather, it states: “Receipt is acknowledged of this provisional patent application. It will not be examined for patentability and will become abandoned not later than twelve months after its filing date.”

As the preceding comment shows, a provisional patent application is not a substantive patent application. It is, rather, a placeholder to preserve the applicant’s priority for the future filing of a complete patent application. Further information about provisional patent applications is available from the USPTO web site at <http://www.uspto.gov/patents/resources/types/provapp.jsp> (partial

printout added to record January 9, 2014). The petitioner's initial submission does not contain any evidence that the USPTO had granted a patent as former counsel claimed, or that the petitioner (or any other involved party) had followed up on the provisional filing by filing a non-provisional application or converting the provisional application to a non-provisional application.

Holding a patent on an invention does not ensure approval of a national interest waiver. See *NYSDOT* at 221 n.7. In this instance, the petitioner does not hold a patent. Rather, as the above discussion shows, UCI filed a provisional patent application which the USPTO would not consider on the merits until and unless a non-provisional application followed within 12 months. The record contains no evidence that UCI took that required second step.

A copy of [REDACTED] business plan discusses the company's goals, and does not indicate that the company has made progress toward those goals beyond preliminary testing stages:

We have been successful in reaching our short term goals by securing intellectual property (IP) protection for this technology and by validating our technology in animal models. We are seeking funding for subsequent clinical development. We believe that we can conclude our research and development activities as well as fulfill government regulatory requirements within [sic] a relatively short time frame of 24 to 36 months. . . .

[REDACTED] has recently discovered 12 novel biomarkers that can be used to diagnose and screen various stages of CKD as well as provide novel therapeutic targets for treatment of various complications associated with CKD. We plan to commercialize this technology named [REDACTED] CKD [REDACTED] by developing tests and devices for all stages of CKD.

The petitioner's national interest waiver claim hinges on his plan to build a business around his CKD testing method, but the business plan states, on page 20: "Initial funding must be used to achieve proof of concept involving in vitro diagnosis of CKD, so that additional funding can be obtained. The company intends to fund later stage R& D with federal grants and venture capital investment." The business plan indicates that the company seeks an initial investment of \$3 million.

The initial submission contained no evidence that the petitioner had a prior history of success as an entrepreneur. The petitioner claimed no prior experience running or owning a business; he earned a business-related master's degree in May 2011, six months before the petition's filing date, and he founded [REDACTED] later still, in August 2011. The petitioner signed the company's operating agreement 12 days before he filed the petition. The initial submission contained no evidence to indicate that [REDACTED] had yet conducted business beyond its start-up stages.

The business plan demonstrates the petitioner's intention to be an entrepreneur, but at the time of filing, [REDACTED] was a new start-up company that was not yet in a position to enter the marketplace. The petitioner's involvement with this company does not constitute a past history of demonstrable achievement with some degree of influence on the field as a whole. The petitioner

must demonstrate specific prior achievements which establish his ability to benefit the national interest. *NYS DOT* at 219 n.6.

The above discussion concerned the lack of evidence of the petitioner's success as an entrepreneur. The petitioner has indicated that he seeks the waiver not only as an entrepreneur, but also as a researcher. Discussion of that facet of the petitioner's claim follows.

The petitioner submitted abstracts of a published article, two short reports, and five conference presentations, two of which relate to the petitioner's current and intended future work with CKD. The other materials concern breast cancer, disorders of the heart and lungs, and a device to detect "organisms associated with Hospital Acquired Infections."

Former counsel asserted that the submitted materials relate to "some of the scholarly articles authored or co-authored by [the petitioner]." The phrase "some of the scholarly articles" implies the existence of others, but the petitioner neither submitted nor identified other articles, and therefore he provided no evidence that other articles exist. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 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).

Former counsel claimed that the petitioner's "work is widely cited by leading researchers" who study chronic kidney disease. The petitioner, however, did not support this claim with documentary evidence of citation.

The petitioner submitted letters from seven witnesses, all of whom have demonstrable ties to the petitioner. Some witnesses emphasized the petitioner's research, others focused on his work in commercialization of biotechnology.

The petitioner spent a year (February 2009 to February 2010) as a postdoctoral research scholar at the [REDACTED] stated:

[The petitioner's] post-doctoral work at [REDACTED] focused on identifying specialized proteins involved in transport of vitamins in CKD and showed that vitamin transporter proteins are down-regulated in various tissues in an animal model of CKD. These transporters are now being investigated as a diagnostic marker for CKD. He is currently associated with the [REDACTED] and is working to develop a multi-analytic bioassay to accurately and sensitively identify CKD at a much earlier stage compared to conventional methods. Moreover, his novel approach regarding the functional aspects of vitamin transporters in CKD will provide a basis for the design and development of therapeutic

interventions, which will give immense benefits to patients suffering from this major health problem.

stated:

[The petitioner] has made a number of valuable scientific discoveries which have helped the understanding of the pathogenesis and molecular changes in the course of important clinical conditions, and more recently Chronic Kidney Disease. Earlier in his career, [the petitioner] identified and characterized the relationship of selective estrogen receptor modulators (SERMs) in the causation of cervical pathology in breast cancer patients. he was part of the multi-disciplinary team that discovered that leukemia/lymphoma patients that have cardiac failure can benefit from allogenic and autologous stem cell transplantation – a life saving treatment that has traditionally been denied to such patient populations. His research at was aimed at characterization of cellular and molecular effects of uremia on vitamin homeostasis. Further, his research is crucial to development of potential therapies for kidney disease. . . .

Additionally, [the petitioner] is the inventor of a novel patent pending technology that involves a panel of multiple biomarkers for diagnosis of Chronic Kidney Disease. . . .

More importantly, as an entrepreneur, [the petitioner] is uniquely qualified to bring this research and technology quickly to market, and to disseminate its use throughout the U.S., thereby saving lives.

In my laboratory, [the petitioner] played a key role in kidney research aimed at studying recently cloned cell and mitochondrial membrane vitamin transporters. . . . Our studies of the function of these transporters will enable us to understand the mechanism of the pathogenesis of various kidney diseases and their complications.

, licensing officer for Office of Technology Alliances, stated:

While working as a researcher at [the petitioner] studied an association between the profile of biomarkers and Chronic Kidney Disease. . . . filed a provisional patent application to protect IP rights for this invention and executed a Letter Agreement with is working with [the petitioner] on marketing this technology to potential investors. . . .

Chronic Kidney Disease is a global healthcare problem, in United States alone more than 37 million patients suffer from Chronic Kidney Disease and 700,000 have end stage renal disease that requires constant dialysis or transplantation. Chronic Kidney Disease results in an economic burden in excess of 80 billion dollars annually in US. There is a large unmet need as current biomarkers are not adequate for early detection of Chronic Kidney Disease. A biomarker to diagnose Chronic Kidney Disease at an

early stage with high sensitivity could potentially help physicians prevent Chronic Kidney Disease and its various complications.

[REDACTED], who supervised the petitioner's postdoctoral training at [REDACTED], stated:

I am aware of [the petitioner's] medical research at [REDACTED] at [REDACTED]. . . There he investigated an important treatment modality for patients with hematologic malignancies – leukemia, lymphoma and myelomas – having cardiac ejection fraction (EF) of less than 35%. . . . Their group showed for the first time that there was no statistical difference between cardiac toxicity and non-relapse mortality (NRM) between normal and low EF groups. The results of his study were published in the [REDACTED]. . . .

[The petitioner's] research has been relied upon by other medical and scientific researchers, including myself, in the advancement of their own research, as evidenced by citations to his work by other journal authors.

In February 2009, [the petitioner] joined my lab at the [REDACTED]. Our group is respected and internationally well-known in the field of ion/nutrient transport research. Our studies focus on the motion of vitamins and micronutrients passing through cell and sub-cellular membranes. . . . [The petitioner] studied the vitamin transport process of the liver and colon (large intestine) cells. . . . His main studies focused on [REDACTED] absorption in various vital organs in experimental uremic animals.

[REDACTED] stated that the petitioner's research at [REDACTED] "made a great contribution to the vitamin transport in various organs," providing information that "may assist physicians" treating patients with CKD, hyperhomocystenemia, diabetes, and other ailments. [REDACTED] also asserted: "During his stay at [REDACTED] [the petitioner] made significant contributions to the field of the business of biomedical sciences." [REDACTED] did not elaborate on this point. Regarding the petitioner's latest venture, [REDACTED] stated:

The diagnostics company – [REDACTED] – that he has established is being supported by eminent institutions such as the [REDACTED] to continue clinical development of the novel kidney biomarkers. Currently, he is negotiating with Venture Capitalists (VC) and corporate investors for funds. At the same time he is confident that his company would be able to get [REDACTED] funds under their SBIR (small business innovative research) grants program. As further indication of the eminent standing [the petitioner] enjoys in the field, his company has attracted the attention and interest of various reputed names in academia and industry, as is evident from the research collaborators, management team and the scientific advisory board members of [REDACTED].

Regarding the last sentence quoted above, [REDACTED] business plan indicates that the company's management team consists of the petitioner and [REDACTED] and its scientific advisory board comprises [REDACTED]. The involvement of [REDACTED] professors is not evidence of the petitioner's reputation outside of those institutions. All of those individuals have provided letters in support of the petition. The enthusiasm of [REDACTED]'s own officers and advisors, and others with a demonstrable vested interest in the company (such as UCI, a licensor of intellectual property to [REDACTED]) is not evidence of the company's impact or influence on the field, and the record does not show wider recognition of the company.

The remaining witnesses are associated with the petitioner's work and studies at [REDACTED] chief technology officer at [REDACTED] stated:

[REDACTED] develops tools for research in nucleic acids, proteins, and diagnostics. The company sponsored a [REDACTED]. The [REDACTED] team mission was designed to support our [REDACTED] funded project for developing a diagnostic assay for detecting *Clostridium difficile* from human stool. Specifically the [REDACTED] team project was to test and optimize our sample preparation system as applied to mock stool samples and detect the analyte organism by [REDACTED]. Additionally the team was assigned to prepare a commercialization plan for [REDACTED] to be included in our Phase II grant submission.

[The petitioner] served on this [REDACTED] team on both aspects of the mission, the testing and optimization and the commercialization plan. He demonstrated a professionally guided attention to critical issues of the molecular biology of the assay, the biology of the target organism, the customer perspective of healthcare facilities, and regulatory hurdles critical to the planning for commercialization. His work and insight was outstanding, and based on his contributions I believe he is ideally suited to the work of commercializing (bringing to market) biotechnology products, and that he would be a major contributor in any venture that includes the research, development and commercialization of diagnostic products.

[REDACTED] stated: "[The petitioner's] research was so promising that I agreed to join [REDACTED] . . . as CTO [chief technology officer]." [REDACTED] described the "large unmet need . . . for early detection of CKD" using biomarkers such as those discovered by the petitioner, and that the petitioner's "CKD biomarkers will improve patient health while saving millions, perhaps billions, of dollars in health care costs." Other materials in the record indicate that the diagnostic tests are still under development and, as of the filing date, unproven. Assertions of prospective national benefit from those tests, therefore, rests on speculation concerning their future effectiveness.

[REDACTED] letter includes the following passage:

Chronic Kidney Disease (CKD) is a global healthcare problem, and in the United States the percentage of people who suffer from CKD is around 15% of total US

population, which is growing at an annual rate of 4%. Furthermore, more than half million patients have end stage renal disease (ESRD) that requires constant dialysis or transplantation. CKD is the ninth leading cause of death and results in an economic burden close to hundred billion dollars annually in US. There is a large unmet need as current biomarkers are not adequate for early detection of CKD. A biomarker to diagnose CKD at an early stage with high sensitivity will help physicians prevent CKD and its various complications.

The above passage is similar to a passage from [REDACTED] letter, which is dated a week earlier than [REDACTED] letter (September 8 and 15, 2011, respectively). Another similarity between the two passages is the occasional absence of articles (“a” and “the”). The shared language and shared grammatical errors suggest common authorship of the two letters, or at least portions thereof. *Cf. Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The director issued a request for evidence (RFE) on April 3, 2012, instructing the petitioner to submit further evidence to show the petitioner’s influence on his field as of the petition’s filing date. (An earlier RFE, issued March 16, 2012, concerned technical issues that the petitioner has since resolved.)

In response, former counsel stated: “this petition would not have been filed, but for the new administration and USCIS policy, announced in July 2011, to apply existing eligibility criteria to facilitate immigrant visas for entrepreneurs.” The petitioner repeats this assertion on appeal, and discussion will follow in that context. Former counsel also stated that the petitioner’s “scientific background, inventions, and potential to create jobs demonstrate that he will serve the national interest (job creation) to a substantially greater degree than others in the field.”

A newly submitted printout of a [REDACTED] electronic slide presentation described [REDACTED] projected growth, stating: “Currently [third quarter 2012], we have 6 personal [*sic*] working on the project, and they are being supported by the university/research center’s funds. . . . We will increase to 10 employees by Q2-Q3 [of 2013], once we have Venture capital funds from investors.” The document predicted “25+ Employee[s]” by mid-2014, when [REDACTED] is “in commercialization mode, getting FDA approval and marketing/selling our diagnostic tests.” The same printout quoted a 2002 article from [REDACTED] as indicating that the “early stage” of a biotechnology company “usually ends when the company has about 25 employees.”¹

Former counsel did not explain how the petitioner’s “potential to create jobs demonstrate[s] that he will serve the national interest (job creation) to a substantially greater degree than others in the field.” The petitioner predicted that [REDACTED] will have 25 employees at the end of its early stage, which, according to the [REDACTED] article, is the number of employees that a startup

¹ The article, “[REDACTED]” which appeared in the June 2002 issue of [REDACTED] (printout added to record January 30, 2014).

biotech company “usually” has at that stage of its development. The article contains generalized observations, and does not establish that [REDACTED] is likely to employ 25 workers at the end of its early stage. Even assuming that [REDACTED] could meet this goal, conforming to the average growth rate does not “serve the national interest . . . to a substantially greater degree than others in the field.”

Furthermore, the figures provided rest on speculation. The petitioner submitted no evidence of a prior history of job creation. At the time of filing, he was [REDACTED] only employee. Speculation about future job creation does not establish that he was eligible for the waiver at the time he filed the petition.

The petitioner submitted a letter from [REDACTED] who discussed the project that the petitioner and other [REDACTED] researchers undertook for his company. [REDACTED] stated that the petitioner’s “well-written commercialization plan, in particular, played a pivotal role in us receiving a superb score from the [REDACTED] review committee such that Phase II of our project will be funded for the next 3 years for nearly \$3 million.” The petitioner was a graduate student, studying biotech management, at the time he participated in the [REDACTED]. The petitioner has not shown that the successful drafting of a commercialization plan is a distinguishing achievement, rather than a routine step in the business process. The petitioner’s evidence does not satisfy the third prong of the *NYSDOT* national interest test.

The director denied the petition on September 20, 2012, stating that the petitioner established the intrinsic merit and national scope of his occupation, meeting the first two prongs of the *NYSDOT* national interest test, but that the petitioner had not established his influence on his field. The director acknowledged the petitioner’s witness letters, but found them insufficient to establish the petitioner’s eligibility for the waiver. With respect to the petitioner’s published and presented research, which the petitioner had previously represented as “widely cited,” the director stated that the petitioner had not submitted any evidence of citation or otherwise shown “that the petitioner’s contributions have enjoyed widespread implementation in the field.” Concerning the petitioner’s entrepreneurial work, the director stated:

The petitioner has also submitted evidence of a patent application. While the evidence suggests the petitioner has submitted his work for consideration in issuance of a patent, the record lacks evidence to establish the material in the patent application has been produced, manufactured or sold in notable quantities.

At this point the Service would like to acknowledge the petitioner’s establishment of [REDACTED] . . . A review of the petitioner’s company indicates the business was established in October, 2011 [*sic*] with the petitioner as the only employee. The petitioner has submitted projections and business plans, but there has been no evidence to suggest that over the past 11 months the business has begun producing, manufacturing, selling or receiving orders for any goods or services. There is no evidence to suggest the business has hired additional staff, secured independent research, manufacturing and business facilities or completed any additional portions of the business plan. Based on the lack of reported progress at

the Service must conclude that this business has not distinguished the beneficiary from his peers.

On appeal, the petitioner states:

[M]y I-140 NIW petition would not have been filed, but for the new administration and USCIS policy, announced in July 2011, to apply existing eligibility criteria to facilitate immigrant Visas for entrepreneurs. A copy of a Q&A reflecting this new policy is attached as Supplement A. However, I believe that my petition was judged mainly on the basis of regular guidelines and my entrepreneurial work was not given due importance or my startup was judged at a very high level compared to what a biotech startup can accomplish within one year of being founded. The expectations from my startup are impractical from a business of biotech conventions. . . .

The Q&A points out that the NYSDOT decision (at footnote 5, p. 218) . . . does contemplate National Interest Waiver eligibility for entrepreneurs. . . . The Q&A . . . mentions that the potential for employment creation by an entrepreneur would be [c]onsidered in addition to the entrepreneur's other contributions to the field.

In a separate statement, the petitioner states: "I believe that my petition was submitted foremost to benefit from the new regulations regarding EB2 visa for entrepreneurs."

The availability of the national interest waiver to entrepreneurs is not "new . . . policy" as the petitioner (and, previously, former counsel) described it, and there are no "new regulations regarding EB2 visa for entrepreneurs." Only Congress has the authority to determine, by statute, which groups of foreign workers can qualify for the waiver. What the petitioner and former counsel described is a public awareness initiative to inform entrepreneurs of opportunities that are already available under what both the petitioner and former counsel acknowledged as "existing eligibility criteria." As such, it does not modify, expand, or overturn existing statute, regulations, or case law governing the national interest waiver. The petitioner alleges that the director erred by considering the petition "on the basis of regular guidelines" instead of giving special consideration to the petitioner's entrepreneurship, but the current statutory and regulatory eligibility requirements apply equally to entrepreneurs.

A printout of "Frequently Asked Questions" from USCIS's web site, submitted in response to the RFE and again on appeal, reinforces the above discussion. The answer to question 14 on that printout indicated that "NYSDOT . . . contemplates that entrepreneurial or self-employed beneficiaries may qualify for the NIW [national interest waiver] under limited circumstances." The printout went on to explain those "limited circumstances," fully consistent with the three-pronged NYSDOT national interest test.

The petitioner asserts: "My company was held at a higher level than biotech startups at the development stage of my company, the expectations for my startup to have sales or product ready within one year of establishment is very unconventional." A petitioner does not qualify for the

national interest waiver simply by being an entrepreneur. The petitioner must show that his entrepreneurial track record sets him apart in his field to an extent that would justify a waiver of the job offer requirement that, by statute, normally applies not just to foreign businessmen and women but to aliens of exceptional ability in business.

The third *NYSDOT* prong calls for a past history of demonstrable achievement with some degree of influence on the field as a whole. The petitioner claims no such history. He asserts that his company is so new that it would be unreasonable to expect job creation and commercial activity at such an early stage. This circumstance underscores the director's conclusion that the petitioner has not yet established a track record as an entrepreneur that would merit the national interest waiver – he has started only one company, which had not yet created jobs or engaged in business as of the petition's filing date.

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). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). At the time of filing, [REDACTED] was still awaiting needed funding and "proof of concept" for the company's intended flagship product. Accordingly, the petitioner has not established that he was eligible for the requested benefit at the time of filing.

The petitioner states that "a biotechnology startup like [REDACTED] . . . needs at least 3-5 years of research and development work before there is a product that can be sold." There exists no blanket waiver for the founders of biotechnology startups, and *NYSDOT*'s provisions regarding a record of influential achievement in the field apply to the petitioner's profession.

The petitioner states that his "most important research work in academia has been the characterization of how chronic kidney disease affects health of patients." With respect to the new diagnostic technique he developed, the petitioner states that the "[REDACTED] . . . decided [to] patent the discovery" "when the importance of the technology became evident." The petitioner states: "It is critical for inventors to keep their technologies confidential if they are interested in commercializing their discoveries," and that therefore, his "further work on kidney diseases was not published" and he "could not go to independent leaders in this field for their recommendation letters."

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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not established that his accomplishments are covered by confidentiality provisions.

After stating that confidentiality considerations have limited third-party awareness of his work, the petitioner contends that his "expertise as a small biotech founder has been recognized internationally." The petitioner submits evidence showing that he received an invitation (on June 24, 2012) to be a

“distinguished speaker” at the [REDACTED] on October 30-31, 2012.

The invitation (dated June 24, 2012) and the conference (in late October 2012) both took place after the petitioner’s November 2011 filing date. The invitation (via electronic mail) is generically worded, inviting the petitioner “to share with the audience [y]our company’s latest research findings in diagnostic/prognostic biomarkers OR [y]our insights on commercialization and translation of biomarkers into diagnostics.” The invitation contains no specific information about the petitioner’s work, and the record does not show how many invitations the conference organizer issued or the selection criteria for those invitations.

The petitioner declined the invitation to the [REDACTED] conference owing to ongoing issues with his immigration status. The petitioner states: “Having a permanent status in the US will not only allow investors to have confidence in me and my long term status, but will also allow me the freedom to attend international conferences and overseas investors to bring in funds to my company.” In this way, the petitioner does not state that his success as an entrepreneur demonstrates his eligibility for the waiver. Rather, he requests the waiver to increase his chances of future success as an entrepreneur. The USCIS regulation at 8 C.F.R. § 103.2(b)(1) requires the petitioner to be eligible for the benefit sought at the time he applies for that benefit. He cannot obtain the benefit first, in order to establish eligibility at a later time.

The petitioner submits a March 15, 2012 press release from [REDACTED] received “a \$1.65 million grant from the [REDACTED].” The petitioner stated that [REDACTED] received the grant “to help startup companies including [REDACTED].” The record does not indicate how much, if any, of the grant funding went to [REDACTED]. Furthermore, like the other events documented on appeal, the March 2012 grant occurred after the petition’s filing date.

Also taking place after the filing date was the 2012 [REDACTED] Marketplace, at which [REDACTED]; was one of 154 “Selected Presenters.” A promotional article submitted on appeal states: “the presenting companies have been hand-picked and mentored and the intellectual proprieties [sic] are the top picks form participation [sic] federal labs and universities.” The submitted materials indicate that the purpose of the event is for the entrepreneurs to interact with venture capitalists and other potential funding sources: “Each candidate is seeking seed capital, venture capital, corporate licensing partners, or a strategic partner.” Thus, even after the filing date, [REDACTED] was still at a preliminary stage and had not yet entered the market. The company’s undeveloped state would be a less serious concern if the petitioner had previously established a track record of success or impact as an entrepreneur with other ventures, but the petitioner does not claim to have started any other company before he started [REDACTED].

The petitioner cites [REDACTED] device,” described in previous submissions, to illustrate his “past success in bringing technologies to market place.” The record shows that the petitioner’s role with [REDACTED] was limited; he tested technology invented by others, and helped to draft a commercialization plan, in conjunction with graduate studies narrowly tailored for that purpose. The record does not show the extend of [REDACTED] commercial success, or the extent to which the petitioner

was responsible for that success. The petitioner's graduate project for [REDACTED] does not establish that the petitioner's work as an entrepreneur has influenced the field as a whole.

The petitioner worked with one product as a graduate student, and has started his own company to commercialize a product he developed. The available evidence, however, does not set the petitioner apart from other entrepreneurs who, generally, are subject to the job offer requirement at section 203(b)(2)(A) of the Act. The petitioner has not met the third prong of the *NYSDOT* national interest test, and therefore he has not established eligibility for the national interest waiver.

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 petitioner "must clearly present a significant benefit to the field of endeavor." *NYSDOT* 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; *Matter of Otiende*, 26 I&N Dec. 128. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.