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U.S. Citizenship and Immigration Services

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FEB 08 2007

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to 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 research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's ultimate finding that the petitioner has not provided sufficient evidence of his influence beyond his collaborators.

Section 203(b) of the Act states in pertinent part that:

> (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 requirement 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 holds a Ph.D. in Food Science and Nutrition from the Ohio State University (OSU). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor 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 the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service 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.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. 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.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used 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.

We concur with the director that the petitioner works in an area of intrinsic merit, food science and technology, and that the proposed benefits of his work, safer and more nutritional food, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-

trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The director concluded that the petitioner had not established his influence beyond his immediate circle of colleagues. On appeal, counsel notes that several letters attest to the petitioner's influence. We will consider the evidence below.

The petitioner received his Ph.D. in Food Science and Nutrition from OSU in 2003. The petitioner then accepted a postdoctoral position with OSU and was promoted to Research Associate II in 2004, the position held as of the date of filing. On appeal, counsel asserts that the petitioner is currently a senior food scientist at Galloway Company, a leading manufacturer of dairy products. The petitioner, however, did not hold this position as of the date of filing.

[redacted], the petitioner's Ph.D. advisor at OSU, asserts that the petitioner is performing a critical role in the research and development of Pulsed Electric Field (PEF) and High Pressure Processing (HPP) technologies as alternatives to thermal food processing to minimize food borne diseases. Such nonthermal technologies do not degrade some of the nutritional elements of food typically degraded by thermal processing. [redacted] asserts that the petitioner "is one of the designers and constructors of the PEF systems used in most research groups (such as US Army Natick Soldier System Center, the Ohio State University, Rutgers University, Battelle Memorial Institute, Alabama A&M University and Louisianan [sic] State University) in the US and worldwide (Spain, Sweden, Hungary, Australia and China)." The record, however, lacks any evidence that the petitioner is listed as an inventor on any patent or patent application.

Other collaborators provide similar assertions. [redacted], another professor at OSU, asserts that the petitioner "helped design and build PEF systems from the ground up and has conducted a number of research projects including the comparison of PEF versus thermal processing [and] studies of the efficacy of PEF processing on bovine IgG in milk." [redacted] Director of GSA Contract Operations for Battelle Memorial Institute in Ohio, asserts that the petitioner worked under his supervision. [redacted] asserts that the petitioner "developed and constructed PEF treatment chamber and fluid handling systems and made the PEF food processing practice possible in commercial scale with improved performance and efficiency. [The petitioner] designed and constructed the chamber systems for the world's first commercial scale PEF processing system." [redacted], another professor at OSU, asserts that the petitioner "is the coordinator for

collaborations with Kraft Foods and Stolle Milk and Biologics. He was invited to Alabama A&M University to present a training lecture on initiating PEF research at this university." The record does not include confirmation of this invitation from anyone at Alabama A&M University.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

The sole independent reference, [redacted] of the University of Connecticut Health Center, asserts that PEF processing technology developed in part by the petitioner is in use around the world. [redacted] does not assert that the University of Connecticut uses it and it is not clear how he has personal knowledge of the information he provides. The regulation at 8 C.F.R. § 103.2(b)(2) permits a petitioner to rely on affidavits only after showing that primary and secondary evidence is unavailable or does not exist. Affidavits should be from individuals with "direct personal knowledge of the event." Thus, while we do not question [redacted] credibility, the regulation cited above strongly suggests that affidavits from those without personal knowledge have little evidentiary value. Far more persuasive would have been letters from the institutions that are alleged to have adopted the petitioner's technology and have invited him to provide training. The record lacks such letters.

The record does contain evidence beyond the letters discussed above. [redacted] endowed chair at OSU, asserts that the petitioner was "invited to present his work on World and Ehrlich Conference held in Germany." The record contains the e-mail invitation, which included a $360 grant and no travel costs. The record lacks evidence regarding the significance of this conference, which does not appear to have been well funded, or that the petitioner accepted this invitation. Significantly, the conference is not listed among the petitioner's conference presentations on his curriculum vitae.

[redacted] further asserts that the petitioner was "a participant in an NIH (National Institute of Health) discussion group, commenting on the definition of bioactive food components to clarify the future research in the area of functional foods." The record contains an e-mail notice from a scientific consultant at NIH stating:

> Thank you for your recent submission of comments and information pertinent to defining bioactive food components. These comments will be reviewed by an ad hoc Federal working group and considered in developing approaches to assess the health effects resulting from consuming these components.
>
> Thank you again for responding to the September 16, 2004 Federal Register notice.

The e-mail notice does not indicate that NIH solicited the petitioner to participate in a discussion group. Rather, the notice strongly suggests that the petitioner, on his own initiative, merely responded to a request for comments posted in the Federal Register, something any member of the public may do.

The petitioner also submitted evidence of his membership in Gamma Sigma Delta, professional membership in the Institute of Food Technologists, recognition from OSU, a certificate of merit in recognition of his finalist status for outstanding student presentation at an Institute of Food Technologists conference, a fellowship from the Society of Chemical Industry and a first place poster presentation award in the Product Development Division from the Institute of Food Technologists. Professional memberships and recognition from one's peers are two of the criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting two, or even the requisite three, criteria warrants a waiver of that requirement. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 222.

Further, the petitioner submitted evidence that on March 22, 2004, the Office of Research at OSU conferred "Principal Investigator" status on the petitioner. [redacted] Chair of the Department of Food Science and Technology at OSU, asserts that this status is limited to faculty and it is a rare privilege to be conferred on a postdoctoral associate. [redacted] further asserts that the Office of Research has conferred this status to non-faculty members in [redacted] department only four other times in 14 years. While this recognition may demonstrate that the petitioner compares well with other postdoctoral researchers, principal investigator status is presumed for faculty and is not indicative of an influence on the field as a whole.

Finally, the petitioner submitted evidence that some of his articles have been cited. As of the date of filing, one of the petitioner's articles had been cited four times and another article twice. In response to the director's request for additional evidence, the petitioner submitted evidence that independent researchers had cited his review article six times and that the petitioner had cited three of his own articles two times, five times and once. On appeal, counsel stresses that the petitioner has now been cited 44 times, which counsel characterizes as "extensive." The citations break down as follows: 22

citations of the petitioner's review article on buckwheat, nine citations of his 2003 article in the *Journal of Food and Science*, and no more than three citations of any other article. Of the nine citations of the 2003 article, six are self-citations. Thus, with the exception of the review article, none of the petitioner's work has been cited more than three times by independent research teams. Three citations per article are not indicative of "extensive" citation. The review article did not report the petitioner's own work and constitutes a review of an area of research the petitioner no longer pursues. Thus, the citations of this article are not evidence of the petitioner's influence in the field of PEF and HPP, the fields he claims he will benefit in the national interest.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. While some references claim that the petitioner has designed technology in use around the world, the record lacks patents or patent applications, letters from those institutes that have adopted this technology or licensing agreements. Thus, the petitioner has not established his influence in the field.

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 alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.