



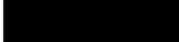
U.S. Department of Justice
Immigration and Naturalization Service

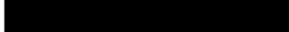
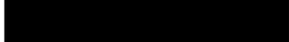
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



JUL 12 2001

File:  Office: Nebraska 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

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 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, Acting 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 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 Masters and Ph.D. degrees in food science and technology from Ohio 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.

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.

In support of the petition, the petitioner submitted her diplomas, background information newspaper articles, the cover pages of the petitioner's thesis and dissertation, a program for the annual BASF meeting listing the petitioner's presentation, a letter from the Associate Editor of Food Hydrocolloids accepting two of the petitioner's articles for publication, and several letters of reference. All but two of the letters are clearly from current or former Ohio State University professors or alumni who were students at the same time as the petitioner.

According to the record, the petitioner has been experimenting with hydrocolloids, including an allegedly unique system of analyzing them through electrophoresis, allowing for the differentiation between harmful hydrocolloids and natural ones. The research is relevant to the efficient preservation of foods by freezing them, the development of low-fat foods and the manufacture of pectin, especially for medicinal purposes. The petitioner, however, appears to be currently completing her post-doctoral research for Professor Michael E. Mangino on a whey protein processing project.

The director concluded that while the petitioner's field had substantial intrinsic merit, and that the proposed benefit would be national in scope, a waiver of the labor certification requirement is not in the national interest. The director noted that publications and presentations are inherent in the research profession, that the record contained no evidence the petitioner's articles had been evaluated by others, and that the letters did not establish that the petitioner's work was known and considered unique outside her circle of colleagues.

On appeal, counsel asserts that the letters from [redacted] staff and alumni are from leaders in the field and should not be discounted because they happen to know the petitioner.

Counsel further asserts that the citation by other researchers is significant because they would not have taken the time to read and cite the article if it were not important. Finally, counsel quotes extensively from several of the letters submitted previously, asserting that they confirm the petitioner's past and expected future contributions to the field of food preservation and the development of low-fat foods.

Counsel asserts:

[The petitioner's] study was responsible for the successful adoption of the milk cryoscope for freezing behavior study and for distinguishing the abilities of hydrocolloids in delaying ice crystal growth thereby assisting industry greatly in the field of quality improvements and preservation of frozen food products. This theory can also be applied in the medical area to preserve frozen tissue and cells without destruction of the body of the living cells. The special characteristics of hydrocolloids as a water binder can also be applied to low fat food products allowing for the retention of water when substituted for fat.

The record does not support all of these assertions, however. While the letters refer to the petitioner's research and its impact on the development of low-fat foods, there is no indication the petitioner's research led to the general adoption of the milk cryoscope for freezing behavior study or that the petitioner's research has any application to the preservation of frozen tissue and cells in the medical field.

Regarding the impact of the petitioner's research, [redacted] Ph.D., former professor at Ohio State and collaborator with the petitioner on her presentation at BASF, states that "her work has already appealed to the interest of many scientists in the field of food stability and who have contacted her about the details of her study." [redacted] refers to [redacted] a collaborator with [redacted] on a 1988 book, who also submits a letter of reference. In his letter, [redacted] states,

Since 1994, I had the privilege of knowing [the petitioner's] research in the area of hydrocolloid functionality in ice creams during which time she presented two and published another two papers. As a result of her studious research she had advanced the understanding on the mechanisms of how hydrocolloids help minimize the rate of ice crystal growth during the storage and distribution of frozen desserts. The learnings can be applied to an array of frozen foods where ice crystal growth is a major problem. She also advanced the electrophoresis method for analyzing hydrocolloid mixtures, and for differentiating those harmful, decomposed hydrocolloids in processed foods.

[redacted] does not indicate how he became aware of the petitioner's research or how her research has impacted his own area of research. While [redacted] asserts [redacted] became aware of the petitioner's research through her articles, [redacted] and [redacted] letters are both dated February 1998. As of that date, it is not clear that the petitioner had had any articles published. The letter accepting her articles for publication, dated January 26, 1998, indicated they would likely be

published in 1998. While the petitioner listed her thesis and dissertation as publications on her resume, the record contains no evidence that they were published in any journal, as opposed to simply being available upon request from the archives of Ohio State, as is common with graduate theses and dissertations.

If the petitioner's research had truly impacted how research in this area was conducted, it can be expected that the petitioner's work would be of particular interest to an interested government agency. The only letters in the record from a government agency are two letters from [REDACTED] at the Florida Department of Citrus. In his first letter, dated May 1, 1997, [REDACTED] indicates that he has known the petitioner since 1993 at Ohio State University and that her research skills "impressed many." In his second letter, dated February 6, 1998, [REDACTED] discussed the importance of pectin, how pectin can be extracted from citrus peels, and that the petitioner's method of distinguishing hydrocolloids "could serve as a sharp quality control procedure." There is no evidence that research is being conducted into whether or not the petitioner's method might be useful to the Florida citrus industry or that the petitioner is participating in such research. As stated above, the letter from [REDACTED] indicates the petitioner is currently performing research on whey proteins.

While we do not discount the letters from the petitioner's colleagues and professionals, letters from individuals who are personally acquainted with the petitioner's research should supplement evidence of the petitioner's notoriety beyond her current and former colleagues. As discussed above, the letters are nearly all from individuals who either worked with or attended school with the petitioner. The only exception, [REDACTED] provides little insight into the impact of the petitioner's research. In fact, as he asserts that the petitioner had two articles published, an assertion which is not supported by the record, his knowledge of the petitioner's research must be questioned.

In her decision, the director accepted that the petitioner's research has been cited by others and counsel asserts on appeal that such citations are evidence of the petitioner's impact on research in her field. The record, however, does not indicate that anyone has cited the petitioner's research. As discussed above, the record only contains evidence that the petitioner's articles were accepted for publication, not that they had actually been published as of the date of filing. The record contains no citation index or other evidence that the petitioner's research has been more heavily cited than other articles in the field.

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.