



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: NOV 28 2014 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 withdrew the director's decision and remanded the petition to the director for further consideration and action. The director again denied the petition and certified the decision to the Administrative Appeals Office (AAO) for review. We affirmed the director's decision to deny the petition. The matter is now before us on a motion to reopen. We will grant the motion and affirm the denial of the petition.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 6, 2012, seeking 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. When he filed the petition, the petitioner was a research and development engineer at [REDACTED] Connecticut. U.S. Citizenship and Immigration Services (USCIS) records identify his current employer as [REDACTED] Iowa.<sup>1</sup> 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 December 12, 2013, stating 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. We affirmed the certified denial on April 16, 2014. A fuller discussion of the underlying issues appears in our earlier decisions.

On motion, the petitioner submits a brief and supporting exhibits.

The petitioner filed the motion on his own behalf, and there is no evidence that attorney [REDACTED] participated in its preparation or filing. Nevertheless, the record contains Form G-28, Notice of Entry of Appearance as Attorney or Representative, designating Ms. [REDACTED] as the petitioner's attorney of record for proceedings before the AAO, and the petitioner has not indicated that Ms. [REDACTED] is no longer his attorney. Therefore, we continue to recognize Ms. [REDACTED] as the attorney of record.

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

<sup>1</sup> A newly approved petition, receipt number [REDACTED], shows validity dates from April 16, 2014 to March 2, 2017. The approval of [REDACTED] earlier petition, receipt number [REDACTED], was revoked on March 18, 2014. The petitioner filed the present motion two months later, on May 14, 2014, but does not mention the change of employment on motion. He filed the motion from an address in Connecticut, although his new employer is in Iowa.

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 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 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.

In affirming the certified denial of the petition, we stated that, although the petitioner had established that he had previously conducted influential research, this research took place while the petitioner was a graduate student at [REDACTED]. Since leaving [REDACTED] the petitioner has worked for several different employers, but appears to have ceased to publish new research. Therefore, his production of highly-cited work during his doctoral studies is not a reliable gauge of his subsequent, continuing impact on the field.

We also noted that, apart from the evidence relating to his studies at [REDACTED], the petitioner’s initial submission focused heavily on his employment at [REDACTED] working on technology to detect dangerous pathogens sent through the mail by bioterrorists. That employment ended in September 2011, and we advised the petitioner of evidence showing that [REDACTED] impact on the field was minimal, and that, in a 2012 complaint accusing the company’s principals of securities fraud, the U.S. Securities and Exchange Commission (SEC) indicated that [REDACTED] had sold “fewer than ten machines” “[i]n its ten year history.”

Regarding subsequent submissions from the petitioner, we observed that the petitioner “did not [submit] any documentary evidence to establish the impact of his work at [REDACTED].” Instead, the petitioner focused on his current employment with [REDACTED] president and chief executive officer of [REDACTED] indicated that the petitioner “is engaged in research, development, production, continuous improvement, process documentation, and engineering support for a range of products manufactured for electron beam applications.” We concluded:

There is no evidence that the petitioner’s employment outside of [REDACTED] has generated further peer-reviewed published work. The response to the certified denial does not establish that the petitioner’s work at [REDACTED] closely relates to the earlier work that formed the basis for the waiver claim. It shows, rather, that the petitioner has occasionally revisited work that remained unfinished at the time he completed his dissertation, while employed at evidently unrelated tasks.

On motion, the petitioner asserts that he had, in an earlier (January 7, 2014) brief prepared in response to the certified denial, “discusse[d] at length why the USCIS should not dismiss two papers published after the Petitioner graduated from [REDACTED] as evidence of his ‘new research.’” In that

brief, the petitioner indicated that he conducted work such as “data analysis and theoretic modeling” after he left [REDACTED] which built on his doctoral work there.

The petitioner submits three new letters, all from individuals who had provided earlier letters in support of the petition. Dr. [REDACTED] is an associate professor at [REDACTED] and Dr. [REDACTED] faculty members. All three of these individuals state that the petitioner’s post-[REDACTED] papers answered new questions that the petitioner’s graduate work had not addressed, and therefore constitute “new research.” These individuals also contend that USCIS had held the petitioner to too high a standard, considering that the petitioner had completed his Ph.D. program less than three years before he filed the petition, and considering how few Ph.D. graduates are eventually able to secure tenured academic positions. The issue, however, is not whether USCIS held the petitioner to the standards of tenured faculty. The petitioner seeks an immigrant classification which does not distinguish between recent graduates and long-established professors. His relative lack of experience is not a favorable factor in granting the national interest waiver under the *NYSDOT* standards. The assertion that the petitioner, at this early stage in his career, lacks access to full-time research facilities does not support the claim that the petitioner’s research work qualifies him for immigration benefits.

The petitioner contends that we undervalued the importance of theoretical (as opposed to practical) research, but he cites no passage from our prior decisions to support this assertion. Throughout this proceeding, we have acknowledged that the petitioner’s work at [REDACTED] (and, by extension, the follow-up work that he conducted shortly afterwards) has had impact and influence. The denial rested on the finding that the petitioner has not shown that his subsequent employment has continued to have a similar impact. As we stated in our April 2013 remand order: “The purpose of the waiver is to secure prospective (future) benefit for the United States. The waiver is not simply a reward for past work. Rather, USCIS looks at the impact of the petitioner’s past work as a guide to what one could reasonably expect from the petitioner in the future.” The petitioner has acknowledged that his post-[REDACTED] articles derived not from his work for later employers, but from follow-up work that he performed while awaiting permission to begin working for those employers.

In our April 2014 decision, we reviewed a letter from Dr. [REDACTED], assistant professor at [REDACTED] and other materials in the record relating to a more recent paper by the petitioner:

Dr. [REDACTED] adds: “[the petitioner] and I had recently put together a full manuscript on the magnetic properties of [REDACTED]” There is no evidence that any journal had accepted the manuscript for publication. Dr. [REDACTED] did not claim that this manuscript relied on research that the petitioner continues to perform. It is based, rather, “upon many phone and email discussions in the past 2 years.” The petitioner submits printouts of electronic mail messages dated between March 2011 and January 2012. In a January 12, 2012 message, the petitioner stated: “January is a little slow here in my company [REDACTED] . . . So I am now reading the [REDACTED] data again these days. . . . I’m going to put all the data together and make a story out of them. Do you think we have enough data to publish a paper now?” The correspondence indicates that, while the manuscript itself is

new, the information in that manuscript involves data collected previously which the petitioner newly analyzed during a “slow” period at [REDACTED]

The petitioner asserts that data analysis is part of the research process, and therefore the materials discussed above “are definitely evidence of his new research activities.” The petitioner’s own statements indicate that the new manuscript is not the result of his recent employment, but an unfinished project from [REDACTED] that the petitioner was able to revisit when free time became available.

The claims in the January 2014 brief, and in the newly submitted letters, are consistent with our earlier conclusion that the petitioner’s published research has all derived from his studies at [REDACTED] or from follow-up work conducted shortly thereafter, and that the petitioner’s subsequent work for a succession of employers has not produced any published research.

In his latest letter, Dr. [REDACTED] observes that, when a researcher works for private industry, intellectual property concerns often prevent publication of new research findings. We had never indicated that publication was the only acceptable means by which to establish continuing impact in the field, and we have previously discussed the petitioner’s work for later employers, although the petitioner has at times provided limited details about that employment.

On Form ETA-750B, Statement of Qualifications of Alien, the petitioner listed the following post-employment:

- Postdoctoral Fellow, [REDACTED], November 2009-July 2010
- Thermal Research Scientist, [REDACTED] September 2010-September 2011
- Engineer, [REDACTED], October 2011-December 2011
- Research & Development Engineer, [REDACTED] January 2012-present

The petitioner’s original filing relied heavily on the claimed benefit from his work for [REDACTED] and we have previously noted the lack of information concerning the petitioner’s work for [REDACTED]. In the April 2014 decision, we stated:

At the time of the remand order in April 2013, the evidence of record suggested that, while the petitioner had conducted influential research on thermoelectric materials as part of his graduate studies, he has not continued in that field. The evidence submitted in response to the RFE [request for evidence] supports this conclusion, as does the continued lack of evidence regarding the nature of the petitioner’s employment at [REDACTED] from 2009 to 2011. The remand order had included the observation that that “the initial submission contains little information about the petitioner’s work” at those companies.

The petitioner, on motion, submits a letter from [REDACTED] production manager at [REDACTED] who had supervised the petitioner’s postdoctoral training there. He stated:

The [petitioner's] research . . . was mainly focused on improving the performance of [redacted] infrared detectors . . . [which] are widely used in applications like moisture measurement, chemical analysis, remote sensing, communications, thermal imaging, etc.

...

The infrared radiation from its source is often so weak that [it] can be easily covered by thermal noises in the detector circuit. Therefore, in many applications the detectors have to be cooled to reduce thermal noises. For this purpose, thermoelectric cooling is the best choice. . . . As an expert in thermoelectrics, [the petitioner] designed graded thermoelectric materials that greatly increased the maximum cooling temperature and cooling efficiency. . . .

Based on [the petitioner's] work, [redacted] has developed infrared detectors with 30% higher sensitivity for high-end customers.

In addition to the work in graded thermoelectric materials, [the petitioner] developed a new deposition method that dramatically improved the uniformity of thin film infrared detectors and optimized the process of sensitization, an indispensable procedure that makes the detectors sensitive to infrared radiations.

Mr. [redacted] letter fills a gap in previous submissions by describing the petitioner's work at [redacted]. Nevertheless, the letter does not establish the petitioner's eligibility for the national interest waiver, for two reasons. First, as with [redacted], the petitioner had already left [redacted] before he filed the petition, and therefore his work there offered no future benefit to the United States. Second, Mr. [redacted] letter does not demonstrate how the petitioner's work for [redacted] influenced his field as a whole.

Regarding the petitioner's subsequent work at [redacted], manufacturer of the [redacted], we have previously noted that the SEC had filed an enforcement action against [redacted] for securities fraud, and that, in its complaint, the SEC alleged that the company "has sold fewer than ten machines." We found that, if these allegations are true, "the scope of the company's impact (and therefore that of its employees) is greatly limited."

On motion, the petitioner submits copies of two United States patents issued to [redacted] relating to the [redacted] as well as news stories concerning the [redacted]. None of these materials relate to the petitioner's role at [redacted] his name does not appear in the patent documents. All of these materials date from between 2005 and 2011, before the SEC filed its complaint in 2012. In this proceeding, we did not deny the existence of [redacted]. Rather, we noted the SEC's allegation that the company has significantly exaggerated claims regarding the company's activity, in an attempt to deceive investors. The stated benefit of [redacted] is the disinfection of contaminated mail. If the company has produced and sold only a handful of the devices, then its impact is necessarily limited because such a small number of machines can treat only a tiny fraction of the materials sent through the mail in the United States.

The petitioner, on motion, states:

[T]he SEC alleges [REDACTED] sold “fewer than ten machines.” Even if the SEC’s number is true, it does not necessarily mean that the [REDACTED] has very limited impact on the field. On the contrary, the [REDACTED] has very influential customers like the U.N. [United Nations], the Justice Department, the Department of Defense and the Saudi Arabian Embassy. . . . [T]wo U.S. patents and . . . four important customers are strong evidence that [REDACTED] impact is significant and national in scope in terms of technology and national security.

The petitioner appears to dispute the SEC’s allegations, but submits no evidence to refute them. He asserts that “the SEC’s complaint has not led to any updates 20 months after the complaint was filed,” but the petitioner submits no evidence to show that [REDACTED] has conducted business at all after the SEC filed its complaint. The record contains no evidence from the identified clients to show that they have, in fact, purchased [REDACTED] systems as claimed. The sources for the client list are news reports from 2009 and a letter from [REDACTED] founder and chairman of [REDACTED] whom the SEC complaint names as a principal participant in fraud, and whose credibility is therefore suspect.

Furthermore, “patents and . . . important customers” are not necessarily “strong evidence that [REDACTED] impact is significant and national in scope.” A patent acknowledges the originality or novelty of an invention, rather than its significance. Also, large organizations such as the Department of Defense would tend to do business with many vendors for a variety of purposes. Doing business with such an organization is not necessarily an indication of the significance of the business conducted.

At the time the petitioner filed the motion, his most recent employer was [REDACTED]. The petitioner states that he had, previously, “specifically highlighted” an electronic mail exchange with Dr. [REDACTED] of [REDACTED] but “the AAO does not mention anything about Dr. [REDACTED] comments.” We did quote from one of Dr. [REDACTED] messages in our April 2014 decision, as the petitioner acknowledges, but the petitioner states that we did not discuss the following passage: “It is also worth noting that there are at least 10 other labs working on a similar development and the field is growing rapidly. No one wants to make their own emitters – we would all prefer to buy from someone who will supply a finished product.”

The petitioner had not previously brought special attention this passage. An accompanying statement discusses the evidence submitted at the time, and mentions Dr. [REDACTED] message, but does not quote the above passage or otherwise indicate its significance.

The petitioner asserts: “Dr. [REDACTED] comments show that the Petitioner’s photoelectron emitters are the first ones available in this field.” That is one possible interpretation of Dr. [REDACTED] quoted comment; however, a comment in an electronic mail message of this kind is not strong evidence that the petitioner is the first to make such emitters available. The petitioner has not submitted documentation from the U.S. Patent and Trademark Office to show that [REDACTED] has sought or received a patent for the emitter. The available evidence does not show whether the petitioner was in charge of developing the

first emitter of any kind, or rather a particular, specialized type of emitter designed for a specific purpose, for which existing emitters would not be ideal. Customizing existing technology for a specific client is not comparable to the introduction of new technology.

The petitioner also states: “Dr. [REDACTED] clearly indicates that the [REDACTED] will continue to order emitters . . . from [REDACTED]” Dr. [REDACTED] indicated that [REDACTED] would order more emitters because “the first version just needs to last long enough to get a single image from the microscope.” Technical information in the message chain indicates that [REDACTED] had contracted with [REDACTED] to build a piece of specialized equipment to [REDACTED] predefined specifications. The petitioner has not established that this arrangement is unusual rather than routine in the research community.

The petitioner, on motion, has shed further light on the nature of his employment activities after he left [REDACTED] but he has not submitted evidence to establish that this work has consistently had a level of impact and influence that would justify the special benefit of 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 national interest waiver contemplates that his influence be national in scope. *NYS DOT*, 22 I&N Dec. 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 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.

We will affirm our prior decision 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 AAO’s decision of April 16, 2014 is affirmed. The petition remains denied.