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

(b)(6)

DATE: APR 22 2015 OFFICE: NEBRASKA 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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks 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. The petitioner seeks employment as a postdoctoral research associate at the . 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 has 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 with supporting exhibits.

I. Law

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).

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), sets forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the beneficiary 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 beneficiary 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 beneficiary's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the beneficiary 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 beneficiary, rather than to facilitate the entry of a beneficiary 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 individual seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise. *See NYSDOT*, 22 I&N Dec. at 218-19.

The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, and that the petitioner had established the intrinsic merit and national scope of his intended employment. The only issue in this proceeding, therefore, is whether the petitioner has met the third prong of the *NYSDOT* national interest test.

II. Facts and Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 24, 2013. The petitioner indicated that his research involves using nanotechnology in drug delivery systems for HIV and tuberculosis (TB). The petitioner stated that he "has, to date, published four peer-reviewed journal papers . . . in leading journals," and that his articles "have been cited in leading journals by other well-known scientists and researchers in the field." The petitioner submitted partial copies of four published articles, and also unpublished manuscripts and abstracts of conference presentations. The petitioner also documented eight citations to his published work including one self-citation by a co-author.

The petitioner stated that he "has received many requests for his work, information, and opinion [from] other scientists in the field including a request [from] a publishing house [for] the

[petitioner's] dissertation to be published as a book." The petitioner submitted printouts of two electronic mail messages. One message was an inquiry from a peptide chemist who had read the abstract of the petitioner's dissertation and expressed interest in reading the entire paper. The other message was from a print-on-demand service, offering to publish the dissertation.

The petitioner submitted seven letters with the petition, many of which described the petitioner's work in technical detail. Two of the letters are from professors at where the petitioner earned his doctorate. Dr. stated that the petitioner's graduate work "has important applications in the study of new anticancer drugs. . . . His successes in developing methods for synthesizing tuberculosis and cancer inhibitors are an indication of his promising future."

Dr. stated: "[t]he molecules synthesized during [the petitioner's] Ph.D. work will be utilized as new probes for visualizing the actin cytoskeleton that plays a major role in the process of cell division and migration."

Dr. , an adjunct professor at is also a professor at where he supervises the petitioner spouse. Dr. stated: "The early detection of metastasis is a critical factor for determining the probability of survival for many cancers. . . . Therefore [the petitioner's] finding of a biomarker is likely to have a major impact on the cancer management and health of many patients . . . [the] world over."

Two of the letters are from faculty members. Dr. professor and chair of Department of Pharmacology and Experimental Neuroscience, stated that the petitioner had made "pioneering contributions" in Dr. laboratory before coming to and that he "has solved some of the difficult problems that have troubled organic chemists worldwide for decades." Dr. stated:

> [The petitioner] has established a medicinal chemistry initiative that has focused on developing new compounds to treat *Mycobacterium tuberculosis*. He has had extraordinary success in developing the initiative and in finding new ways for treatment of an age old disorder that still afflicts individuals both in and outside the USA. . . . [The petitioner] has also developed new nanoformulations for sustained release of antituberculus agents that serve[] to improve patient compliance.

Dr. , the petitioner's supervisor at stated that the petitioner "has grasped new techniques quickly, and is a fine researcher. At the end of this post-doctoral fellowship, [the petitioner] will have a set of skills in pharmacology, experimental neuroscience and medicinal chemistry techniques that very few researchers will possess." Dr. further stated that the petitioner's "projects will revolutionize the long search for new cures by developing new drugs against multidrug resistant TB and HIV infections."

Dr. director of chemistry at the first learned of the petitioner's work from an article in the . Dr. stated that the petitioner's "pioneering work has had a great impact on research" and that "his contributions have been recognized as representing major advances in the field. . . . His research and publications are milestones in our recent effort to find[] cures against HIV and TB co-infections."

Dr. assistant professor at the attended a conference presentation by the petitioner. Dr. stated that the petitioner's "profound knowledge on the synthesis of unnatural amino acids and cyclopeptides" led to a "significant breakthrough [that] has a great impact on the design of anticancer and anti-parasitic drugs."

The director issued a request for evidence on May 7, 2014. The director instructed the petitioner to submit evidence of "a history of achievement with some degree of influence on the field as a whole," including evidence of citation of the petitioner's published work.

In response, the petitioner indicated that he has continued to contribute to his field since filing the petition, stating in part that he has published additional works and was "recently awarded a fellowship by company to develop long acting antiretroviral formulations for HIV eradication at ." These developments, however, cannot serve to establish eligibility as of the filing date. The petitioner must establish that he is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). U.S. Citizenship and Immigration Services (USCIS) cannot properly approve the petition at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner submitted a second letter from Prof. who stated:

> [The petitioner] has had sustained and unquestioned success in developing long acting drug nanocarriers that target cellular reservoirs of infection. This represents the most challenging goal in drug targeting. The nanocarriers minimize drug degradation and loss, prevent harmful side effects and increase the availability of the drug at the disease site. [The petitioner] has shown how the drugs and disease causing organisms are trafficked inside the cell. This groundbreaking work was recently submitted to the where he is the first author. [The petitioner] has also devised unique methods for formulating hydrophilic drugs through prodrug approach. These discoveries are very important for improving outcomes in HIV and tuberculosis therapy. . . . New and important science is resulting from [his ongoing] studies.

Additional documentation showed that the petitioner's citation count had increased to 11, including two self-citations by co-authors.

In denying the petition, the director listed the evidence that the petitioner submitted in support of the petition, and stated that the petitioner's citation record was not sufficient to show influence on the field as a whole. The director noted that several of the letters in the record indicated that the petitioner's work is promising and could lead to important new developments, but that the petitioner's documented past impact is not sufficient to show that the petitioner's continued employment in the United States is a matter of national interest.

On appeal, the petitioner states that the director "failed to consider evidence of petitioner's past achievements" that showed his influence on his field, and that the director selectively quoted from letters to emphasize references to his "potential," thereby "failing to consider the references to petitioner's past achievements." The petitioner also states that the director "failed to consider . . . evidence which demonstrates that petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications." The petitioner refers to previously submitted letters that indicate the petitioner's departure from his current research projects would adversely affect continued progress on those projects.

In his decision, the director acknowledged that the submitted letters "note the importance of what you are doing and what you have done," but found that they were "not backed up with sufficient evidence to demonstrate that your contributions have been noted by other researchers within your field as having influence on your field as a whole." While the petitioner asserts on appeal that the submitted letters establish the significance of the petitioner's prior achievements and his influence on the field, the record does not include independent evidence to corroborate the assertions in the letters. The opinions of experts in the field are not without weight and have received consideration above. USCIS 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'r 1988). However, USCIS 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; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may give less weight to an opinion that is not corroborated. *See id.* at 795; *see also Matter of V-K-,* 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also 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)).

With respect to the contention that the petitioner's departure would hamper his ongoing research at the denial of the present petition does not affect the validity of any existing nonimmigrant status permitting the petitioner to work temporarily in the United States, and the evidence does not establish that intends to continue employing him following his temporary postdoctoral position.[1]

[1] As of this writing, the petitioner holds H-1B nonimmigrant status, authorizing him to work at until November 30, 2017.

Regarding his citation history, the petitioner states on appeal: "[redacted] shows that there are only 14,000 published articles in the area of HIV/TB co-infection area in comparison to more than 2.5 million articles for either HIV or TB research when assessed independently, which explains the beneficiary's lower number of citations." The record does not contain a [redacted] printout to support these asserted figures. *See Matter of Soffici*, 22 I&N Dec. at 165. Regardless, the petitioner has not asserted or established that his articles are highly cited in comparison to other articles within his specialty.

The appellate brief lists the petitioner's publications, awards, and appointments, but the record does not contain evidence establishing the significance of the listed achievements. For instance, counsel contends that the petitioner's [redacted] . . . recognizes the **outstanding achievements that revolutionized the field** of tutelage in chemistry and stem programs" (counsel's emphasis), but the submitted evidence does not establish that the petitioner has influenced the field of chemistry instruction. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Under 8 C.F.R. § 204.5(k)(3)(ii)(F), evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations can be partial evidence of exceptional ability, but exceptional ability alone does not establish eligibility for the national interest waiver.

The appellate brief concludes with a discussion of the petitioner's activities and accomplishments since filing the petition, including his [redacted] fellowship. Activities that took place after the petition's filing date cannot retroactively show that the petitioner was eligible at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 49. Furthermore, the petitioner has not submitted documentary evidence to establish the asserted significance of the fellowship and his other recent activities. Statements made without supporting documentation are of limited probative value and are not sufficient to meet the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165.

III. Conclusion

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. *NYSDOT*, 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 beneficiary 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 seeking the waiver. 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 dismiss the appeal 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 appeal is dismissed.