

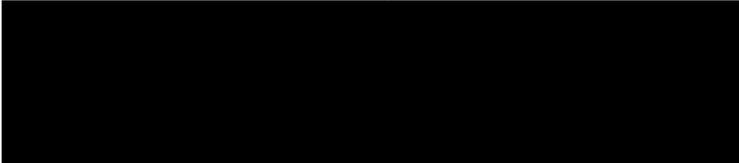


U.S. Department of Justice

Immigration and Naturalization Service

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Public Copy

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



File:



Office: Nebraska Service Center

Date:

DEC 21 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:

Self-represented

**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, Nebraska 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 to classify the beneficiary 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 is a university which seeks to employ the beneficiary as a postdoctoral research associate. 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 beneficiary 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 beneficiary holds a Ph.D. degree in Plant Physiology from the petitioning university. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a 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.

Two officials of the petitioning institution describe the beneficiary's work in a joint letter. Professor Clarence A. Ryan and Dr. Michael L. Kahn, acting director of the petitioner's Institute of Biological Chemistry, state:

The major goals of the research program in which [the beneficiary] works . . . are to investigate the regulation of synthesis of defensive proteins in plants that are induced by predator and pathogen attacks. . . . A variety of plant- and pathogen-derived chemical molecules which act as signals that

can initiate a defense response in plants have been identified and characterized in our laboratory. Elucidating the biochemistry and cell biology of this signaling pathway is the main focus of current research. The application of this knowledge to improve crop production and to understand ecological systems is a major goal of our program.

[The petitioner's] research has focused on understanding the fundamental biochemical events that are involved in plants to mount defenses against pests and pathogens. For the first time, he has identified a key enzyme in tomato leaves that regulates the signaling pathway that activates genes . . . that defend the plants against further insect and pathogen attacks. This enzyme is activated by a signal called systemin, that is produced at sites of pest attacks. [The petitioner] is the only scientist in the world who has reported this finding, which appears to be key to the understanding of biochemical events regulating many defense and developmental processes in plants. . . .

[The petitioner's] results will soon be published in the Proceedings of the National Academy of Science, one of the premier, broad coverage journals in the world. Many laboratories throughout the U.S. and the world are working on induced plant defense. However, none of these labs has yet taken the research to the level achieved by [the petitioner] in understanding the biochemistry within plant cells that is triggered by the signals generated at the attack sites. . . .

[The petitioner is] at the cutting edge of plant biology research and far ahead of peers working throughout the world on this defense system. He continues to push back the frontier of the knowledge of a system that holds exceptional promise to improve U.S. agriculture.

The forthcoming article mentioned above would not be the beneficiary's first to appear in the Proceedings of the National Academy of Sciences; that prestigious journal carried an article co-written by the beneficiary in 1989. The beneficiary's work has also appeared in Plant Physiology and other journals. The beneficiary has also written a popular (i.e., non-technical) article in Agricultura de las Américas regarding biotechnological research. We note that the very act of publication does not inherently qualify the beneficiary for a waiver, but it does provide a forum through which other researchers can learn of the beneficiary's work. Evidence that the beneficiary's publications have significantly influenced others in the field would provide strong support for a waiver application.

In addition to copies of the beneficiary's published articles and other documentation pertaining to the beneficiary's field, the

petitioner submits several witness letters. All of these witnesses are tied to the beneficiary, primarily through having worked or studied alongside the beneficiary under Prof. Ryan at the petitioning university. The witnesses discuss the beneficiary's work with plant defenses (already described in Prof. Ryan's and Dr. Kahn's letter) but their statements directly establish only that the beneficiary's former collaborators have followed his research.¹

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 copies of previously submitted documents and a new joint letter from Professor Clarence Ryan and Dr. Norman G. Lewis, director of the petitioner's Institute of Biological Chemistry (having replaced acting director Dr. Michael Kahn). Prof. Ryan and Dr. Lewis argue persuasively to establish the intrinsic merit and national scope of the beneficiary's work.

The two authors argue that the beneficiary's past experience and accomplishments justify expectations of future benefit to the national interest. The petitioner's initial submission and response to the director's notice, however, do not consistently establish that the scientific community outside of the petitioning university, and those with ties thereto, view the beneficiary's work as being of markedly greater importance than that of others in the field. Prof. Ryan and Dr. Lewis make other assertions which they repeat on appeal, and which we shall address in that context.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary's work, but finding that the petitioner has not shown that "the beneficiary's contributions have influenced the field to a substantially greater extent than those of other qualified researchers."

On appeal, Prof. Ryan and Dr. Lewis repeat their prior assertion that the beneficiary "is the only scientist in the world who has reported a major finding" regarding the tomato plant's chemical response to attack. Given that a principal purpose of scientific reporting is to reveal new findings and new information, it would appear that many if not most new findings are reported only once; after they are reported, there is nothing novel in reporting the same finding over again (except perhaps in instances where a controversial finding is replicated independently). The petitioner has not submitted any evidence to show that the majority of reported findings are redundant duplications of already-announced

¹To emphasize this conclusion, a number of witnesses assert that they no longer study the beneficiary's area of interest (indeed, one witness has become a patent attorney), but they continue to follow his work.

findings, or that it is in any way unusual for a novel finding to be reported only once. Thus, the approval of the petition does not rest on the assertion that the beneficiary was the first to report a particular finding.

Prof. Ryan and Dr. Lewis observe that they cannot obtain a labor certification for the beneficiary because a labor certification requires a permanent job offer, and the petitioner seeks only to employ the beneficiary on a temporary basis. That being the case, the question naturally arises as to why the beneficiary requires permanent immigration benefits to hold a temporary position. For this reason, the temporary nature of the position is not, itself, a strong factor in favor of granting the waiver (but neither is it an immediately disqualifying factor).

Prof. Ryan and Dr. Lewis argue that the evidence clearly elevates the beneficiary above others in his field. For instance, they assert that the beneficiary succeeded in isolating chemicals which Prof. Ryan's previous charges had failed to do, and they contend that the beneficiary's published articles and conference presentations "greatly exceed those of similarly trained scientists of his age."

Much of the evidence submitted on appeal deals with the overall importance of the beneficiary's specialty, without distinguishing the beneficiary from others in the same area of expertise. While this evidence speaks to the intrinsic merit of the occupation, the director had already acknowledged that the petitioner had satisfied this prong of the national interest test.

Several new letters accompany the appeal. As with the initial letters, these letters are from faculty members of the petitioning university and the beneficiary's former collaborators. While we do not dispute the expertise of these witnesses (three of whom are members of the highly prestigious National Academy of Sciences), because they are directly connected with the beneficiary, their statements cannot provide first-hand evidence that the beneficiary's work is highly regarded by researchers with no direct connection to the beneficiary.

The most persuasive direct evidence submitted on appeal is a printout from the Science Citation Index, showing that eight of the beneficiary's articles have been cited a total of 302 times, with 173 of those citations pertaining to a single article (the aforementioned 1989 article published in the Proceedings of the National Academy of Sciences). There are 70 citations of the five works for which the beneficiary is the first named author; the most-cited of these articles is a 1995 article from Planta, with 23 citations. In light of these figures it is difficult to conclude that the beneficiary's work has not gained the sustained attention of other researchers in the field. This documentation provides

concrete support for the claim that the petitioner is widely respected as an important figure in his field, whose past achievements are an indication of future contributions to come.

The petitioner, for whatever reason, had not provided this information to the director prior to the denial of the petition. While the director's decision appears to have been defensible in light of the record as it stood at the time of the denial, the objective evidence submitted on appeal provides empirical support for the oft-expressed claim that the beneficiary's work has been influential throughout the field. The heavy citation of his publications supports the assertion that the beneficiary's work is of greater importance than that of his peers.

The petitioner has since submitted copies of further published articles by the beneficiary. Consideration of this evidence is entirely discretionary, because the petitioner was instructed to explain, in advance, why there is good cause to accept a supplementary submission more than 30 days after the filing of the appeal. In this instance, the initial appeal made no mention at all of any future supplement. We will briefly note that the new articles confirm that the beneficiary remains active in his field, investigating and disseminating new information.

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 scientific community recognizes the significance of this beneficiary'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.