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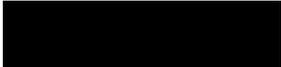
U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:  Office: Nebraska Service Center Date: **AUG 11 2002**

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)

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations 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. At the time of filing, the petitioner was a research associate at the University of Wisconsin-Madison School of Pharmacy. The petitioner states that he is “searching for a faculty position in the field of pharmaceutical sciences, particularly in drug stabilization, at a major university.” The petitioner has subsequently accepted a position at Inhale Therapeutic Systems, Inc. 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.

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. -- The Attorney General may, when he 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 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 Service 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 Service 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 Dept. of Transportation, 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.

The petitioner describes his work, referring to himself in the third person:

[The petitioner] has worked for more than ten years in the field of stabilizing biological materials. . . . His research is used to improve the stabilization of traditional pharmaceuticals, and thus extend their shelf life. . . . [The petitioner’s] work is also applied to stabilize novel formations for gene delivery and protein delivery treatments. These formulations are under extensive studies and are aimed at curing diseases such as cancer and AIDS that are incurable at present. . . .

[The petitioner’s] works have many important applications that can considerably improve the health care of the American people. For example, most of the new drugs that need to be stabilized are protein or gene based [and] are aimed at curing currently incurable diseases such as cancer and AIDS, and liposome technology, such as he uses, is regarded as being a cutting edge gene delivery tool. . . . However, liposome formulas usually are very unstable, steady to phase-separate in a time scale of minutes to days. This stability problem makes gene delivery very expensive and time consuming. Because the formula cannot be stored, it also is possible that a patient might miss the best time of delivery, as the formula supply has to be prescheduled. With the stabilization technology such as that developed by [the petitioner], the liposome formula can be batch-produced by pharmaceutical companies, stabilized, and shipped to hospitals and even small clinics where they can be used by physicians treating patients. In his recent research . . . [the petitioner] proposed an exciting possibility to stabilize these drugs at ambient temperatures by some specific polymer-sugar mixtures.

The petitioner submits several letters from faculty members of universities where the petitioner has worked and studied. Some of these witnesses' comments are assertions regarding the petitioner's personal character and work ethic, as well as general descriptions of the petitioner's area of research. Other remarks are more pertinent to the matter at hand. Professor Gerald W. Feigenson, a member of the beneficiary's doctoral committee at Cornell University, states:

[The petitioner] is a remarkable researcher. . . . In my opinion, his graduate work has been a huge success in establishing the fundamental physical basis for protection of biomembranes from freezing damage. Applications of his work could reduce freezing damage to crops, as well as provide increased stability for storage of pharmaceuticals. In fact this area of cryoprotection has numerous practical applications.

Another member of the petitioner's doctoral thesis committee, Dr. John Brady, associate professor at Cornell, states:

[The petitioner's] doctoral research involved the study of sugars in low-moisture systems and their use to control water in biological glasses. . . . This research into the effects of different sugars on the glass transition temperatures of membrane-type systems is quite important, since this subject is of great practical, technological significance in such areas as cryobiology, pharmaceuticals, foot technology and agronomy.

Professor George Zografí, the petitioner's supervisor at the University of Wisconsin-Madison, states:

[The petitioner] made major contributions in his Ph.D. work at Cornell University on the low temperature stability of cell membranes and, in particular, the cryostability of various lipid-sugar combinations essential for such stability. . . . [The petitioner] made major contributions in truly ground-breaking research. . . .

Since [the petitioner] has joined my laboratory in June 1998, he has quickly established himself as an expert in the applications of cryobiology to pharmaceutical systems. He has taken on the very difficult problem of preventing the degradation of drug products in the freeze-dried state from residual moisture that invariably is in the product. He has just completed a major study on the underlying mechanisms by which water interacts with various polymers and sugars used to protect drugs against instabilities. He independently has developed a model that allows us to better understand and predict hydration behavior and he has prepared an excellent paper for publication in this relatively short period of time.

Most of the witnesses have supervised or collaborated with the petitioner. One witness appears to be more independent, and familiar with the petitioner through his work rather than through

close collaboration. [REDACTED] an associate professor at the University of New South Wales, Australia, states:

I have been following [the petitioner's] work since I first heard about it three years ago at the meeting of the International Society for Cryobiology. [The petitioner] won the prestigious Crystal Award for the best student presentation to the meeting of that society. . . .

[The petitioner's] doctoral work is of truly outstanding quality. It includes a major discovery about the way in which certain chemicals reduce the damage produced by freezing in biological tissues and some other biomaterials. The breakthrough is definitely his own work, and has far reaching consequences in the fields of tissue preservation and biomolecule preservation.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted additional witness letters and documentation showing that the petitioner has accepted a job offer from Inhale Therapeutic Systems, and that another company, Advanced Drug Delivery Technologies, had expressed an interest in interviewing the petitioner. David Lechuga-Ballesteros, technical leader of the Solid State Research Group at Inhale Therapeutic Systems, Inc., states:

[The petitioner] is one of the very few applicants with relevant experience to fulfill the requirements of the Scientist position he will be filling in, which entails the formulation and characterization of dry powders for inhalation to deliver biological products of clinical relevance into the human body through the lung. . . .

[The petitioner's] work on the physicochemical analysis of water-induced instability of pharmaceutical formulations marks the state of the art in our field. In a recent manuscript published in the Journal of Pharmaceutical Sciences, he has provided the theoretical basis to further advance our current understanding of the mechanism responsible for the inherent physicochemical instability of glassy formulation (the type found in dry powder formulations for inhalation). His analysis has provided the pharmaceutical scientist with an experimental tool to readily screen out successful formulation of a new generation of pharmaceuticals, which are under vigorous investigation by leading drug delivery companies such as Inhale.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director states that the petitioner has amply established the overall importance of his field of endeavor, and that "the petitioner has played an important role in the research activities undertaken both at the University of Wisconsin and, prospectively, at Inhale Therapeutic Systems, Inc. However, . . . it has not been demonstrated why the labor certification process is inappropriate in this case." The director, responding to repeated statements regarding the reputations of the universities that the petitioner had attended, asserted that the petitioner's educational background does not inherently justify a waiver. The director found that "[t]he

petitioner appears to be at an early stage of his research career” and that the petitioner’s achievements do not appear to exceed those of others in the specialty.

On appeal, the petitioner asserts that his “achievement exceeds the majority of those in his field” and that his position at Inhale “is not an entry level [position], and the petitioner is not in [an] early stage of [his] career.” The petitioner asserts that he “has worked more than ten years in his field.” At the time he filed the petition, every position he had ever held was at a university, tied to ongoing graduate education or postdoctoral training.

The petitioner argues that his educational background should carry significant weight, because he studied at “top United States universities, with top scientists,” and therefore possesses better training than U.S. workers who had trained at lesser institutions. This argument is not persuasive. An alien does not serve the national interest by virtue of having attended a prestigious university. While such an education may provide an excellent foundation for future accomplishments, it is those accomplishments, rather than the path leading to them, that establish the extent to which the alien benefits the national interest.

The petitioner’s academic performance, prizes, high salary and other such information may support a claim of exceptional ability. Nevertheless, a plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one’s field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement.

Similarly, the argument that demand exists for the petitioner’s services suggests that a labor certification could be obtained via a U.S. employer. The petitioner has in fact documented a job offer from Inhale, which he accepted. The existence of one or more job offers is not a strong argument in favor of waiving the job offer requirement.

A new letter from Professor George Zografí accompanies the appeal. The letter, for the most part, repeats Prof. Zografí’s earlier letter, with new sentences added to each of the last two paragraphs. The new passages read:

His research on the stabilization of proteins in the solid state has had a major impact on our ability to produce the important group of protein drugs prepared for use in pharmacogenomics, the application of genetic materials to drug therapy. In all aspects of cryobiology and cryopreservation, [the petitioner] sits at the cutting edge as a productive scientist at the top of his field. . . .

In this regard, I am pleased to see that Inhale Therapeutic Systems, a major innovator in the use of proteins for therapeutic uses, has recognized [the petitioner’s] accomplishments and has offered him a position as a research scientist. As a consultant to this company, I see Inhale Therapeutic Systems as having a major impact in drug therapy because of having people of [the petitioner’s] quality on their scientific staff.

The record does not demonstrate the extent to which the petitioner's innovations and discoveries have affected research and drug development outside of the universities and companies that have employed him. The record contains no published material discussing the petitioner's work in depth, nor does the record show that the petitioner's own published articles are heavily cited by others in the field. We cannot, therefore, conclude that the sincere opinions of those close to the petitioner are shared by a significant number of researchers outside of that circle. Some of the petitioner's assertions, such as references to eventual cures for AIDS and cancer, appear to be entirely speculative and hypothetical; the record contains no evidence that the petitioner's work has led to effective drugs that fight those deadly diseases, nor does the record show that Inhale is pursuing the development of such agents.

While the record contains numerous references to international recognition earned by the petitioner, the record contains little primary evidence to establish the extent or depth of such recognition. A number of letters from outside the United States are from the petitioner's former collaborators. The relocation of these individuals outside the U.S. does not confer international recognition. We note Joe Wolfe's prediction of "far-reaching consequences" resulting from the petitioner's research, but the record does not establish that these consequences have so far been manifest in further research findings, nor does the record make entirely clear exactly what those consequences are.

In sum, while the petitioner has conducted original work that has earned the sincere praise of his superiors and collaborators, the record contains minimal evidence that the petitioner's overall impact has exceeded that of others in the same research specialty. By statute, exceptional ability in an important field is not grounds for an automatic waiver of the job offer requirement.

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 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, 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 a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.