

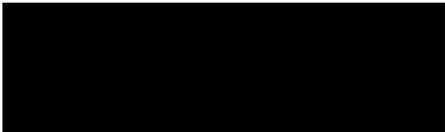


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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

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prevent clearly unwarranted
invasion of personal privacy



File: EAC-99-179-51871 Office: Vermont Service Center

Date: DEC 19 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:



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 Ph.D. in biochemistry from the Novosibirsk Institute of Bioorganic Chemistry, Siberian Division of Academy of Sciences. 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.

The petitioner works in an area of intrinsic merit (medical research) and the proposed benefit of her work, new treatment for diabetes, is in the national interest. 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.

Dr. William Benjamin, a professor at State University of New York (SUNY) Stony Brook where the petitioner is currently working, writes:

At our institution, [the petitioner's] research has opened up a whole new understanding of the role [that] an important enzyme in intermediary metabolism plays in the hormone and dietary regulation of fatty acid and cholesterol synthesis (related to heart disease and stroke) and glucose synthesis in the liver (related to Diabetes Mellitus). Before [the petitioner's] new findings the enzyme (ATP:citrate lyase) that she has extensively studied was not thought to be involved in the regulation of lipid and glucose synthesis. Her new scientific findings will be used in the near future by the pharmaceutical and biotechnology industries to design new drugs to regulate this enzyme to affect glucose and lipid levels to the significant benefit to our people and to control health costs. . . .

What makes [the petitioner's] current technical skills somewhat unique is that she has elected to apply her modern molecular biology skills to problems in intermediary metabolism in man. Thus, her effort[s] have direct relevance to human disease. Many scientists with her skills have applied their scientific knowledge to problems in genetics and cell division with direct relevance to cancer biology. However, there is a need in our country for scientists with interest in Diabetes Mellitus and heart and blood vessel disease who have accumulated a sufficient base of knowledge in the most advanced forms of molecular biology to ask cogent questions about these problems and to apply their modern scientific skills to them.

In a subsequent letter, Dr. Benjamin reiterates that the petitioner was solely responsible for the research she published.

Dr. Peter R. Brink, Chair of the Department of Physiology and Biophysics at SUNY Stony Brook also asserts that the petitioner's work with ATP:citrate lyase "is of great importance to the pharmaceutical industry and will result in the production of new and hopefully useful drugs for the treatment of Diabetes and related disorders." Dr. Leon C. Moore and Dr. M. Raafat El-Maghrabi, professors at SUNY Stony Brook, provide similar information.

Dr. Srinivas N. Pentylala, another professor at SUNY Stony Brook summarizes the petitioner's research in Russia, asserting that "her publications are cited by many of the researchers working in the field of molecular biology and set a standard of excellence in this area." Dr. Pentylala asserts that this history was the basis for inviting the petitioner to work at SUNY Stony Brook. Dr. Pentylala then discusses the petitioner's work at Stony Brook reiterating the information quoted above.

In response to a request for additional evidence, the petitioner submitted another letter from SUNY Stony Brook staff. Dr. Craig Malbon, the Vice Dean for Scientific Affairs at Stony Brook, writes:

[The petitioner] is a recognized expert in the area of insulin action, having made the seminal observation that insulin action involves protein phosphorylation. [The petitioner] was recruited to my laboratory to provide to us the expertise in protein chemistry and the affinity-labeling of enzymes. The basis of diabetes and its cure are locked in the intracellular signaling networks involving cascades of enzymes, termed protein kinases. The central thrust of our \$1.6M grant award from the National Institute of Diabetes, Digestive, and Kidney Diseases of the National Institutes of Health is to identify the protein kinases and their temporal regulation in normal and diabetic states. This goal has been formidable due to the large numbers of kinases believed to be involved in the signaling of insulin. To address this task we are relying upon [the petitioner] to apply her unique skill in affinity labeling of proteins to identify the specific kinases activated and the temporal sequence of activation in normal and diabetic states. Use of affinity

labels for study of protein structure requires considerable knowledge of chemistry and physical chemistry at the post-graduate level. [The petitioner's] training in chemistry and physics is unsurpassed and her specific expertise is significantly beyond her peers and perhaps among the best in the world. Thus, [the petitioner's] contributions and role in this major NIH-funded project is essential.

Dr. Olga I. Lavrik, Chief of the Laboratory of the Institute of Bioorganic Chemistry in Russia, discusses the petitioner's research prior to coming to the United States:

I know [the petitioner] from the time when she was a doctoral student in my laboratory of Bioorganic Chemistry of Enzymes of the Novosibirsk Institute of Bioorganic Chemistry. [The petitioner] was involved in the study of the mechanism of DNA replication catalyzed with DNA-dependent DNA polymerases. She investigated the interaction of E. coli K12 fragments of DNA polymerase I and human DNA polymerase alpha with deoxynucleoside-5'-triphosphates. [The petitioner] published several very excellent and well-received first-author articles on these subjects in [a] prestigious Russian scientific journal called *Molekuliarnaia Biologiia*. She is what would ordinarily be considered the first-author of these articles since the research was hers. The authors of papers in this journal are listed alphabetically according to the Russian alphabet, but I can confirm, as the laboratory supervisor, that [the petitioner] would be named as the first-author of these papers if they had been published in journals outside Russia. In addition, she co-authored a book chapter with me entitled "Affinity Labeling of DNA polymerases" which appeared in a book, which I co-edited which was published by Nova Science Publishers, Inc. in New York. The book was entitled Chemical Modifications of Enzymes.

Following the granting of her Ph.D. in 1990, [the petitioner] went on in her career to become a very skilled biochemist and an outstanding molecular biologist. From 1990 until 1997 she was a research scientist in my laboratory, where she also demonstrated her ability to teach diploma students. [The petitioner] was a member of [the] Organizing Committee of [the] French-Russian meeting on Gene Expression, which took place in Novosibirsk, Russia in 1995.

Dr. Armand Tavitian, Director Emeritus at the National Institute of Health and Medical Research (INSERM) in France indicates that he began following the petitioner's work when INSERM cooperated with the Institute of Bioorganic Chemistry in Russia. Dr. Tavitian also indicated that he met the petitioner at a meeting in Russia in 1995. Dr. Tavitian provides the following general praise:

[The petitioner] has a good background and a strong training in the fields of Biochemistry, Cellular and Molecular Biology; she was an asset to her laboratory and a real expert in many techniques and procedures in the field of gene

transcription; she has already demonstrated, in the U.S., her scientific abilities by being quite productive in her present host laboratory.

Dr. Serguei N. Vladimirov, a research associate at the University of Pennsylvania who worked with the petitioner in Novosibirsk, provides information similar to that already quoted above and general praise of the petitioner's work.

Dr. Michel Philippe, a professor at the Université de Rennes, indicates that he has known the petitioner for "a long time," that he met the petitioner at the French-Russian meeting discussed above, and that he was impressed by the quality of the petitioner's work.

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. The above letters are all from professors, colleagues, and collaborators. While these letters are important in demonstrating the details of the petitioner's research and her role in the laboratory, they cannot, by themselves, demonstrate that the petitioner has influenced her field as a whole. Some of the assertions in the letters, that the petitioner's research is of interest to the pharmaceutical and biotechnology industries and that the petitioner's articles have been frequently cited, are not supported by the record. Specifically, the record contains no letters from any pharmaceutical or biotechnology company expressing interest in the petitioner's work. In addition, as will be discussed below, the evidence of citation is minimal.

On appeal, counsel states that the director ignored the opinions of independent experts in the form of their comments on the petitioner's submission to *Biochemistry*. The first reviewer states:

The paper is important because it nicely resolves a long standing controversy. While there are still aspects of the control mechanisms that remain unclear (critically, the role of glucogen synthase kinase-3 phosphorylation), this paper represents a major step forward and merits publication.

The second reviewer summarizes the petitioner's improved methods for examining ATP:citrate lyase and concludes the article is suitable for publication.

The article reviewed, however, was only accepted for publication on November 23, 1999. As it had not been published as of the date of filing, the petitioner cannot demonstrate that this article has influenced her field as a whole. For example, the petitioner is unable to demonstrate that the article had already been widely cited at the time of filing. Nor are the comments evidence of the significance of the petitioner's research on ATP:citrate lyase. It can be argued that the petitioner's field, 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. Thus, that the reviewers found

the petitioner's work original enough for publication is not evidence that her research is groundbreaking or will have a longer lasting impact than other published research.

On appeal, counsel argues that the director failed to give sufficient consideration to the petitioner's published articles. At the time of filing, the petitioner had authored eight articles and one book chapter. 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 petitioner submitted evidence that her 1985 article published in *Genetika* has been cited once and her 1990 article published in *Febs Letters* has been cited twice, once as a self-citation by co-author Gregory A. Nevinsky. While self-citation is a normal, expected practice, it is not evidence of influence in the field. The citation of two articles by one independent researcher each is not evidence that the petitioner has influenced her field or that she has a track record of groundbreaking achievements.

The book publisher advertises Chemical Modification of Enzymes as a "significant" book which presents "contributions dealing with methods of chemical modification of enzymes." The record contains no evidence, however, that the petitioner's chapter in this book has been cited or other evidence of its influence.

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.