U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-O-H-

DATE: DEC. 4, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a researcher in environmental and atmospheric science, seeks classification as a member of the professions holding an advanced degree, and 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. *See* Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

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. –
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> > (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 –
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> > > (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).

Matter of New York State Department of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or she 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, a petitioner must demonstrate a past record justifies projections of future benefit to the national interest. *Id.* at 219. A petitioner's assurance that he or she 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 petitioner, rather than to facilitate the entry of a foreign national with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 13, 2014, at which time he was working as an assistant professor in the Agricultural Science Department at [redacted] The record reflects that the Petitioner previously worked as a post-doctoral researcher and laboratory manager at [redacted], having earned a Master's degree in soil science and a Ph.D. in environmental and atmospheric science from the [redacted] In an introductory letter, the Petitioner stated that his work "offers significant enhancements to the understanding of greenhouse gas emissions from agricultural production, and makes important advances in the role that agricultural soils might be able to play to act as a sink for methane."

Documentation supporting the Form I-140 included a personal statement with details about the Petitioner's past and current research, and evidence that he had published four scholarly articles in addition to presenting his work at numerous conferences in his field. The Petitioner also provided five letters from current and former colleagues and collaborators attesting to the significance of his work and the importance of his areas of research.

The Petitioner indicated in his personal statement that his research aims to "develop alternative farming systems practices and techniques that can be used . . . to increase carbon sequestration, improve crop production, utilize energy waste products, and reduce greenhouse gas emissions." He

stated that he is currently investigating the use of biochar, charcoal produced by burning organic biomass under low oxygen conditions, to reduce greenhouse gas emissions and augment corn and soybean production. In addition, he is "incorporating nanotechnology to improve on water and nutrient efficiency of agronomic crops and to increase the ability of these crops to adapt to new environmental conditions resulting from climate change." The Petitioner also noted that he has a proposal "under review" with the U.S. Department of Agriculture's Agriculture and Food Research Initiative to further examine the link between soil microorganisms and atmospheric greenhouse gas concentrations, a topic that he previously studied during his graduate research at the His postdoctoral research at focused on "the impact of long-term herbicide application on soil microbial community."

In a May 10, 2014, letter, , professor at attested to the Petitioner's past and continuing "valuable impact" on the field, and described the national benefits posed by his work. For instance, he predicted that the Petitioner "will make a major contribution to understanding how the soil and the agricultural practices used in crop production influence the exchange of gases between soil and the atmosphere." He noted that the Petitioner's previous research established an association between soil temperature, soil biology, and greenhouse gas emission. In addition, expressed that the Petitioner's work on biochar "is essential if we are to develop strategies to cope with changing climatic conditions." He praised the Petitioner's novel techniques and approach to this area of research, including his "unprecedented" use of nanotechnology to investigate the potential of biochar to improve drought tolerance in crops.

, professor at and co-author of three of the Petitioner's published articles, stated in a May 8, 2014, letter that the Petitioner's graduate research on soil microorganisms and greenhouse gas "places him among the pioneers in this area of research," and that he is also "recognized as being among the pioneers seeking to employ nanotechnology as a new and effective strategy to offset climate change issues." She called the Petitioner's work "critical to US agriculture" and described its prospective environmental and economic benefits.

is a microbiologist at the U.S. Department of Agriculture, adjunct professor at the and co-author of one of the Petitioner's articles. In a May 12, 2014, letter, he described the Petitioner's expertise and the potential applications of his research. For instance, he stated that the Petitioner's "excellent research . . . and his unique expertise in the area of soil microbial ecology, greenhouse gas emission, and crop production are of key importance to US food security." also offered his "professional assessment," that based on the success of the Petitioner's past work and the importance of his current research, he "will make very significant contributions to US agriculture."

In a May 9, 2014, letter, , assistant professor at stated that "[the Petitioner's] research in microbial contribution to greenhouse gas emission is becoming increasingly important," noting national and international efforts to mitigate greenhouse gases. He called the Petitioner "one of the leading innovators in applying biochar technique combined with nanotechnology to agronomic crop production," and stated that this technique has "great potential."

Finally, the Petitioner submitted a May 9, 2014, letter from , assistant professor at and collaborator on his who stated that the Petitioner "has made excellent accomplishments that will significantly contribute to the field of " For instance, he stated that the Petitioner's analysis of the impact of manufactured nanoparticles on major agronomic species has "resulted in a better understanding of these unique systems materials and their potential effects." also described the Petitioner's leadership role in ongoing projects and explained the importance of his areas of research.

The Director issued a request for evidence (RFE) on September 18, 2014, in part requesting additional documentation to establish a past record of specific prior achievement with some degree of influence on the field as a whole, and to demonstrate that the Petitioner will serve the national interest to a substantially greater degree than an available U.S. worker having the same minimum qualifications. In response, the Petitioner stated that such requirements are not included in the relevant law, regulations, or the *NYSDOT* precedent decision, and that a correct reading of *NYSDOT*'s third prong instead requires a petitioner to demonstrate that the proposed work cannot continue without his presence in the U.S. He maintained that, in this instance, he is not replaceable because he "developed his own studies" rather than working as a "team member on someone else's projects." He submitted a new letter from dated December 10, 2014, attesting that the Petitioner's presence is required for the continuation of his research, and again offering his professional opinion that the Petitioner will make significant contributions to the field.

The RFE included a specific request for the Petitioner to show that other researchers had cited or otherwise recognized his research. The Petitioner's response included a Google Scholar printout, copies of two published articles that cited his work, several articles that thanked him for his assistance in the "Acknowledgements" section, and four theses by graduate students for whom he served as an advisor.

The Director denied the petition on March 24, 2015, finding that the Petitioner had not established sufficient impact on his field to meet the third prong of the *NYSDOT* national interest analysis. He found that the evidence of the Petitioner's publications and presentations did not establish his influence on other researchers, and that the submitted letters focused on the prospective rather than past impact of his work. The Director stated, "[w]hile the letters do speak of your contributions in the field, there is no evidence to support that your contributions have influenced the field as a whole." The decision concluded, in part, with the following statement:

> A complete review of the available evidence does not persuasively establish that you have a past record of prior achievement at a level which would justify a waiver of the requirement of an approved labor certification which would be in the national interest of the United States.

In his appeal brief, the Petitioner asserts that the Director applied the incorrect standard of proof in this matter, noting his use of the phrase "persuasively establish." The Petitioner states that the

Director should instead have determined whether he established eligibility by a "preponderance of the evidence," and he submits case law and policy guidance relating to the application of that standard.

The appeal brief also states that the third prong of the *NYSDOT* national interest waiver analysis is not applicable to the current matter, and applies only when an individual has the option of applying for a labor certification. The Petitioner cites our statement from *NYSDOT* that an individual "must present a national benefit so great as to outweigh the national interest inherent in the labor certification process," as well as our findings that an individual's qualifications or a local labor shortage would not merit a waiver because such matters are addressed by that process. He maintains that, in this instance, the labor certification process is "not relevant" because he is a self-petitioner. He concludes: "The third prong of the *NYSDOT* case, then, has been satisfied since the concern for protection U.S. workers and the rules and regulations established by the Dept. of Labor for standard 'employer-employee' relationships does not apply to [the Petitioner's] situation."

Lastly, the Petitioner asserts that the Director did not adequately consider evidence regarding his past achievements, including first-authored research articles and letters attesting that his past studies have been recognized for their innovation. Specifically, he states that the submitted letters constitute "expert testimony," and that they were not given proper weight in the decision. The Petitioner contends that, in order to deny the Form I-140, the Director would have to directly refute the experts' statements or the basis of their analysis, which he has not done. In support of this position, the Petitioner cites *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989), in which the Board of Immigration Appeals (BIA) found affidavits sufficient to establish the continuous residence of an applicant seeking temporary resident status under section 245A of the Immigration and Nationality Act.

III. ANALYSIS

The Petitioner is correct that "preponderance of the evidence" is the applicable standard in this proceeding. A petitioner must prove by a preponderance of the evidence that he or she is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* at 376.

Regarding the applicability of the third prong of *NYSDOT*, the Petitioner's assertion that it does not apply to self-petitioners is incorrect. An individual may file a petition on his own behalf, i.e. self-petition, whether or not he will be self-employed, and the *NYSDOT* analysis is applicable in both instances. In *NYSDOT*, we clarified that "the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field." *Id.* at 218 n.5. We further explained that, in order to make such a demonstration, a petitioner must have a past record that "justifies projections of future benefit to the national interest" by showing that he or she has had "some degree of influence on the field as a whole." *Id.* at 219, 219 n.6.

As noted above, the record includes letters attesting to the influence and importance of the Petitioner's work based on the authors' expertise in the field and their knowledge of his past and ongoing research. However, the submission of letters from experts supporting the petition is not presumptive evidence of eligibility, as asserted by the Petitioner. The cited decision, *Matter of E-M-*, did not relate to expert testimony, nor did it hold that testimony alone would always be sufficient for meeting an individual's burden of proof. In *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988), the BIA held that "[t]his Service may, in its discretion, use advisory opinions" as expert testimony. *Id.* at 795. However, USCIS is ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought. *Id.*

In this instance, the submitted letters attest to the importance of the Petitioner's research and state that he has made significant contributions to the field. However, neither the letters nor the supporting evidence demonstrate specifically how the Petitioner's findings have impacted his field. For instance, multiple letters noted his past study linking soil microorganisms and atmospheric greenhouse gas concentrations, but they do not describe the subsequent impact of that work on his field of research. In addition, several letters praise his innovative research on biochar and nanotechnology, but they do not state, and the record does not indicate, that this research has widely influenced farming practices or the work of other researchers in the field. Accordingly, we find the record insufficient to demonstrate that the Petitioner has had some degree of influence on the field as a whole.

IV. CONCLUSION

A plain reading of the statute indicates that it was not the intent of Congress that every advanced degree professional or individual of exceptional ability should be exempt from the requirement of a job offer based on national interest. The Petitioner has not shown that his past record of achievement is at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification he seeks. While a petitioner need not demonstrate notoriety on the scale of national acclaim, the national interest waiver contemplates that his influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217, n.3. More specifically, a petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the individual must have "a past history of demonstrable achievement with some degree of influence on the field as a whole"). Considering the other evidence submitted, the Petitioner has not established by a preponderance of the evidence that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-O-H-*, ID# 14655 (AAO Dec. 4, 2015)