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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

File: EAC 99 149 50456 Office: Vermont Service Center Date:

11 DEC 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

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 an alien of exceptional ability. The petitioner seeks employment as a research associate at Regeneron Pharmaceuticals, 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 had 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 petitioner holds an M.S. degree in Biochemistry from the Ohio State University. 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 petitioner claims eligibility as an alien of exceptional ability. Because she qualifies as an advanced-degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner. 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, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

Counsel credits the petitioner with "significant discoveries and accomplishments, which had shed new light on possible new and better treatments for diabetes and associated illnesses." Counsel asserts that the petitioner's "accomplishments were recognized . . . all over the world."

Pharmaceutical research against diabetes is of obvious intrinsic merit and national scope. At issue is whether this petitioner's contributions to such research reach a level that distinguishes her from others in the field to an extent that justifies a waiver of the job offer requirement.

Counsel asserts that the petitioner's work at Regeneron "has in fact changed the manner in which the scientific community approaches the study of diabetes," and that the petitioner is one of those rare researchers who has "been able to refocus the entire research community based upon their findings." If true, these statements would provide strong support for the waiver request. Of course, if the petitioner truly has had an impact on "the entire research community" "all over the world," then evidence of this impact should be readily available outside of the institutions where she has worked or studied. The assertions of collaborators and mentors, while valuable in their place, cannot constitute first-hand evidence of the petitioner's influence on those who are not her collaborators and mentors. Widespread influence on the field can best be demonstrated by persuasive, independent evidence, such as heavy citation of the petitioner's published works; statements from established researchers at a variety of institutions; and official endorsements of the petitioner's work by top officials of recognized national organizations.

Along with documentation pertaining to Regeneron, the petitioner submits several witness letters. Dr. Stanley J. Weigand, director of Neural and Endocrine Biology at Regeneron Pharmaceuticals, Inc., states that the petitioner "has already made several significant contributions to our research programs, particularly in her studies of diabetes." Dr. Weigand continues:

[The petitioner], as chief contributor, and her colleagues demonstrated that Brain Derived Neurotrophic Factor (BDNF) improves blood glucose control in obese diabetic mice, and discovered several, apparently novel mechanisms through which BDNF might act to achieve this result. These findings have opened an entirely new approach to understanding and treatment of diabetes. [The petitioner] and her colleagues are presently engaged in an intensive effort to understand the causes of diabetes as well as the mechanisms by which BDNF and other naturally occurring neurotrophic factors act to reverse impairments in glucose and insulin homeostasis as well as fat and carbohydrate metabolism which characterize this disease.

Dr. Vivien Wong, staff scientist at Regeneron, states:

Our research has found that administration of the neurotrophic factors Brain Derived Neurotrophic Factor (BDNF) or AXOKINE normalized glucose metabolism and insulin sensitivity in diabetic animals; thus, arresting the progression of the disease.

Dr. Wong states, with little elaboration, that the petitioner is a critical participant in ongoing studies of BDNF and Axokine.

Dr. Husam Abu-Soud, a staff scientist at the Cleveland Clinic Foundation where the petitioner worked as a research associate in 1996 and 1997, states:

[The petitioner] made major contributions toward understanding the Structure-Function relationship in Domain I of Elongation Factor G (EF-G) which is an important translational factor in protein synthesis. . . . [S]he has made excellent progress in answering fundamental questions on the structure-function relationships of nitric oxide synthase (NOS). This enzyme plays [a] critical role in the nervous system, cardiovascular diseases, and cancer growth. [The petitioner] has characterized the active site of nitric oxide synthase . . . [and] developed the optimal purification condition for the endothelial nitric oxide synthase . . . by using ion-exchange column. This is a novel method for simplified eNOS purification. . . . [The petitioner's] enthusiastic work has led to elucidate a comprehensive kinetic model for the functional enzyme and possible development of highly selective inhibitors that may help many diseases in USA.

Most of the witnesses are associated with Regeneron or other entities where the petitioner has worked or studied. The most independent witness appears to be Dr. C. Yan Cheng, senior scientist at the Population Council Center for Biomedical Research, who began to follow the petitioner's research after encountering her work at a 1998 professional conference. Dr. Cheng states:

The area of research [the petitioner] has focused upon is the mechanism of Axokine and BDNF lowering blood glucose level in diabetic mice model. . . . The research results have made a successful progress in the project. . . . Her recent analysis has shown that Axokine significantly stimulates the STAT3 phosphorylation in liver [sic] and fat in diabetic mice. Under the direction of her discovery, I believe that the pathway of activation and signaling of Axokine and BDNF in diabetic animal[s] will be completed in the near future. As the initial clinical trial has planned for Axokine, there will be a new world for the treatment of diabetes and its complications.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but noted that while some witnesses state that the petitioner has already made significant contributions, others appear to state only that the petitioner may prove capable of such contributions in the future. In response, the petitioner has submitted further reference letters.

Dr. Lin Wang, a research assistant professor at Yale University, states:

I have no institutional relationship with [the petitioner] and our personal relationship is rather limited. However, my knowledge of [the petitioner's] work has come from our professional interaction at conferences and my subsequent

following-up of her research. What impressed me most about [the petitioner] and easily separated her from others in her field, is her solid scientific background and her highly interesting work at Regeneron. . . .

Regeneron Pharmaceuticals is currently conducting a clinical trial of AXOKINE for the treatment of type II diabetes in obese patients. The interim data for the AXOKINE phase I study demonstrated that AXOKINE is well tolerated at low doses. In this double-blind safety study, the treated patients lost weight and had decreased blood glucose. . . .

[The petitioner's] research directly focuses on elucidating the mechanism of the treatment. . . . [H]er superb experimental skills have made research breakthroughs possible. . . . [The petitioner] has identified a series of protein transduction pathways and gene expression targets of AXOKINE and BDNF. . . . This work represents major progress in the understanding of the mechanism of Type II diabetes and will have a lasting impact in this field.

Other witnesses, some with no demonstrated connection to the petitioner, assert that the petitioner is a key researcher in Regeneron's studies of Axokine and BDNF. Dr. Mark Sleeman of Regeneron asserts that labor certification is inappropriate because the petitioner's talents and achievements far exceed the minimum requirements for the position sought, and research would benefit far more from the petitioner's continued work than from the efforts of a minimally qualified replacement.

The director denied the petition, stating that the levels of praise expressed in the witness letters cover a "wide range" and thus demonstrate a lack of consensus. The director added that "a team of bright and well-educated scientists . . . are bound to [produce] successes of one degree or another. However, we do not feel that every step forward in medical research warrants the granting of a national interest waiver."

On appeal, counsel asserts that the director misinterpreted the witness letters, and selectively quoted them to exaggerate the appearance of disagreement regarding the significance of the petitioner's work. Counsel maintains that, when viewed in context, the letters show unanimous and emphatic support for the importance of the petitioner's work and the significance of her individual contribution.

The petitioner submits another letter on appeal. Dr. Mingzhong Zhu, whose only connection with the petitioner appears to be an encounter at a professional meeting, echoes previous assertions that the petitioner "is one of the main investigators in research of BDNF and Axokine." Dr. Zhu states:

It was previously thought that BDNF lower[ed] the non-fasted blood glucose levels by decreasing food intake. However, [the petitioner's] findings have established a new insight of understanding the mechanism of the action of BDNF. . . .

[H]er work is unique, original and has already been shown to be significant in understanding how BDNF and Axokine stimulat[e] the pathways that suppress food intake and alter blood glucose level in diabetic animal models.

Praise for the petitioner's individual contribution is not limited to the universities where she studied, or to the pharmaceutical company where she works (and which has an undeniable vested interest in the expeditious availability of drugs it has developed). Statements from a variety of sources, some with little direct connection to the petitioner apart from a shared area of research interest, attest that the petitioner's work is more than a merely incremental addition to the general body of knowledge. The witnesses of record have shown that they view the petitioner's work to be a significant advance in our understanding of diabetes, and thus of our ability to treat it. Certainly, the witnesses vary in the degree of detail in their letters, but none of the letters appear to be ambivalent or "lukewarm" in their support of the petition. They uniformly assert that the Axokine/BDNF project is of particular significance, and that the project benefits greatly from the special skills that the petitioner brings to her work, well beyond the minimum requirements that could be considered in the context of a labor certification.

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 above testimony, and further testimony in the record, establishes that the medical research 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 which 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, 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.