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

[redacted]

DATE: NOV 2 1 2011 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

RICHARD AVERWATER
LAW OFFICES OF RICHARD AVERWATER
840 VALLEYBROOK DR.
MEMPHIS, TN 38120

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

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 is a postdoctoral research associate at the University of [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner 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, the petitioner submits a brief from counsel.

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

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] 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 Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Comm'r 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.

The AAO also notes that 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.

The petitioner filed the Form I-140 petition on December 28, 2009. The petitioner's initial submission included documentation showing that the petitioner earned a B.S. in chemistry and biology from the University of the [redacted] He then studied biochemistry for a year at [redacted] University, [redacted] before transferring to the University of [redacted] and earning a Ph.D. in chemistry.

The petitioner's initial submission included copies of four published articles that he co-authored, along with lists of other articles that have cited the petitioner's articles:

"Photochemical Instability of CdSe Nanocrystals Coated by Hydrophilic Thiols," 2001. 322 citations.
"Photoluminescence Upconversion in CdTe Quantum Dots," 2003. 28 citations.
"Size Dependent Dissociation pH of Thiolate Ligands from Cadmium Chalcogenide Nanocrystals," 2005. 78 citations.
"Surface Ligand Dynamics in Growth of Nanocrystals," 2007. 22 citations.

In total, the petitioner showed 450 citations of his work, averaging 112 citations per article.

Six witness letters accompanied the petitioner's initial submission, four from University of [redacted] faculty members and two from other institutions. The earliest-dated letter is from Dr. [redacted] associate professor at the University of [redacted] The letter, dated March 1, 2009, predates the other letters in the record by six to eight months. Dr. [redacted] stated:

> In my independent opinion, [the petitioner] is one of the top young scientists in the country, and is both nationally and internationally recognized for his extraordinary research work in the field of nanoscience and nanotechnology, with special emphasis on how surface chemistry affects the optical properties of nanomaterials. . . .
>
> [The petitioner] has done pioneering work in various areas of nanomaterials science including developing new synthesis of tiny semiconductor particles, understanding how light affects the stability of the nanoparticle solution, and developing new ways to impart biological functionality to semiconductor nanoparticles. His work not only demonstrates impressive intellectual contributions to the field of nanomaterials research, but also includes novel technical and synthetic advancements, which are very valuable to other scientists.
>
> [The petitioner] is an expert in the surface chemical properties of novel nanometer scale materials that have new characteristics that can not be obtained from their macroscopic counter-parts. He possesses the ability to develop new strategies for materials synthesis and to combine these skills with a strong analytical background in order to fully characterize and more importantly to fully understand the nature of nanoparticle surface chemistry. Since nanometer scale materials have a huge percentage of atoms on the surface, relative to a macroscopic object, his work is of prime importance to researchers in the field as well as those looking to use nanoparticles in a practical manner. . . .
>
> For someone at his very early career stage, [the petitioner] has also established a strong record of research accomplishments and leadership in the area of nanomaterials. He has published papers in the top-rated chemical journals in the world.

Professor [redacted] chair of [redacted] Department of Chemistry and Biochemistry, signed a letter dated November 11, 2009. Much of the text of Prof. [redacted] letter repeats Dr. [redacted] letter, even including the idiosyncratic use of "can not" rather than "cannot," and "counter-parts" instead of

"counterparts." [redacted] Professor [redacted] signed a November 23, 2009 letter that also included some of the same language. A September 9, 2009 letter from Professor [redacted] of [redacted], likewise includes passages quoted from Dr. [redacted] letter. It is not clear whether these witnesses copies from Dr. [redacted] letter, or, instead, all of the witnesses (including Dr. [redacted]) relied on a template provided by an unspecified author.

The letters that do not borrow heavily from Dr. [redacted]'s letter also do not provide many details about the petitioner's work. [redacted] Professor [redacted] who supervised the petitioner's doctoral research, asserted that the petitioner "is one of the top young chemists in the country." Prof. [redacted] stated that the petitioner "performed well" in his group, but offered no details about the nature or importance of his work.

Dr. [redacted], associate professor at the University of [redacted], praised the petitioner's abilities as a teacher, but acknowledged that the petitioner's "research topics are not in my area of expertise."

On February 2, 2010, the director issued a request for evidence. The director noted that many letters described the petitioner's work as "revolutionary," but found that the petitioner had submitted no documentary evidence to support that claim. The director acknowledged the petitioner's submission of "copies of four articles" published while the petitioner was a student, but did not mention their citation history. The director instructed the petitioner to submit evidence to show the national importance of his work, and to establish that it is in the national interest for the petitioner to do that work, instead of a qualified United States worker.

In response, the petitioner submitted background information about his research specialty and the growing nanotechnology industry. In terms of his own contributions, the petitioner noted that other researchers around the country and the world have cited his published work. The petitioner observed that three of his articles appeared in the *Journal of the American Chemical Society*, "the most cited journal in chemistry" with an impact factor of 8.091 in 2008. Every article claimed by the petitioner well exceeds that citation rate.

The director denied the petition on August 20, 2010, stating that the petitioner "failed to submit any of the information the Service requested." The director observed that the importance of the field is not sufficient to show eligibility. The director stated that the petitioner's materials "made reference to work accomplished mostly throughout the years he was completing his studies."

On appeal, counsel states that the director's "written decision did not detail how he or she reached [the] conclusion" "that Petitioner did not establish that a waiver would be in the national interest." Counsel notes that the director identified "various factors to be considered," the director did not discuss how the petitioner's evidence measured up to those factors.

Counsel persuasively asserts that the intrinsic merit and national scope of the petitioner's work are not in dispute, and asserts that the petitioner "has proven himself to be a noted author" with several cited

articles. Counsel also asserts that distinguished scholars have provided letters in support of the petition. (For reasons already discussed, the witness letters have limited favorable weight.)

The AAO finds considerable merit in many of counsel's assertions. The record supports counsel's claim that the director listed various factors for consideration, but offered little if any explanation as to why the petitioner's evidence is inadequate relative to those factors.

The AAO takes particular note of the hundreds of documented citations of the petitioner's published work. While the petitioner has not produced a large volume of published work, the articles he has published have been widely influential, as demonstrated objectively by their very high citation rate. The director did not even mention this aspect of the record, much less explain why it should not be considered a major factor strongly in favor of approval of the petition.

Other assertions by counsel are less persuasive (such as a discussion of a predicted worker shortage), but the weaknesses of these arguments do not detract from the stronger points.

With respect to the director's observation that the petitioner was a student when he published his cited articles, the *NYSDOT* decision states: "the alien's past record need not be limited to prior work experience. . . . The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole." *Id.* at 219 n.6. If the petitioner's published research has been heavily influential in the field, as appears to be the case, then it is not particularly important that he was a student at the time he conducted and published that research. It has no effect on the content of the publications.

The record objectively indicates that the petitioner has performed consistently influential research in his specialty. The director did not identify any persuasive negative factors. Therefore, the petitioner has established by preponderance of evidence that he stands out in his field to a degree that a waiver of the job offer requirement would serve the national interest.

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 field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.