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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
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DEC 19 2001

File: EAC-99-036-53186 Office: Vermont Service Center

Date:

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 an alien of exceptional ability and 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 an alien of exceptional ability or 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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Master's degree in organic chemistry from the Shanghai Institute of Materia Medica. 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.

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 record establishes that the petitioner is working in an area of intrinsic merit (natural product chemistry) and the proposed benefits of his work (cancer prevention) is in the national interest.

Dr. Chi-Tang Ho, in whose laboratory the petitioner worked at Rutgers University, writes that the petitioner was the first to identify the anti-cancer, chemopreventive agents in blueberries, sage and thyme, discovering "18 new antioxidants, three new anticancer agents, and 6 new compounds from these two spices." In addition:

[The petitioner] successfully designed and synthesized 12 resveratrol derivatives, which show strong cancer chemoprevention activity. Now one compound MR-3 is in clinical study. This compound is the exact cancer chemopreventive agent and it even can recognize normal cells from cancer cells. We are preparing to apply [for] a patent for these compounds with Rockefeller University researchers.

Finally, Dr. Ho asserts that the petitioner was involved with research on the medicinal herb *Aster Lingulatus*, nonvolatile products from Maillard reaction, and the thermal degradation products of N-acetylglucosamine and carnosol.

Dr. Nitin T. Telang, Head of the Carcinogenesis and Prevention Laboratory affiliated with Cornell University, writes:

I have recently established a collaborative research program with [the petitioner] and Prof. Chi-Tang Ho to screen the new compounds isolated or synthesized in Prof. Ho's laboratory by [the petitioner.] From amongst several classes of compounds currently being tested in my model, bioactive structural analogues of a natural phytoalexin (Resveratrol) present in grapes exhibit exceptional promise as a new class of chemopreventive agents. These compounds have potent antioxidant and apoptosis inducing properties, and induce a strong inhibition of HER-2neu oncogene expression. Upon completion of preliminary screening in my model, promising agents will be rapidly entered into conventional preclinical and clinical trials on breast cancer patients. During our collaboration, I have had several occasions to interact with [the petitioner.] He has provided ample evidence for an outstanding technical competence in the areas of natural produce chemistry, pharmacognosy, pharmacology and modern analytical methods. His wide experience in isolation, purification and identification of natural products represents a major technical strength of our collaboration.

Edmond J. LaVoie, a professor at Rutgers University, indicates that he co-authored two articles with the petitioner and that the petitioner's "research efforts, insights, and ability to problem solve were the principal factors that gave rise to the data presented in these manuscripts."

Voldemar Madis, Vice Chairman of Madis Botanicals, Inc. indicates that his company has collaborated with Dr. Ho's laboratory and writes:

[The petitioner] is the principal researcher working on a very important and promising nutraceutical project which is supported by grants from the New Jersey Government. The research goal is to study the cancer chemoprevention activity of American dietary fruits and spices and to try to try to isolate and structurally elucidate anticancer and antioxidative components. This project could significantly improve health care in the United States.

Dr. Mou-Tuan Huang, the Director of Biochemistry at Rutgers University; Dr. Geetha Ghai, the Assistant Director; Dr. Chung Yang, the Associate Chairman of the Chemical Biology Department at Rutgers University; and Dr. Nobuji Nakatani, a professor at Osaka City University who has collaborated with Dr. Ho reiterate much of the information quoted above. Dr. Ghai adds that the petitioner also played a key role isolating and purifying tea polyphenols for a joint project to elucidate the inhibitory mechanisms of tea against carcinogenesis. Robert T. Rosen, a member of the petitioner's thesis committee indicates that the petitioner published 10 papers while a graduate student at Rutgers, "many times more publications than any other student who has been in the graduate program."

Professor Aina Lao of the Shanghai Institute of Materia Medica writes:

[The petitioner's] project here was "[S]tudies on the chemical components of *Acorus tatarinowii* Scott[.]" This plant is a traditional medicinal herb and has been used as medicine in China for hundreds of years, but the chemical components are unknown and we wanted to know the bioactive compounds of this plant. [The petitioner] showed his remarkable talents and great research capability, he did an excellent job here. He isolated 25 compounds, three new alkaloids showed strong bioactivity when they were tested in [the] Lab of [the] Department of Pharmacology. Now together with [the petitioner] and Dr. Xichan Tang, I am applying [for] a patent for these new alkaloids. In addition, [the petitioner] also published two papers [in] Chinese Chemical [L]etters, the leading journal of Chinese chemical research when he stayed in my lab.

The director concluded that the petitioner had not demonstrated greater achievements than other researchers evaluating antioxidants. The director questioned whether the benefits of antioxidants had been established.

While the petitioner fails to submit evidence firmly demonstrating the acceptance by the medical community of the importance of antioxidants in preventing cancer, counsel argues that the petitioner's work, which led to a degree from Rutgers University and was published by American Chemical Society journals, cannot be dismissed as merely speculative. It appears that the area of chemopreventive foods is studied at prestigious university labs and that the petitioner's work has been published in mainstream journals. Thus, this general area of research cannot be characterized as entirely speculative.

Counsel's remaining arguments regarding the petitioner's contributions to this area of research are not as persuasive. Counsel argues that the petitioner's role as a "leader in the group of one of the top five research teams in natural products research in the world," and the petitioner's publication of articles in leading journals is sufficient to establish that his work could not be duplicated by an available U.S. worker with the same minimum qualifications.

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. The reference letters are all from professors, colleagues, and collaborators. While such letters are useful in detailing the specifics of the petitioner's research and his role in collaborations, they cannot, by themselves, establish that the petitioner has influenced his field as a whole. New letters submitted on appeal fail to provide evidence of independent evaluation of the petitioner's work. Dr. Yu Shao, who praises the petitioner's work, indicates that the petitioner "is engaged into our company's research project" at Whitehall-Robins Healthcare. The remaining letters are from Rutgers faculty.

On appeal, the petitioner submits copies of his 20 articles, most of which have been published, many of which are only a few pages long. While the number of articles is noteworthy, five of the

articles are on sage, and three of the articles are on thyme, suggesting that the petitioner published several articles on different parts of the same research project. 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 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 no evidence that the petitioner's articles have been cited by independent researchers, or even that they have been cited at all.

The petitioner also submits evidence that he was one of ten finalists in the Food Chemistry Division's Graduate Poster Paper Competition at Florida State University. There is no evidence of whether he won this competition or letters from independent researchers attesting to how this poster presentation influenced their own research.

Finally, the petitioner submits evidence that he has applied for a U.S. patent. It is not clear that everyone who holds a patent for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. Matter of New York State Dept. of Transportation, *supra*, note 7. The patent application reveals that the invention is an analog of resveratrol, a natural compound in grapes known to have chemopreventive attributes. There is no evidence, however, from independent experts evaluating the importance of a resveratrol analog in preventing cancer or explaining how this invention has influenced the field of natural products chemistry. A patent merely certifies an invention or process as original. Finally, as the patent had yet to be approved at the time of filing or even at the time the appeal was filed, the petitioner cannot demonstrate that his invention has been utilized nationwide or influenced his field as a whole.

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.