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U.S. Citizenship
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Services

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Office: NEBRASKA SERVICE CENTER

Date:

MAR 31 2008

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:

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.

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 (AAO) 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 assistant. 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 asserts that the director misstates the law and facts and ignores the independent evidence, including the advisory opinions submitted. For the reasons discussed below, we uphold the director's decision.

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 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 holds a Master's degree in Mechanical Engineering from Toyohashi University of Technology. 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 the phrase, “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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

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, 217-18 (Commr. 1998)(hereinafter “NYSDOT”), 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. *Id.* at 217. Next, it must be shown 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.

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. *Id.* at 219. 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. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, materials research, and that the proposed benefits of her work, the development of improved high-energy absorbent materials, 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.

In response to the director’s request for additional evidence, counsel asserts that the adjudicative test is whether the alien will benefit the national interest to a greater extent than an available worker with the same minimum qualifications. Under counsel’s analysis, however, we would be relying on a subjective comparison: that of the alien to others with the minimum qualifications for the job.

Rather than accept bare statements that the alien's abilities exceed those of other researchers qualified for the position, however, we look for specific accomplishments that have influenced the field and therefore justify a prediction of future benefit.

Specifically, 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. *NYS DOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. 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 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 she seeks. By seeking an extra benefit, the petitioner assumes an extra element 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.

On appeal, counsel asserts that the director did not give sufficient weight to the opinions of independent experts. Counsel cites a non-precedent decision by this office for the proposition that expert witness letters must be afforded evidentiary weight. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also relies on a July 30, 1992 correspondence memorandum from Lawrence Weinig, Acting Assistant Commissioner, to the then Director of the Nebraska Service Center, James M. Bailey. Mr. Weinig states that "testimony from other scholars on how the alien has contributed to the academic field . . . would more than likely be solid pieces of evidence." Mr. Weinig issued his correspondence memorandum in response to an inquiry from Mr. Bailey and makes clear that he is discussing his personal inclinations. Moreover, correspondence memoranda issued to a single individual do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the correspondence may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000).¹

¹ Although this memorandum principally addresses letters from the Office of Adjudications to the public, the memorandum specifies that letters written by any CIS employee do not constitute official CIS policy.

A more thorough discussion of this issue is, not surprisingly, found in precedent decisions that are binding on us. 8 C.F.R. § 103.3(c). 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 (Commr. 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. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of originality, 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 her reputation and who have applied her 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.

As stated above, the petitioner obtained her Master of Science degree in Mechanical Engineering from Toyohashi University in Japan in 2002. As of the date of filing, the petitioner was still a Ph.D. student at the University of Washington. In response to the director's request for additional evidence, the petitioner submitted her Ph.D., issued on March 17, 2006. On the date the petition was filed, the petitioner was working as a research assistant at the University of Washington while pursuing her degree there. The record does not establish the nature of her employment now that she has finally finished her education.

At Toyohashi University, the petitioner performed her research under the direction of [REDACTED] Dr. [REDACTED] asserts that while at Toyohashi University, the petitioner "developed the world's first analytical model that could predict the crack tip singularity of functionally graded materials." [REDACTED] explains that the prior models were merely numerical models that provided "approximate answers" and that the petitioner's model "has been an invaluable tool to scientists and industry researchers alike because it can accurately determine where and how cracks will develop and grow in materials used on airplanes." [REDACTED] does not identify any scientist or industry researcher using the petitioner's model and provides no examples of the model's use outside the petitioner's immediate circle of colleagues. As of the date of filing, the petitioner had **not published** any articles reporting on this model. In 2005, the petitioner's collaborative work with [REDACTED] was presented at the second JSME/ASME International Conference on Materials and Processing. It is not clear that this presentation, entitled "Stress Wave Method for Identification of Viscoelastic Material Property based on Finite-Element Inverse Analysis," relates to the petitioner's model for predicting cracks. Even if this presentation does represent the petitioner's model, the record still lacks confirmation from independent researchers that they are using the petitioner's model.

At the time of filing, the petitioner was pursuing her Ph.D. under the direction of [REDACTED]. [REDACTED] discusses the petitioner's research on porous nickel titanium alloys, NiTi. Dr. [REDACTED] asserts that the petitioner was the first to develop NiTi with high ductility and excellent super elasticity. Dr. [REDACTED] further asserts that previous efforts to develop this material, including at Texas A&M University and Northwestern University, were unsuccessful. More specifically, the petitioner's NiTi "has a reversible strain error that is three times better than the next best material and therefore withstands impact better."

As evidence of the significance of this development, [REDACTED] notes that the petitioner was one of 10 invited speakers at the JSME/ASME International Conference. [REDACTED], General Chair of the conference, confirms that the petitioner was one of the 10 invited speakers, that there were 208 presentations total at the conference, and that invited speakers were selected based on those presentations that represented "the most significant contributions in specific areas of research in recent times." The selection of original work that has not been previously disseminated in the field for presentation represents an educated opinion as to the promising nature of the work. Such selection cannot, however, demonstrate that once disseminated, the work was ultimately found useful and proved influential. The record lacks any letters from independent conference attendees who are now pursuing the petitioner's spark plasma splintering method for creating NiTi.

[REDACTED] further asserts that the petitioner "formulated the first metal mathematical models to predict the stress-strain curve of [NiTi] under compression and the force-displacement curve of the composite structure." [REDACTED] explains that the petitioner's "high energy absorption composite structure achieved energy absorption capacity that was seven times higher than the next best conventional devices." This work, however, had yet to be published as of the date of filing.

In response to the director's request for additional evidence, the petitioner submitted an affidavit assigning her interest in the invention "High Energy Absorbent Material" to the University of Washington. The affidavit which implies that the petitioner has a patent on the invention postdates the filing of the petition. As noted by the director, the petitioner did not submit the patent application itself or evidence that it had been filed. The petitioner does not address this concern on appeal. As stated above, an alien cannot secure a national interest waiver simply by demonstrating that she holds a patent, which the petitioner in this matter has not even demonstrated. Regardless, whether the specific innovation serves the national interest must be decided on a case-by-case basis. *NYSDOT*, 22 I&N Dec. at 221, n. 7. In a new letter, [REDACTED] asserts that Noveltech "has already jumped at the opportunity to use [the petitioner's] patented work as the basis for furthering its own research of shape memory alloy reinforced aluminum foam composites for ballistic protection in military vehicles and equipment." The record does not contain any confirmation of this interest from a high level official or anyone else at Noveltech.

As noted by counsel, the petitioner did submit letters from four independent references. Only two of these references claim to have had any prior familiarity with the petitioner's work. Specifically, Dr.

Program Director for Sensor Technology for Civil and Mechanical Systems at the National Science Foundation, attended conferences and workshops with the petitioner. While Dr. [REDACTED] indicates that he shares an area of interest with the petitioner, he does not suggest that the petitioner has influenced his own work. [REDACTED] does not support his general assertion that the petitioner's work "has had a major impact on this area of research" with any examples of independent researchers in academia or industry using the petitioner's work. [REDACTED] Scientific Director of Mailages Calculs Dimensionnement in France, provides a similar letter.

[REDACTED], a professor emeritus at Stanford University and a member of the National Academy of Sciences, does not affirm any prior knowledge of the petitioner's work. Rather, he asserts that his assessment is based on a review of the petitioner's "credentials and track record." Dr. [REDACTED] asserts that the petitioner's materials are relevant to his area of specialty, bone biomechanics, and represent the first viable alternative to current bone implants. Some of the citations of the petitioner's work relate to this area. Specifically, [REDACTED] and his colleagues published their own development of high strength, low stiffness, porous NiTi with super elastic properties for bone replacement. In this article they acknowledge the petitioner's production of 13 percent and 25 percent porosity through spark plasma sintering but concluded that the 25 percent porosity material "was found to be very weak." This article does not single out the petitioner's methods as particularly noteworthy and the authors ultimately used a gas expansion method rather than spark plasma sintering in their own work.

[REDACTED], a professor at Tohoku University in Japan, asserts that his evaluation is based on his "independent review of [the petitioner's] CV and selected works." He provides no examples of how the petitioner's work is already being applied in the field.

As of the date of filing, the petitioner had authored a single published article and had given four conference presentations, including as one of ten invited presentations. Counsel notes that in the above-mentioned 1992 correspondence memorandum, [REDACTED] asserts that scholarly articles and citations are "solid pieces of evidence." Counsel asserts that if scholarly articles are "solid pieces of evidence" for aliens of extraordinary ability, they must also constitute strong evidence for this lesser classification.

In his letter to [REDACTED], Mr. [REDACTED] raised concerns about several regulatory criteria relating to aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act and outstanding researchers pursuant to section 203(b)(1)(B) of the Act. Specifically, [REDACTED] advised that "it is almost a job requirement at many universities that professors and researchers publish papers." Separately, Mr. [REDACTED] questioned whether citations were published material about the cited author. In his response, [REDACTED] unequivocally states that "a footnoted reference to the alien's work without evaluation . . . would be of little or no value." [REDACTED] goes on to state that "entries (particularly a goodly number) in a field . . . would more than likely be solid pieces of evidence."

As stated above, Mr. Weinig makes clear that he is discussing his personal inclinations. Moreover, as also stated above, correspondence memoranda issued to a single individual do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000).

As noted by the director, the Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." Moreover, the Department of Labor's Occupational Outlook Handbook 224 (2006-2007 ed.) provides that university faculty spend a significant amount of their time doing research and often publish their findings. In addition, the handbook acknowledges that faculty face "the pressure to do research and publish their findings." *Id.* at 225. This information reinforces CIS's position that publication of scholarly articles is not automatically evidence of an alien's track record of success with some degree of evidence on the field as a whole. Rather, we must consider the response to the articles or presentations.

Initially, the petitioner provided no evidence that her article or presentations had been cited. In response to the directors' request for additional evidence, the petitioner submitted four articles that cite her 2005 article. Two of the citations postdate the filing of the petition. Thus, as of the date of filing, the petitioner's article had only been cited twice. The petitioner must demonstrate a track record of success with some degree of influence on the field as a whole. *NYS DOT*, 22 I&N Dec. at 219, n.6. We will not separate the two concepts such that a petitioner who has a track record deemed promising by a handful of experts may secure a priority date based on the speculation that the work will prove influential in the field later the proceeding. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. We cannot consider "facts that come into being only subsequent to the filing of a petition." *Matter of Izummi*, 22 I&N Dec. at 176 (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981)).

Regardless, the citations of the petitioner's work are not persuasive. As stated above, Christian Greiner and his colleagues conclude that at least one of the petitioner's materials was weak and ultimately use a different method in their own research. In a second article, the petitioner's work is simply cited as one example of the "number of investigations [that] have been carried out on the fabrication of porous metals and alloys." A third article lists spark plasma splintering as one technique for fabricating NiTi but states: "All of these techniques lead to NiTi materials having large amounts of secondary phases." The authors ultimately use a solid state sintering process, which does not appear to be the petitioner's spark plasma sintering process. We acknowledge, however, that the authors of the fourth article citing the petitioner's work ultimately use spark plasma sintering in their own work.

This single example of spark plasma sintering by an independent research team cannot demonstrate the petitioner's influence as a whole.

We acknowledge that the petitioner received a prestigious scholarship and that her work is listed as a reference on [REDACTED]'s current grant application. Scholarships are typically based on academic performance, which cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. *NYS DOT*, 22 I&N Dec. at 219, n.6. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.* The fact that [REDACTED] continues to seek funding based on her prior work, including the work coauthored with the petitioner, is not persuasive. We note that the petitioner is not listed as significant personnel on the grant application.

While the petitioner has published useful research and claims to be listed on a patent application, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research which did not add to the general pool of knowledge in the field. Similarly, it is not clear that everyone who has filed a patent application for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. *Id.* at 221, n.7. The record lacks evidence that, as of the date of filing, the petitioner's work was influential 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.