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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

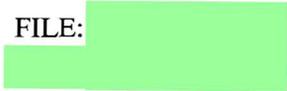


U.S. Citizenship
and Immigration
Services



DATE: **MAY 06 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

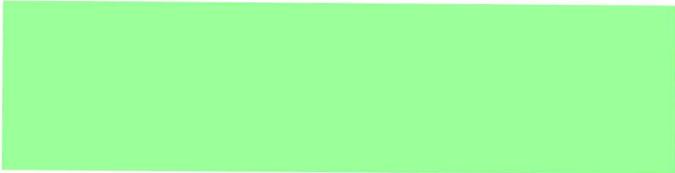
IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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. We dismissed the petitioner's appeal from that decision. We subsequently reopened the proceeding on the petitioner's motion and affirmed the denial of the petition. The matter is now before us on a second motion to reopen. We will grant the motion and affirm the denial of the petition.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on May 25, 2012, seeking 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 the sciences. The petitioner seeks employment as a geologist. 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 denied the petition on November 6, 2012, stating 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. We issued our first decision on April 29, 2013, and our second decision on December 5, 2013.

On motion, the petitioner submits a brief and "voluminous new documentation."

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.

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, Pub. 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.

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, an 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 first substantive assertion on motion is that the petitioner “has developed a technology and machinery (patent pending) for the production of oil, and gas from [REDACTED] (Exhibit I).” Exhibit I is a copy, in Russian with an English translation, of [REDACTED]

[REDACTED] Although the petitioner described it as “new evidence,” this same document accompanied the prior motion. The record does not include any evidence that the method described in the booklet has entered practical use anywhere in the years after the booklet’s publication in [REDACTED]. The petitioner asserts: “the U.S. can be energy independent by mining the enormous [REDACTED] in the U.S.,” through implementation of his “(patent pending) innovation.” This assertion rests on speculation regarding the future adoption of the petitioner’s invention, as well as the implied claim that [REDACTED] oil will remain inaccessible without that invention.

The brief on motion contains the following passage:

Counsel, on behalf of alien, references the dramatic increase in the price of gold world-wide. . . . This renewed interest by the U.S. Government and private businesses in gold mining and prospecting gives rise to the use of [REDACTED] [the petitioner’s] Patent Pending invention. The utilization and implementation [of] this revolutionary method of extracting [REDACTED] without the disastrous harm to the environment is certainly in the national interest.

. . . [The petitioner] can make a significant contribution to the entire science of mineral prospecting in the U.S. by implementing his invention [REDACTED]

The brief refers to the petitioner's [REDACTED] method and [REDACTED] as "patent pending," but the petitioner submits no evidence on motion to show that he filed for patents, and does not identify the country or countries where the patent applications are said to be pending. 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 petitioner submits a copy of a "Receipt for Payment Tendered," showing that the petitioner paid a patent attorney a retainer on November 10, 2013, for a patent search. The receipt states: "Upon completion of the Patent search documentation will be submitted for a Patent Application." The receipt does not specify the nature of the patent application to be filed. This document does not establish that the petitioner has applied for any patents in any jurisdiction. Rather, it indicates that, nearly 18 months after the petition's filing date, an unspecified patent application by the petitioner had yet to be filed.

Our April 2013 dismissal notice contained the following passage, which is relevant in the context of the above discussion:

The appeal includes a December 4, 2012 letter from the petitioner to a patent attorney, indicating that the petitioner has "developed a completed self-contained system for obtaining a synthetic analysis of oil and gas by a special process [he] invented." The system is the [REDACTED] mentioned in the petitioner's affidavit. The petitioner contends that this "invention is of international significance since it is the new technology for extracting oil and gas from [REDACTED] rock, with a minimal impact on the environment." The record does not indicate that the [REDACTED] is in use anywhere. The petitioner only began seeking a patent more than six months after the filing date, which suggests that the innovation has not advanced beyond the planning stages.

The brief also indicates that the petitioner "has been a pioneer in the science of pollution control and the effects of climate change on our environment. Evidence is presented to establish that [the petitioner] has conducted research and has also developed several methods to address these issues (Exhibit III)." The brief does not identify Exhibit III. Sequentially, the third exhibit in the motion, as it is now constituted, is a group of photographs with an explanatory statement that begins: "Description of the attached photos and the explanation of the new environmentally friendly method of thin/fine [REDACTED] extraction." The statement indicated that the petitioner's "developed methods use special, non-gravitational processes, which are completely harmless to the environment," whereas "the method of [REDACTED] for [REDACTED] extraction . . . uses very toxic solutions, such as mercury." This material discusses pollution in the narrow context of [REDACTED] extraction, but does not address "the effects of climate change on our environment."

The petitioner states that he “was responsible for reviewing the work of other scientists in his position as Head of the Central Institute of [REDACTED] in Moscow. Based on his evaluation, fellow scientists were able to produce significant innovations in [REDACTED] prospecting and for other precious and semi-precious metals (Exhibit IV).” The fourth exhibit on motion is a partial copy of a Russian-language book from 1986, with the title page translated as [REDACTED]. The petitioner’s name is not on the document. The petitioner has not established the book’s relevance to the claims made on motion.

The petitioner states that he

was a member of the [REDACTED] of Kazahk, USSR. This highly esteemed position is evidence of one who has attained the highest level of accomplishments in his field. . . . This designation also resulted in the recognition of full professorship in his teaching and lectures throughout the USSR. Prior to the collapse of the Soviet Union, [the petitioner] was actively involved in several new research projects and he continued to produce several significant theoretical applications in Geology for the [REDACTED] as Chief of the [REDACTED].

The December 2013 motion decision acknowledged the discussion of the petitioner’s academic background and employment history, and included this statement:

The petitioner’s previous positions of high rank in what was then the Soviet Union do not establish his continued standing in the field or show that the petitioner has continued to make significant contributions to that field. Counsel, on motion, cites no precedent decision or other authority to indicate that the petitioner presumptively qualifies for the waiver on the basis of holding certain degrees or academic or professional titles.

The petitioner submits a printout from the web site of the [REDACTED] “the global network of science academies,” describing the [REDACTED] as “the highest scientific institution in Russia,” and stating: “Academy members and researchers from its institutes are in demand as top scientific experts by the industry and the business community.” The petitioner does not explain how this document bears on his claim of membership in the [REDACTED] of the Republic of Kazakhstan; the two organizations are separate entities.

The petitioner submits copies of several letters that he had submitted previously. Discussion of these letters appeared in earlier appellate decisions, and the petitioner, on motion, does not explain how that discussion was deficient.

The April 2013 appellate decision included this passage:

The petitioner also submitted a list of 88 “scientific works” he claimed to have written between 1963 and 2002, with 66 described as “printed,” 21 described as

“manuscript” and one (from 1976) described as “published.” . . . The petitioner did not submit copies of the published works themselves, or evidence of their publication (such as indexes or database printouts).

The December 2013 motion decision acknowledged the petitioner’s claim to have “published 88 scientific works,” but included the finding that the petitioner’s own list of claimed publications is not sufficient evidence to establish that the claimed publications exist. On motion, the petitioner states: “As a very practical matter, it would be unrealistic if not impossible to submit all or part of the 88 published scholarly articles with this petition,” because “[s]everal of his published works are still classified as ‘Secret,’” and the cost of translating the available articles “would be prohibitive.” Evidence of publication need not include complete translations of all 88 claimed works.

The petitioner, on motion, takes exception to our description of one of the petitioner’s claimed publications, stating that he

did submit a published document: [REDACTED] translated. The Service in its abuse of discretion claimed, “the document itself however, does not look like a finished publication.” The Service did not have a reasonable basis for its determination, since the scientific works published within the Soviet Union were classified ‘Secret’ and not for the general public. The issue of publication does not rest on its binding, but rather on its contents. This particular publication was available to the scientific community and not for the general public.”

The petitioner had not previously claimed that the [REDACTED] document was “classified ‘Secret’” by “the Soviet Union.” From the December 2013 motion decision:

Exhibit C is a photocopied document, [REDACTED] of forecasting and search mineral accumulations.” A legend at the bottom of its translated cover page . . . reads [REDACTED] / 2008.” The document itself, however, does not look like a finished publication. Rather, it appears to be a typed manuscript. It shows numerous handwritten annotations and occasional corrections and overtyped letters.

The Soviet Union dissolved in 1991, many years before the stated publication date of 2008. Elsewhere on motion, the petitioner claims that the [REDACTED] document was “published” as a “research article,” and the document itself contains a reference to a “Publishing House.” Thus, the petitioner has put forth two contradictory claims: the [REDACTED] paper is a classified secret document, but it is also a published research article. The petitioner, furthermore, has submitted several complete copies of the [REDACTED] document, none of them bearing any evident markings of a classified document.

With respect to the assertion that USCIS “did not have a reasonable basis for its determination” that the [REDACTED] document resembles a manuscript rather than “a finished publication,” the appellate decision explained the factors leading to the conclusion that the document has the

appearance of a marked-up draft. The petitioner submits nothing from the [REDACTED] to confirm that the publisher accepted, published, and distributed the document in the state shown in the record; the assertion that USCIS adjudicators lack expertise in the Russian publishing industry is not a sufficient rebuttal to the stated findings.

The petitioner, on motion, states that his “significant contributions include 88 published research papers and more than 300 co-authored articles on gold and silver prospecting.” Throughout this proceeding, the issue has not been simply that the petitioner claimed 88 publications but did not adequately document all 88 of them. Rather, that particular issue was part of a larger pattern of the evidence failing to fully support the petitioner’s claims, as well as the sometimes conflicting nature of those claims.

The claim of “more than 300 co-authored articles on gold and silver prospecting” did not appear in the statement that accompanied the initial filing of the petition; that statement instead indicated that the petitioner “has authored more than 88 scientific publications.” The petitioner’s latest motion includes some evidence of individual prior publications, but the petitioner’s statement on motion cites no evidentiary exhibit to support the new claim of “more than 300 co-authored articles.”

The petitioner submits new affidavits from himself and from his spouse, [REDACTED] stating that the two “have co-authored more than 300 scientific research papers.” The petitioner asserts: “An affidavit is a verifiable statement by the affiant that is made under penalty of perjury and therefore considered valid.” The regulation at 8 C.F.R. § 103.2(b)(2)(i) limits the circumstances under which USCIS will accept affidavits in place of primary evidence:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Three new letters refer to the petitioner’s efforts, including his published work. Dr. [REDACTED] of [REDACTED] Florida, stated:

I have known [the petitioner] since 1975. We have collaborated on a project regarding an extraction and mining accompanied with further [REDACTED]. Our goal was to produce alloys of special advanced properties. The methods and technologies that we used are still being used today in Russia at the same region on the same deposits.

With an excellent balance between fundamental and applied knowledge in scientific and engineering areas, [the petitioner] regularly demonstrated creativity in problem solving situations.

He has co-authored a published paper [redacted] – quantitative production of endogenous mineralization. His work in analog computerization is in use today in the scientific community. I have also referenced his work in several of my research papers in metallurgy.

The record does not include copies of Dr. [redacted] own published work, with references to the petitioner's claimed publications, or any other documentary evidence that the petitioner's "methods and technologies . . . are still being used today."

In a translated letter, Dr. [redacted] "Academician of the [redacted] [redacted] states that he and the petitioner "worked in the same institute [redacted] from 1982 to 1991," and that he and the petitioner have often collaborated since 2006. Dr. [redacted] states that the petitioner "created and developed a methodology for predicting and identifying deposits (gold, in the first place)," and he "describe[s] just one section of [the petitioner's] forecasting methodology" in technical detail, stating that the petitioner "and colleagues developed an algorithm of hierarchical taxonomy."

[redacted] a consulting geologist based in Denver, Colorado, who has "known [the petitioner] since the early 1980s," states:

[The petitioner] is considered one of the foremost authorities in the development and implementation of advanced methods for theoretical prospecting [of] gold deposits in the former Soviet Union. . . . His book [redacted]

[redacted] had 12 editions and has been widely used by scientists and field geologists. . . .

I know that [the petitioner] is working now on a comprehensive summary of his previous studies of Russian [redacted] and methods of their theoretical prospecting. The introduction if this study into the literature of the [redacted] could make a major contribution toward future mineral exploration in the United States.

USCIS has not denied that the petitioner has had a long and productive career. The issue lay in prospective (future) benefit to the United States. The petitioner's most thorough documentation dates from the 1970s and 1980s, signaling reduced work by the petitioner in subsequent years. The original premise for the national interest waiver was a specific offer to prospect for phosphate on a particular tract of land in Florida. The petitioner has effectively abandoned this initial claim, not mentioning it on motion. The petitioner has subsequently asserted that he will engage in future activities such as gold prospecting and oil refining, without establishing that he has realistic

prospects of conducting those activities in the United States. Rather than submit existing evidence of recent activity, the petitioner has created new evidence (such as the evidence from late 2012 and late 2013 showing that the petitioner has made inquiries into patenting one of his claimed inventions).

Another of the petitioner's post-filing claims concerns medical research. The petitioner states: "The U.S. economy will also benefit from [the petitioner's] research regarding dental treatment and a cure for Sjogren's Syndrome," but the record does not show that "a cure for Sjogren's Syndrome" has been discovered, or that the petitioner's work has pointed the way to such a cure. The petitioner maintains that his "work as published in [redacted] concerning Sjogren's Syndrome is an advance in diagnosing and treating the disease." The petitioner is not a medical researcher, and has not worked with Sjogren's Syndrome (an autoimmune disease affecting the glands that produce tears and saliva).

The petitioner did not mention Sjogren's Syndrome until the first motion to reopen, at which time he submitted a letter from a professor at a Moscow medical school, who stated that she adapted "a computer forecasting system" developed by the petitioner and his spouse for use in her own research on Sjogren's Syndrome. The December 2013 decision had indicated that the petitioner had submitted evidence of the publication of [redacted] but that the submitted evidence "does not indicate that geology or mineralogy had produced improvements in diagnosing or treating the disease." The petitioner, on motion, repeats the core claim but does not address any of the points raised in the December 2013 motion decision.

The petitioner lists various appellate decisions approving national interest waivers, and the petitioner claims to be more highly qualified than the individuals who had received those waivers. The cited decisions are not binding precedent decisions under 8 C.F.R. § 103.3(c), and the petitioner submits no evidence to establish that the favorable factors in his own case equal or exceed those in the cited decisions.

Much of the evidence described as "new" actually duplicates prior submissions, and the new evidence does not address significant issues raised in prior decisions. At the outset of the proceeding, the petitioner described himself as "retired," claimed no published work after 2002, and based the waiver claim on an offer to prospect for phosphate. The petitioner's claims have subsequently evolved, but the petitioner has not shown that he was eligible for the benefit sought at the time of filing and remains eligible now, as required by the regulation at 8 C.F.R. § 103.2(b)(1). The petitioner, on motion, has not established that USCIS should have approved the petition, or that new facts warrant an approval now.

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 denial of the petition is affirmed.