



U.S. Department of Justice

Immigration and Naturalization Service

B5
Public Copy

OFFICE OF ADMINISTRATIVE APPEALS
225 Eye Street N.W.
4th Floor
Washington, D.C. 20536



File: EAC 99 077 50897 Office: Vermont Service Center Date: DEC 17 2001

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:
[Redacted]

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 dismissed.

We note that, while the record shows that the petitioner has been represented by counsel and there is no evidence that counsel has withdrawn his representation of the petitioner, there is no indication that counsel was involved in preparing or filing the appeal.

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 seeks employment as a postdoctoral researcher at Pennsylvania State University ("Penn State"). 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 director did not dispute that the petitioner qualifies as 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, 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 states:

[The petitioner] is a biomedical researcher with a specialty in cardiovascular disease and nutrition. Her research on the effects of trace elements on cardiac health has received a great deal of attention from the medical community and has

important implications for understanding and eventually treating cardiac disease.

Along with copies of her published research work and other documentation of her efforts, including a number of awards, the petitioner submits several witness letters. Penn State Professor Penny M. Kris-Etherton states:

[The petitioner] is presently working with me on different projects related to coronary risk factors. . . . She is very knowledgeable about coronary risk factors and the role of nutrition in the modification of risk factor status. . . . The results of her work on atherosclerosis and trace elements are exciting. . . . Her work may play a role in the recommendation of new guidelines for optimal health. . . .

[The petitioner] has demonstrated that she is an innovative and productive scientist with outstanding career potential. . . . Because of her many significant contributions that she has made to the field already, she has all the attributes necessary to make further important contributions to our understanding of the role of nutrition in the prevention and treatment of Cardiovascular Disease.

Professor C. Channa Reddy, also at Penn State, asserts that the petitioner's "findings are important for filling in the information gaps we face regarding trace elements in cardiovascular disease," and that the petitioner's "present work on LDL oxidation and phytonutrients will open a new avenue in cardiac research for the prevention of atherosclerosis, acute myocardial infarction, etc." Prof. Reddy adds that the petitioner's "research contributions for cardiovascular disease prevention are highly appreciated by the scientific community around the world."

Several other witnesses state that the petitioner's work studying the link between trace elements and cardiovascular disease is significant and important. These witnesses, for the most part, participated in training the petitioner; therefore, while their statements have weight, those statements are not direct, first-hand evidence that the petitioner's contributions are recognized as significant outside of the institutions where she has studied.

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 arguments from counsel. Counsel devotes some of these arguments to disputing the soundness of Matter of New York State Dept. of Transportation, but it remains that the decision is a published precedent, and therefore it is binding on the director; the director's compulsory reliance on published precedent cannot reasonably be viewed as Service error.

Counsel observes that the petitioner holds a postdoctoral position, which is by nature temporary and therefore not amenable to labor certification. This assertion, however, begs the question of why permanent immigration benefits are necessary for the petitioner to hold a temporary position. The petitioner's desire to obtain permanent resident status before the academic community considers her to be sufficiently trained for permanent employment is not a national interest issue. The outcome of the waiver request must rest primarily on the petitioner's work rather than on the transitory details of her current employment situation.

With regard to the petitioner's work, counsel states:

[The petitioner's] research on the correlation between micro-nutrients and cardiac health, and the scientific methodology associated with her research, has been the subject of considerable attention. The Petitioner's research and findings have contributed to an understanding of the fundamental causes of CVD and provide clues for the discovery of new approaches for reducing the incidence of such diseases.

Several Penn State faculty members describe the petitioner's ongoing projects in which the petitioner seeks to find links between diet and cardiovascular disease. Dr. Naman Ahluwalia, an assistant professor at Penn State, states for example that the petitioner's "work on L-arginine and its significance in the diet was well appreciated by many food industries." The significance of this statement is difficult to evaluate because of the use of vague terms such as "well appreciated," and because Dr. Ahluwalia has not identified the "many food industries," let alone provided documentation from them.

All but one of the letters are from faculty members of universities where the petitioner has studied or worked; the remaining letter is from an official of a private company with whom the petitioner has collaborated. The testimony of these individuals cannot directly establish that the petitioner's work has attracted serious interest outside of those who have taught, supervised, and worked with her. The record shows that the petitioner has published her findings, but this in itself does not establish the scientific community's reaction to those publications.

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers

publication of one's work to be "expected," even among postdoctoral researchers who have not yet begun "a full-time academic and/or research career."

The director denied the petition, stating that while the petitioner is working in a meritorious area of research, the record does not show that the petitioner has already shown accomplishments that distinguish her work from that of other researchers in the same specialty.

On appeal, the petitioner asserts that her "current work on cardiac biomarkers will open a new avenue in cardiovascular nutrition to combat the heart disease. The current research is definitely a break through to prevent heart disease in the United States." While the petitioner and her mentors are surely sincere in their opinions regarding the petitioner's work, the record contains no direct evidence to show that those opinions are shared by researchers who have not been directly involved with her training. The petitioner claims "significant recognition in the scientific community," but the only evidence she cites to support this assertion is the previously submitted "exhibit I," consisting entirely of letters from the petitioner's own collaborators, mentors, and former professors.

The petitioner lists her accomplishments, such as awards she received at professional gatherings. Many of these claims could 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, an alien's exceptional ability is not *prima facie* evidence of eligibility for a national interest waiver of the job offer requirement.

The petitioner states "I am getting job offers in academic institutions . . . but they are asking national interest waivers for the position." The existence of multiple job offers cannot reasonably be considered a strong argument in favor of waiving the job offer requirement, particularly when those employers are unwilling to assist the petitioner in securing permanent resident status.

The petitioner submits copies of correspondence from researchers at various institutions worldwide, requesting copies of the petitioner's published work. Although several of these requests came years before the petition's filing, the record contains no evidence that any of these requests led ultimately to published citations of the petitioner's work. In the absence of such citations, we are unable to determine if the requests reflect interest in this particular petitioner's work, or merely the fact

that the other researchers share a common area of interest with the petitioner and seek to examine the work of others in the field.

The record shows that the petitioner is a skilled researcher in an important field, and that those who have worked with her hold her achievements in high regard. We cannot, however, determine from the record that the petitioner's work has had a more significant effect overall than that of other competent researchers who work in the same specialty. The petitioner's arguments on appeal to the effect that a job offer waiver would simplify her own search for permanent employment do not establish a national interest issue. Crucial claims have no objective, independent support. While the petitioner is at the threshold of what could be a promising career, the waiver request appears to be premature at best.

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.