



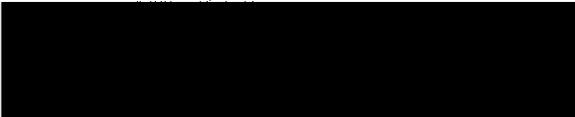
U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC 99 032 53541 Office: Vermont 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:



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.

The director denied the petition on July 20, 1999. On August 23, 1999, the petitioner filed a motion to reopen and reconsider with the Vermont Service Center. On January 7, 2000, after granting the motion to reopen, the director affirmed the denial of the petition.

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 Health and Finance Management from Johns Hopkins University. The director did not contest that the petitioner's occupation falls within the pertinent regulatory definition of a profession. The director acknowledged that the petitioner 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.

Counsel describes how the petitioner will serve the national interest:

The [petitioner's] education, experience, and future career plans in the area of promoting economic development between the United States and the international community, particularly India, in the area of healthcare, pharmaceuticals and patent protection are of substantial intrinsic benefit to the national interest of the United States.

The petitioner submits several witness letters. Professor Padmanabhan Nair, Senior Scientist in the Agricultural Research Service of the United States Department of Agriculture and Adjunct Professor at Johns Hopkins University, states:

[The petitioner] has been involved in examining the policies of the production and marketing of pharmaceuticals which are relevant for international trade in general and U.S. interests in particular. His work in this area is unique, and has a high impact on the economics of health care delivery. His knowledge of India and other developing countries has been a distinct advantage in his work in this country enabling him to draw conclusions based on a wide perspective.

* * *

His work related to the pharmaceutical sector, at the Harvard School of Public Health and the John Hopkins University has given him considerable insight into this very important component of the health care market and also allowed him to develop quantitative skills of a very high order. He has been making important contributions to a new and ambitious international project initiated by the Johns Hopkins University to establish an Asian Institute of Public Health in India. This center will be part of a global network in public health extending preventative medicines to millions of citizens in Asia. This is part of a stated strategy enunciated by the President and members of his administration to establish centers of excellence for the surveillance and control of communicable diseases. As we move forwards to the implementation of this project, I expect [the petitioner's] experience and training will be an invaluable asset to Johns Hopkins.

Professor Richard Frank of Harvard Medical School states:

I previously taught at Johns Hopkins University, which is where I became acquainted with [the petitioner]. He has a unique grasp of the dynamics of the pharmaceutical industry in India. His research on the relationship between patent policy and pricing is important and increasingly a matter of global economic policy under WTO. He has also examined the cost structure of the industry and generated findings about optimal size of pharmaceutical firms.

John Norris, J.D., M.B.A., of Harvard University, states:

[The petitioner] is one of my most capable former Harvard Students. [The petitioner] has worked closely with me during his tenure at Harvard and subsequent to his graduation.

* * *

Without ready access to an India-based joint venture partner, the services of a U.S.-based individual, such as [the petitioner], who has detailed knowledge of the Indian healthcare and healthcare-technology markets, and applicable Indian laws and regulations- as well as similarly detailed knowledge of the U.S. healthcare and healthcare-technology industries- becomes critical to these investors. [The petitioner's] background makes him an ideal candidate to assist U.S. companies and other U.S. interests with their efforts at entering the rapidly growing and changing Indian healthcare and healthcare-technology markets.

* * *

In sum, from my personal experience in working closely with [the petitioner], I know that he is fully conversant with the healthcare and healthcare technology markets in both the U.S. and in India. In addition, I know that he has an in-depth knowledge of issues relating to health insurance and patent protection- the understanding of which is critical to the success of businesses in the healthcare and healthcare-technology industries.

Professor Mathuram Santosham of Johns Hopkins University states:

[The petitioner] has the distinct advantage of doctoral preparation in health care economics and vast experience with the Indian bureaucracy as a senior member of the Administrative Service. With the exploding global economy and the economic interdependence that fosters, individuals like [the petitioner] will be crucial to U.S. competitiveness in the international marketplace. Their insider's perspective will allow the United States to play on a level field in international commerce.

Professor Laura Morlock of Johns Hopkins University states:

[The petitioner] has the background and skills that will be needed to facilitate the entry of U.S. firms into Indian markets and to assist in the creation of cooperative ventures between the two countries. [The petitioner] has an in-depth knowledge of health care financing and delivery issues, including the healthcare technology markets, in both the U.S. and India. Most recently he has completed an important analysis of the price dynamics in pharmaceutical markets in India under various patent arrangements. His background also includes considerable experience in the Indian public sector as a senior member of the Indian Administrative Service. His knowledge of public services and agencies will be a valuable asset as the Indian government plays and increasingly important role in regulating the private health care market and the emerging health insurance market.

Professor David Salkever of Johns Hopkins University states:

[The petitioner] has carried out important studies relating to price dynamics in pharmaceutical markets in India under differing and changing patent arrangements. His work on defining and measuring economies of scale also has important implications for assessing government policies to promote small-scale manufacture. His work in these areas have important implications for the emerging global pharmaceutical market.

Anthony Bower, Director of Pricing and Economic Analysis at SmithKline Beecham Pharmaceuticals, states:

[The petitioner] has been hired by us as a consultant to help us with pricing some of our new products that are due to be launched very soon. His background and training in this area has been of great value to us. In particular, his work relating to effects of entry on pricing behavior and effects of price control mechanisms are of great use to us as we try to formulate our entry and pricing strategies in many countries where some form of price control regime exists. He is helping to direct, and is solely responsible for, the execution of an innovative project for SmithKline Beecham: collecting large, available data resources in one place so that he can perform complex analyses to understand pricing behavior in global markets.

The petitioner also submits a letter from Thomas Croghan, M.D., of Eli Lilly and Company, complimenting the petitioner on his thesis on pricing behavior. Doctor Croghan mentions the thesis was provided to him by Professor Salkever of Johns Hopkins. Doctor Croghan states: "With Dr. Salkever's permission, I have taken the liberty of sharing the abstract of your work with my colleagues in International Pricing and in Public Policy Planning and Development at Lilly."

In another letter, Sudhakar Rao, an economic minister serving at the Indian Embassy in the United States, requests a conference or seminar highlighting the investment opportunities that are available in India for United States investors.

I am writing to you to propose that both as a means of enhancing further cooperation between India and the U.S. in the health and related sectors, and as one of the events to commemorate the 50th anniversary of India's independence, a seminar to address comprehensively the various issues covering the health matters be organized by Johns Hopkins.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, the petitioner has submitted arguments from counsel and two additional letters.

Counsel argues persuasively that the petitioner's field possesses substantial intrinsic merit, and that, the petitioner's work is, by nature, national in scope because of the universal applicability of the petitioner's research regarding price control regulations and the pharmaceutical industry in emerging markets.

Kevin Rigby of Roche Pharmaceuticals describes the petitioner's involvement in consulting projects at Roche.

[The petitioner] has been assisting Roche Laboratories, Inc. with our pricing and contracting operations. His analytical skills related to the pharmaceutical industry and particularly the area of pricing, has been valuable to us in many ways and his background in pricing and law is a unique combination that places him in a position to continue to make contributions in the future.

Jack Mycka of Roche Pharmaceuticals states:

[The petitioner's] statistical expertise as it applies to pharmaceuticals is key to him leading the development of a model that would help correlate the various performance parameters of our contracting and pricing initiatives. The project when implemented will have a major impact, as it would bring about substantial qualitative and quantitative improvements in the information that we use to design and refine appropriate contracting and pricing strategies as well as in tracking performance.

The director denied the petition, stating the petitioner failed to establish that "it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position available to United States workers."

On August 23, 1999, the petitioner filed a motion to reopen and reconsider the director's decision. In support of the motion, the petitioner has submitted three additional letters and arguments from counsel.

Counsel argues persuasively that the petitioner's field possesses substantial intrinsic merit. In regards to whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, counsel states that the petitioner's "contribution is in a field where very little empirical work has been done." Counsel indicates that the full potential of the petitioner's work "is going to become more and more important as the crisis in the healthcare industry becomes more and more acute with the increase in the number of seniors becoming dependent on Medicaid and Medicare." Counsel also argues as to the practical importance of the petitioner's work in the pricing of pharmaceuticals as it relates to product accessibility.

In his second letter, Professor David Salkever of Johns Hopkins University states:

[The petitioner's] thesis research dealt with the critically important subject of the price of prescription pharmaceuticals. He developed an innovative model to explore the effects of regulating prices of some pharmaceuticals on the costs of non-related drugs. His research demonstrated that adverse "spill-over" effects have in fact occurred. The important implication of this finding is that strategies to contain health care costs by selectively regulating pharmaceutical prices will be undermined by unintended adverse "spill-over" effects.

* * *

Another project which [the petitioner] and I jointly pursued concerned the factors that determine long-term disability claims rates among covered workers in the U.S. This research has generated important findings for public policy, including

evidence that Federal practices in administering Social Security Disability benefits have economic impacts on the costs of long-term disability benefits for private-sector employers. A paper on which [the petitioner] was a joint author with me has been produced from this work and is currently being reviewed for publication in a major international health policy research journal.

Professor Kenneth Clarkson of the University of Miami states:

I have been working closely with [the petitioner] and others at Roche on methods to monitor price changes in order to insure drug availability for current users and funding for new products. [The petitioner's] previous analysis and current research, as well as his understanding of pharmaceutical pricing and availability to integrate alternative regulations within the overall public policy goals, will be extremely important in identifying the best solutions for solving the pharmaceutical industry's portion of the Nation's health care dilemma.

Professor E.M. Kolassa of the University of Mississippi also asserts his confidence in the petitioner's knowledge and abilities. Professor Kolassa serves as an advisor to Roche Pharmaceuticals and "participated in the interviewing process that brought [the petitioner] to Roche." Professor Kolassa describes the petitioner as possessing a "unique set of talents and interests not seen in others" and discusses the usefulness of the petitioner's understanding of healthcare markets and government policies.

The letters submitted by the petitioner are primarily from faculty members and colleagues at universities and companies where petitioner has studied or worked. Many of these individuals say little apart from briefly describing the petitioner's work and asserting that the petitioner is knowledgeable in the areas of pharmaceutical pricing and healthcare markets. A number of these witnesses assert their confidence in the future significance of the petitioner's work, but provide minimal evidence of his accomplishments having a significant impact on these industries.

The testimonial letters submitted demonstrate that the petitioner's expertise makes him a valuable asset to the team at Roche Pharmaceuticals, but the record does not indicate that he is responsible for especially significant progress in his field. The petitioner has not established that his research, to date, has consistently attracted significant attention outside of the universities and companies where he has conducted pricing research. The witnesses provided by the petitioner are former professors, co-workers, or collaborators on the petitioner's projects. The petitioner's skills and familiarity with different aspects of pharmaceutical pricing and health care markets, while useful to his research institutions, does not appear to represent a national interest issue.

According to some of the witness letters, the petitioner has written or co-authored research papers related to his field of endeavor. The petitioner, however, has failed to provide evidence that these works have been published in professional magazines or trade journals. 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the petitioner's work.

Counsel argues persuasively that the petitioner's field possesses substantial intrinsic merit. In regards to whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, counsel states that the petitioner's "contribution is in a field where very little empirical work has been done." Counsel indicates that the full potential of the petitioner's work "is going to become more and more important as the crisis in the healthcare industry becomes more and more acute with the increase in the number of seniors becoming dependent on Medicaid and Medicare." Counsel also argues as to the practical importance of the petitioner's work in the pricing of pharmaceuticals as it relates to product accessibility. As noted earlier, the petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit.

On January 7, 2000, after granting the motion to reopen, the director affirmed the denial of the petition stating: "The documentation submitted does not indicate that the beneficiary has made a significant contribution which has been widely adopted/accepted by others in the field."

On appeal, counsel states: "The Service erred in determining that the petitioner failed to establish that waiver of the labor certification process would be in the national interest." Counsel adds that "the Service failed to peruse the evidence on record" in determining whether the contributions of the beneficiary had been widely accepted by others in the field.

Counsel restates the petitioner's educational background and qualifications. Counsel refers to the petitioner's research at Johns Hopkins and his "development of a model to explore the effects of pharmaceutical price relation on the cost of non-related drugs." Counsel argues that the petitioner's "contribution is unique in that it is the only study of its kind, and it has been accepted for approval by eminent experts in the field and by the pharmaceutical industry." The record, however, does not support this conclusion. While the petitioner's research related to "spill-over" effects may be unique, there is no evidence his pricing model has earned a wider reputation outside of his co-workers, colleagues and educational institutions. The petitioner has failed to demonstrate he has attracted the attention of independent researchers or that his work has been

published in any major trade publications.

Counsel contends that "any research on the effects of pharmaceutical price control is an area likely to impact on the manner and way in which future legislation and public policy is going to be acted upon." This statement seems to contradict counsel's previous arguments regarding the petitioner as being the only individual uniquely qualified to conduct this type of research. Counsel also states: "The impact the appellant's work will have on pharmaceutical pricing would make pharmaceutical products available to a greater number of individuals at a more affordable cost." These conclusions are entirely speculative and unsupported by the record. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the "labor certification procedure would be improper for the position which the position is filed for, in that, the need for the appellant's expertise is immediate." The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. Congress plainly intended that, as a matter of course, advanced degree professionals should be subject to the job offer/ labor certification requirement. The national interest waiver is not merely an option to be exercised at the discretion of the alien or his employer. Rather, it is a special, added benefit which necessarily carries with it the additional burden of demonstrating that the alien's admission will serve the national interest of the United States. It cannot suffice for the petitioner to simply enumerate the potential benefits of his work. To hold otherwise would eliminate the job offer requirement altogether, except for advanced-degree professionals whose work was of no demonstrable benefit to anyone.

It should also be noted that H-1B nonimmigrant visas are available to postdoctoral researchers. The regulation at 8 C.F.R. 214.2(h)(16)(i) permits an alien to work under an H-1B visa while a visa petition or labor certification is pending. Therefore, the petitioner's continued participation in his research projects is obviously not contingent on his obtaining permanent resident status.

Counsel claims the Service has ignored the evidence as it relates to the petitioner's work and the impact it has on the health care industry. Counsel describes the petitioner as "not only the most competent in his field, but the only one who has done extensive research in this field." This statement from counsel is not supported by the record. The testimonial letters submitted generally discuss the impact that the petitioner and his methods "will," "would," and "should" have on the pharmaceutical industry in the future. While the witnesses are able to cite specific projects in which the petitioner has participated, there is no direct evidence to show the lasting or wide-ranging industry effect which the petitioner's work has had to this point. A pharmaceutical and health care consultant whose primary goal is to develop optimal pricing strategies for his current employer does not necessarily serve the interest of all other United States firms in the same markets. Certainly competition in the open market is favorable, but the national interest as

a whole is not served by ensuring that one particular United States corporation outperforms its competitors.

While the Service recognizes the importance of understanding the implications of pharmaceutical pricing controls, 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. We do not dispute that the petitioner's work has yielded original results at Johns Hopkins University, but any accredited university would require a doctoral candidate to perform original research.

The issue in this case is not whether pharmaceutical consulting services are in the national interest, but rather whether this particular petitioner, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role. There is no indication that researchers outside of the petitioner's universities and employers regard his work to be of greater significance than that of other researchers. Rather, many key witnesses have couched their remarks not in terms of what the petitioner has done, but what he is likely to achieve at some unspecified future point. While the petitioner certainly need not establish national fame as a researcher, the claim that his research is especially significant would benefit greatly from evidence that it has attracted significant attention outside of his research groups.

At issue is whether this petitioner's contributions in the pharmaceutical and health care industries are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in these fields, we must find that the petitioner's assertion of prospective national benefit is speculative 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.

ORDER: The appeal is dismissed.