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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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File: EAC-99-066-50012

Office: Vermont Service Center

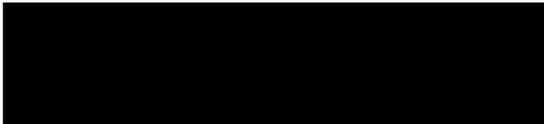
Date: DEC 19 2001

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:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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.

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 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 a Master's degree in Microbiology from South Dakota 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 remaining issue 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.

On appeal, counsel states that the intent of Congress and the "essence" of immigration legislation is:

Any person qualified to engage in a profession in the United States should, in and of itself, be the basis for exemption from the requirement of a job offer based on national interest, and cause a loss to U.S. leadership in the science and technology [fields].

By law, advanced-degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. Section 203(b)(2)(B) of the Act states that the job offer requirement "may" be waived when it is in the national interest to do so. The very existence of a job offer waiver underscores the existence of the underlying job offer requirement, and the plain wording of the statute amply demonstrates that Congress did not, in fact, intend for every alien member of the professions holding an advanced degree to be exempt from the job offer/labor certification requirement.

A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that Congress intended that the job offer requirement should never be enforced, counsel argues in effect that the section of the statute creating the job offer requirement would have no purpose or meaningful effect.

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.

As acknowledged by the director, the petitioner seeks employment in an area of intrinsic merit, biomedical research, and the proposed benefits of her work, new treatments for cancer, would be national in scope. It remains, then to determine whether the petitioner has established that she will benefit the United States to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Matter of New York State Dept. of Transportation, *supra*, note 6.

Noting that the petitioner had published only one article at the time of filing, had not received a significant number of requests for reprints, and had not submitted evidence of the article's being widely cited, the director determined that the petitioner had not demonstrated a track record of success that would provide a strong assurance of future benefit to the United States.

On appeal, counsel relies heavily on the statements of the petitioner's references, most of whom are colleagues or collaborators of the petitioner or her supervisor.

Dr. Mary Sugrue, the petitioner's supervisor at Mount Sinai Medical Center, writes:

One specific project in which the petitioner has played a major role required her to learn to use confocal microscopy, which is a very specialized skill in cell biology that usually takes many months-year to master competency. [The petitioner], however, was able to learn this highly technical skill and become a true master of this area in a matter of weeks! This work has culminated in [the petitioner] being second author on an extremely significant paper entitled "Reduced Mitochondrial Membrane Potential in p53-induced Senescence: Evidence for Altered Responsiveness of a Mitochondrial Membrane Megachannel," which we recently submitted to a premier journal in the field of cancer, namely *Cancer Research*, the official journal of the American Association for Cancer Research. In this recent paper, we showed the first evidence for decreased mitochondrial membrane potential in senescent cells. Thus, we have discovered a common pathway between two different growth arrest pathways, which now can be strategically targeted to selectively force cancer cells to stop growing or die. This discovery represents a real breakthrough in the understanding of how cells decide to die vs. to grow without control (i.e. cancer) and therefore, has significant implications with respect to cancer treatment.

Another project in which [the petitioner] plays a key role is entitled "Isolation of Tumor Suppressor Genes in Rhabdomyosarcoma[.]" This project is funded by the National Cancer Institute. Rhabdomyosarcoma is an embryonal tumor of childhood which arises from primitive skeletal muscle-forming cells know[n] as rhabdomyoblasts. The identification of new tumor suppressor genes has been hindered by the limited number of available techniques. Our goal is to identify tumor suppressor genes in rhabdomyosarcoma using a modified functional expression cloning method. [The petitioner's] extensive background in molecular biology and her high quality technical skills make her the ideal individual to carry out this work. Currently, she is working on the first specific aim of this grant, namely the construction of a normal human DNA library in an inducible expression cloning vector. Based on her preliminary work on this project, I expect that we will make timely contributions to understanding the molecular basis of rhabdomyosarcoma, which should translate ultimately in substantially improve[d] existing methods to diagnose and treat this pediatric cancer.

In a subsequent letter, Dr. Sugrue writes that the petitioner is a key member of her research team, whose unique background elevates her above others meeting the minimum qualifications for the job. Frederick J. Suchy, Chairman of Pediatrics at Mount Sinai Medical Center, where the petitioner is currently employed, writes:

Since joining our department, [the petitioner] has made great progress in her research with Dr. Sugrue, which focuses on understanding the molecular basis for how cancer cells decide to continue growing vs. to die. As a reflection of her intelligence, perseverance, and outstanding research potential, [the petitioner], together with Dr. Sugrue and colleagues, have recently submitted a manuscript to a leading cancer journal that I believe will have wide impact on the field of cancer research. This is an outstanding accomplishment for [the petitioner] and clearly demonstrates her potential for future outstanding achievements in research.

Dr. Sam W. Lee, an assistant professor of medicine at Harvard Medical School, indicates that he knows the petitioner through his (Dr. Lee's) collaboration with Dr. Sugrue. Dr. Lee writes:

[The petitioner], although early in her career, has already made significant contributions to cancer research. Specifically, she showed that p53-induced senescence is associated with a specific decrease in mitochondrial membrane potential in tumor cells. This is a very exciting result given that a decrease in mitochondrial membrane potential is a critical initiator of programmed cell death (apoptosis), an important mechanism of killing tumor cells. Moreover, [the petitioner] has also made an important observation that this decrease in mitochondrial membrane potential appears to be differentially regulated in senescence compared to that in apoptosis. Therefore, these findings represent a major discovery because they reveal a potential method for selectively targeting cancer cells to either cell death or senescence (a form of permanent growth arrest).

These original results obtained by [the petitioner] and her colleagues provide the basis for developing new methods of cancer treatment.

Dr. William G. Tatton, another collaborator of Dr. Sugrue, writes:

Much work has been done to investigate possible mechanisms of p53-induced apoptosis, but relatively little work has addressed the equally important question of how p53 induces senescence. Our recent studies have provided the first evidence that apoptosis in degenerative neurons depends on mitochondrial signals. Specifically, a fall in mitochondrial membrane potential was shown to be a critical early event in apoptosis. Decreased mitochondria membrane potential induces opening of a mitochondrial permeability transition pore, which leads to the release of mitochondrial factors that initiate cell apoptosis.

[The petitioner] has taken the major responsibility in our collaborative research showing that a decrease in mitochondrial membrane potential is also a feature of p53-induced senescence in tumor cells. This novel demonstration has resulted in the recognition of a new mechanism for cell again, one which is different from apoptosis. This exciting finding was submitted as a manuscript to Cancer Research, which is a leading journal in the cancer field. [The petitioner's] significant contribution to this work has earned her being listed as second author on this ground-breaking paper. The work which [the petitioner] accomplished for this project required having strong molecular/cell biology experience and excellent skills in using highly specialized laboratory equipment, including epifluorescence microscopes and laser confocal microscopes. Furthermore, [the petitioner] has demonstrated outstanding computer skills, which are vital for the data analysis in her research.

Dr. Barbara M. Aufiero, a biologist at Walter Reed Army Institute for Research who knew the petitioner personally while working at Mount Sinai Medical Center writes that the petitioner and her colleagues "have made a major contribution in the field of the tumor suppressor gene, p53."

Dr. Fang Liao, a senior scientist at ImClone Systems, Inc., praises the petitioner's project at Mount Sinai Medical Center but fails to indicate how he became aware of the petitioner's work there or whether it has influenced his own work.

The petitioner's advisor for her Master's thesis at South Dakota State University, Dr. Carl Westby, writes of the petitioner's thesis:

[The petitioner] was the first to demonstrate the presence of an obesity gene in pigs. This work was funded by USDA . . . and was accepted for publication in a recognized national journal, . . . and will be published soon. She identified the presence of one section (exon) of the obesity gene in this important livestock animal. This was breakthrough work because nobody had identified this gene in

pigs before that. The results have tremendous ramifications in agriculture and human health. Hog breeding decisions in the future can hopefully be made so that the "lean form" of this gene is passed along to progeny and the "fat form" is avoided. This will provide pork that is less fatty and better nutritionally for the meat eating public. Since this same gene is also found in humans, medical decisions can be made in individuals with obesity potential to forestall some of the damaging effects of obesity.

While the petitioner's thesis research may have practical applications, it can be argued that any thesis, in order to be accepted, must offer new and useful information to the pool of knowledge. The petitioner and, on appeal, counsel, repeatedly emphasize that the petitioner's thesis constituted original work which had never been done before. The director acknowledged that the petitioner's research is original, and we concur. The petitioner's field, however, like most science, is research-driven, and there would be little point in publishing research which did not add to the general pool of knowledge in the field. A petitioner must demonstrate that her research is groundbreaking, with far-reaching implications. It is not clear that her thesis is particularly groundbreaking. The comments of the reviewer for publication indicates that the petitioner's thesis, "reports a partial sequence of porcine agouti gene *similar to those already reported in other animals.*" (Emphasis added.) In addition, as discussed below, the record does not reveal that this research has been cited or otherwise utilized by independent researchers.

On May 24, 1999, the director requested additional evidence from the petitioner, stating:

It is reasonable to expect that substantial documentation for [sic] well known United States experts, established institutions, and appropriate United States governmental agencies, who are *clearly independent of the beneficiary*, would be readily available if the exemption of the job offer is realistically in the "national interest" of the United States.

(Underlining in original, italics added.) In response, the petitioner submitted several new letters.

Dr. Ying Huang, a biologist at the National Institute on Aging, National Institutes of Health, indicates that he had a post-doctoral fellowship at Mount Sinai Medical Center where he met the petitioner's supervisor, Dr. Sugrue. While Dr. Huang praises the petitioner's work at Mount Sinai, echoing the sentiments quoted above, he is not independent of the petitioner. Moreover, it does not appear that his opinion reflects the official endorsement of the National Institutes of Health.

Dr. Serge Przedborski, a professor at Columbia University, appears to have no professional relationship with the petitioner. He provides a general summary of the petitioner's research discussed above, stating:

[The petitioner's research on p53-induced senescence] may be a breakthrough finding in cancer research which has the potential to lead to the development of

alternative cancer treatments, particularly for tumors that do not respond to apoptosis-based treatments.

. . . [The petitioner's] research may contribute to the development of therapies aimed at the induction of senescence in tumor cells.

. . . [The petitioner's recent] work may contribute to our understanding of [Huntington's and Parkinson's] diseases.

Dr. Przedborski merely indicates that the petitioner's work has potential. He does not indicate that the petitioner has influenced his own research or that she has influenced her field as a whole.

Dr. Gertrude Pfaffenbach, a scientific advisor at a law firm, writes that she was asked to review the petitioner's work and provide a recommendation. She states that the petitioner gained significant experience while earning her Master's degree and that she made "important discoveries" and participated in "exciting work," at Mount Sinai. Once again, Dr. Pfaffenbach fails to explain how the petitioner has influenced her field as a whole. Specifically, she has not explained how other, independent cancer researchers have been influenced or taken a new direction in light of the petitioner's findings. It is also noted that Dr. Pfaffenbach lists on her resume that she taught at Mount Sinai in 1990 and 1992, suggesting she may have a professional connection to the petitioner or her coworkers.

The new references, especially Dr. Przedborski, the most independent expert to provide a reference letter, do not demonstrate that the petitioner has influenced her field. Rather, they support the director's conclusion that it was too early to determine the impact of the petitioner's work on the cancer research community. Thus, counsel's argument that the director's conclusion in this regard was "an arbitrary conclusion not based on the facts," is not persuasive.

On appeal, counsel also notes that the petitioner has published articles which have attracted requests for reprints. At the time of filing, the petitioner's thesis had been recently published and her research at Mount Sinai had been accepted for publication. 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 researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that, contrary to counsel's assertion on appeal that a "distinguishing" factor is publication in top scientific journals, publication of scholarly articles is not automatically evidence of influential contributions. We must consider the research community's reaction to those articles.

The record contains three requests for reprint for the petitioner's thesis and no evidence of citations. Three requests for a reprint, where the requester is simply demonstrating curiosity in the article and may not have even read it yet, is not evidence that the petitioner has influenced her field as a whole. While Dr. Sugrue asserts that she expects the petitioner's work at Mount Sinai to be "widely cited," the petitioner must demonstrate that she had already influenced her field at the time of filing. As the article presenting the petitioner's research at Mount Sinai had not yet been published, the petitioner can not demonstrate the community's reaction to it. It is acknowledged that on appeal, the petitioner submits numerous requests for reprints of the article. These requests, sent to Dr. Sugrue after the petition was filed, is not evidence that the petitioner had influenced her field at the time of filing. Moreover, as stated above, requests for reprints, while noteworthy, are not necessarily evidence that the article was groundbreaking and influential. It remains to be seen whether these researchers will find the articles useful to their own research and cite it in their own articles. One published article which had not been cited at all at the time of filing is simply not evidence that the petitioner had influenced her field as a whole.

In her response to the director's request for additional documentation, the petitioner noted that her work has resulted in a renewed grant for Mount Sinai. While the petitioner's research is no doubt of value, it can be argued that any research must be shown to present some benefit if it is to receive funding and attention from the scientific community.

On appeal, counsel notes the petitioner's membership in professional organizations. The record does not reflect that the membership requirements for these organizations is such that membership is evidence that the petitioner is more influential than others in her field. Moreover, membership in professional organizations is merely one criterion of the exceptional ability classification, a classification normally requiring a labor certification. Thus, we cannot say that evidence relating to one criterion of that category is evidence that a waiver of the labor certification process is warranted in the national interest.

Finally, counsel provides several arguments as to why the labor certification process itself would be detrimental to the national interest.

First, counsel argues the labor certification process would be an "obvious disadvantage" for the petitioner as it would mix her with "many other relatively less qualified applicants." Counsel characterizes the process as "unfair" to the petitioner and "risky" to the cancer research field. Counsel does not adequately defend these assertions. Counsel's arguments that the petitioner's work requires "sophisticated skills" and that "research consistency" is important are not persuasive. An employer can list the necessary job skills on an application for a labor certification. Moreover, as stated above, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. Nor do we find that the Service should waive the labor certification requirement for every researcher simply because the project on which they began work as a nonimmigrant requires "consistency."

Counsel's second argument seems to contradict her first argument, asserting that the labor certification process would restrict the petitioner's skills to her employer, whereas waiving the requirement would allow her skills to be applied nationwide. If research consistency is so important to the petitioner's current employer that it is in the national interest not to make them go through the labor certification process, it is not clear how allowing the petitioner the freedom to find other employment is also in the national interest.

Counsel's final argument that the labor certification process will disrupt the petitioner's concentration on her job is not persuasive. The labor certification process is the normal requirement for advanced degree professionals. A petitioner must demonstrate that her skills warrant a waiver of that process, not simply that it will be distressing for her to endure the process.

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. 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. Matter of New York State Dept. of Transportation, note 5. As discussed above, the petitioner has not demonstrated that she meets this 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, 8 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.