



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 24 2014** OFFICE: TEXAS SERVICE CENTER

IN RE:

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, Texas 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 a member of the professions holding an advanced degree. The petitioner seeks employment as a physician scientist. 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 new statement and copies of previously submitted exhibits. The petitioner also requests oral argument. The regulations required the requesting party to explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. He stated: "It seems the approval hinges on technicalities, which I cannot explain as a non attorney applicant," and that USCIS had not been sufficient "clear as to precisely what is the single required document to issue an approval." The petitioner's lack of legal representation is not grounds for granting oral argument, and there is no "single required document" that would have changed the outcome of the proceeding. The written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 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 February 2, 2012. On that form, the petitioner described himself as a “Physician Scientist with extraordinary abilities in investigating special types of brain cells and channels and proteins which mediate cell-cell communication and interactions and are targets for developing new treatments for neurological diseases. The petitioner did not identify a particular employer on Form I-140, but he evidently had a specific position in mind because he specified that he sought a temporary position that paid \$50,418 per year. Since December 2011, he has been a research associate at the [REDACTED], where he was previously a postdoctoral researcher beginning in October 2006.

The petitioner had filed two previous immigrant petitions seeking the same classification with the national interest waiver. The director had denied one of those petitions in March 2010; the other was still pending when the petitioner filed his third petition. The petitioner appealed the denial, and the appeal was pending when he filed the latest petition. (The AAO subsequently dismissed the appeal in March 2012.)

The initial filing of the present petition included “[c]omments on a prior application and decision.” The petitioner stated: “I respectfully disagree with the decision and I need to further clarify the following.” The petitioner then presented 24 numbered paragraphs, disputing elements of the earlier decision. The filing of a new petition initiates a new proceeding; it is not a forum to dispute the outcome of an earlier decision on a different petition, or to supplement a pending appeal.

To support his latest petition, the petitioner stated:

My research is focused on understanding the pathology and developing new treatment for demyelinating neurological diseases, which affects millions in the United States and worldwide.

To do so, I use [an] exceptional and advanced electrophysiological procedure called whole cell patch clamp synchronized with neuroimaging procedures to investigate a special group of brain Glial cells, known as Oligodendrocytes. . . . Changes in these cells and their interactions account for the pathology seen in Multiple Sclerosis and demyelinating neurological diseases.

I was the first to show . . . that these oligodendrocytes . . . are connected with each other through special channels called gap junctions forming a brain network that was not described before. I further confirmed the existence of this network with electron microscopy. I was also the first to specify . . . the proteins forming these gap junctions and contributing to cell-cell communication between these cells and other types of brain cells. And I was the first to show how exactly changes in these proteins and channels cause the brain pathology seen in Multiple Sclerosis and demyelinating neurological diseases Charcot-Marie-Tooth disease and leukodystrophies which also affect millions around the world. . . .

My prior contributions and extraordinary abilities are now the foundations for a new research to further understand the pathology and develop new treatment for this disorder and other demyelinating neurological diseases.

The petitioner submitted a copy of a November 1, 2010 letter from [REDACTED] who stated:

[The petitioner] has been working as a post-doctoral researcher in my laboratory since 2006 to investigate how [a] special group of brain cells called astrocytes and oligodendrocytes are connected with each other through special channels. . . . By understanding how these cells interact, we hope to provide a treatment for [various neurological] diseases. To do so, [the petitioner] has been examining these cells with an exceptional complex electrophysiological approach called whole cell patch clamp and dual patch clamp studies; this requires exceptional abilities and expertise to perform. . . . The patch clamp technique . . . was developed by [REDACTED] or their work in 1991.

To study these cells [the petitioner] also used additional research approaches such as fluorescence imaging from living cells in brain tissue, and electron microscopy. His expertise and exceptional abilities in performing many procedures are definitely significantly above the [*sic*] ordinarily encountered in science, and his abilities in performing whole cell electrophysiology and dual patch clamp to study these cells are exceptional.

[The petitioner] has built a new electrophysiology rig equipped with neuroimaging tools, and performed medical research experiments using his experience in studying living cells in brain tissue. He is the first author of two different publications describing his findings, submitted to top journal [*sic*] in the field of Neuroscience. . . . [O]ne of these publications . . . is easily one of the most important publications of my 30 year career as a physician-scientist, and will change how neuroscientists think about glia. . . .

These important findings added to our understanding of how mutations in gap junctions causes [*sic*] neurological diseases.

Mastering the use of advanced technology developed by others is not an achievement or contribution comparable to the creation of that technology. *See NYS DOT* at 221 n.7. [REDACTED] deemed the petitioner to be “exceptional” in his field, and also virtually repeated the regulatory definition of “exceptional ability” from 8 C.F.R. § 204.5(k)(2), “a degree of expertise significantly above that ordinarily encountered.” By statute, aliens of exceptional ability are ordinarily subject to the job offer requirement. Therefore, the assertion that the petitioner meets the definition of exceptional ability does not show eligibility for the waiver.

The petitioner documented various conference presentations, and submitted copies of two articles, both published in 2011, that he co-wrote. The petitioner documented three citations of his article published in *Neurobiology of Disease*, including a self-citation by his co-author, Prof. Scherer. The petitioner did not document any citations of his article published in *Neuron Glia Biology* in 2011.

The petitioner submitted partial copies of two grant applications. One application appears to be a revision of the other one; it repeats language from that application but also expands upon that language, and addresses comments from two reviewers. The applications described what Dr. [REDACTED] laboratory achieved “[i]n the last cycle of this grant,” and what the laboratory hoped to accomplish with the next round of funding.

The director issued a request for evidence on October 10, 2012. The director stated: “The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole. The beneficiary’s previous influence on the field as a whole must justify projections of future benefit to the national interest.”

In response, the petitioner stated that the evidence, in the form of “publications, presentations, citations and approved grants,” confirms that he “established a past record” of influential achievement in his field, and that “new manuscripts and posters” show that he continues to make contributions in his area of expertise.

The petitioner submitted copies of grant applications, some of them approved and others under review. Grant funding does not establish the impact and influence of the petitioner’s research, because the petitioner secured that funding at the beginning of a given project. Furthermore, the petitioner did not establish that grant funding is reserved for the most important research, rather than a routine means of funding research throughout the petitioner’s field.

The petitioner submitted a copy of an August 29, 2011 letter, co-signed by [REDACTED] and another [REDACTED] professor, offering the petitioner a one-year renewable appointment as a research associate, beginning November 1, 2011. The petitioner asserted that this appointment indicates that he “was promoted to faculty position from postdoctoral researcher,” and that such a promotion amounts to “[a]n award for the work in the field.” Employment is not an award for past work (although past experience can demonstrate that one qualifies for employment).

The petitioner submitted a [REDACTED] printout from November 27, 2012, showing nine citations of his article from [REDACTED]. The petitioner also submitted partial copies of two textbook chapters that cited the article. One chapter is on the [REDACTED] list of citations; the other shows [REDACTED] as one of its authors, thus amounting to another self-citation. The evidence shows an increase in citation of the petitioner’s work, but not that there was a pattern of frequent citation already in place as of the petition’s filing date; the petitioner documented only two independent citations as of the 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).

The petitioner submitted a manuscript copy of a third article, and stated that it has been accepted for publication in [REDACTED]. There has been no dispute that the petitioner continues to produce published work while employed in Prof. Scherer's laboratory, which is where he wrote his two prior published articles.

The petitioner submitted copies of three appellate decisions in which the AAO approved national interest waivers for a marine laboratory specialist and two medical researchers. The petitioner highlighted parts of the decisions and asserted that his petition shares these traits. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the petitioner did not demonstrate that his petition is similar enough to the approved petitions to warrant the same outcome. The beneficiary of one approved petition wrote part of the standard textbook in a particular specialty; another developed new technology subsequently licensed by a major pharmaceutical corporation. The petitioner did not establish that his own achievements reached a comparable level of influence.

The petitioner submitted excerpts from four grant proposals, including what the second (revised) version of the proposal submitted previously. The petitioner highlighted portions of these documents in order to establish the significance of the research. These highlighted passages, however, also demonstrate that the work is ongoing and that its significance rests on hypotheses with as-yet-unknown outcomes. One application, for instance, includes a number of "if-then" statements such as "If gene replacement in oligodendrocytes was feasible, then it would be an appropriate treatment to consider." The same application includes the caveat: "These experiments will be technically challenging, but we believe that we can perform them."

The petitioner submitted three witness letters [REDACTED]. [REDACTED] claimed that the petitioner "provided a novel and a new map of the cellular communication in the brain," and that the petitioner's work "significantly changed and influenced the field regarding the pathology of diseases such as multiple sclerosis. [The petitioner] is known in the field for these findings. I used and cited [the petitioner's] work in my research paper on . . . experimental autoimmune encephalomyelitis." [REDACTED] *curriculum vitae* shows that [REDACTED].

Professor [REDACTED] director of the [REDACTED] [REDACTED] also reported collaboration with [REDACTED] on his *curriculum vitae*. [REDACTED], whose "research has focused on the area of gap junction biology in health and disease," stated that the petitioner's "work is essential to understand how [glial] cells work, [and] how they are affected in neurological diseases." [REDACTED] stated that the petitioner "characterized the proteins required for

these communications [across gap junctions], and analyzed the effect of genetic mutations on cellular communications.”

stated that the petitioner “is making major important contributions to neuroscience and neurobiology of disease.” He stated that the petitioner “has successfully employed [patch clamping] to investigate the connections of oligodendrocytes, described the proteins required for their interactions, and characterized how they are affected in models of demyelinating neurological diseases.”

The witnesses explained why the petitioner’s area of research is important, which addresses the intrinsic merit of the petitioner’s occupation. They did not, however, explain how the petitioner’s work is more significant than that of others within the same specialty. Effective new treatments for multiple sclerosis and related neurological diseases would have a major impact on medicine, but the witnesses did not explain why the petitioner’s work, more than that of others studying the same problem, have brought those treatments closer to reality. Emphasis on the importance of particular laboratory techniques does not establish eligibility, because the petitioner did not invent or substantially improve those techniques and there is no blanket waiver for researchers who have learned complicated laboratory techniques from others.

The director denied the petition on April 24, 2013, stating that the evidence submitted showed the intrinsic merit and national scope of the petitioner’s work, but did not establish that the petitioner has influenced his field to an extent that would warrant the national interest waiver.

On appeal, the petitioner states: “The denial decision cited that I did not submit work that has been evaluated in independent journals despite that my findings has [sic] been cited/discussed in . . . book chapters and in the review articles . . . that I submitted.” The director’s wording was as follows:

While [the evidence] demonstrates that others are aware of the beneficiary’s work, unevaluated listings in a subject matter index or footnote or reference to the work without evaluation is insufficient to establish its significance. . . . Citations alone do not provide the evidence that the beneficiary’s work has made an impact on the field as a whole.

The petitioner did not document a high number of citations, and the citing articles and chapters that he submitted do not give special attention to the petitioner’s work in relation to other cited work. The submitted citations refer to the petitioner’s work to support statements of fact, such as “in the corpus callosum, chains of oligodendrocyte somata are linked by gap junctions” and “electron microscopic data confirmed O/O gap junctions.” The closest thing to “evaluation” in any of these citations appears in an article by

Cx47.” The quoted article is a review article, providing an overview of published research; its bibliography includes 95 entries.

The petitioner states that he submitted evidence that the director requested, including grant proposals, lists of citations, and witness letters, “yet . . . [this evidence] was deemed insufficient.” The director, in requesting those materials, did not state that their submission would ensure approval of the petition. Rather, the director requested evidence that would establish the nature of the petitioner’s work and allow the director to determine the extent of its impact on the petitioner’s field.

Regarding his grant documentation, the petitioner states:

The grants clearly show that I described new anatomical and pathological findings related to demyelinating neurological diseases, and how I am using new and innovative ways to further examine these diseases. The grants by itself [*sic*] establish a past record of specific prior achievements that [are] of significance to the field, and prove unique and innovative background.

The petitioner’s grant applications are not evidence of influence on the field. By themselves, the applications only show that [redacted] laboratory sought funding. While the text of the applications includes descriptions of past work, any assessment of that work within the application is necessarily the applicants’ opinion of their own past work. The petitioner submits no evidence regarding the criteria for approval of grant applications. The record does not show that the approval of grant applications establishes the petitioner’s influence on the field as a whole.

The petitioner asserts that his influence on the field “is well stated in the letters, and grants, and the papers.” Those materials establish what the petitioner has done, but they do not establish that the petitioner’s work has influenced the field to an extent that would warrant approval of the national interest waiver. Research scientists, as members of the professions, are generally subject to the job offer requirement. Performing activities that are routine within the profession, such as seeking grant funding and publishing or presenting the results of one’s work, do not establish eligibility for a waiver of the job offer requirement.

The petitioner states: “my application was denied while other applications from individuals with lower qualifications have been approved! Individuals, with very bad English, no training or skills, highly questionable degrees, and who obtained green cards with work that is of no medical significance and no benefit to the national interest!” The petitioner submits no evidence or identifying information relating to these claimed approvals, and therefore no meaningful comparison is possible. USCIS decides each petition on its own merits, based on its own record of proceeding; there is no direct comparison between different petitions. Also, the AAO does not ordinarily review approved petitions, and therefore the AAO has no means to determine whether the petitioner’s claim is accurate and correct. Because the AAO cannot determine whether the unidentified other petitions were properly approved, their claimed approval does not establish that the director should have approved the present petition.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Service center decisions are not binding on the AAO. See *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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. *NYS DOT* 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.