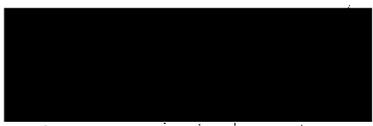




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U.S. Department of Justice
Immigration and Naturalization Service

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



Public Copy

JUN 6 2001

File: EAC 98 263 52375 Office: Vermont Service Center Date:

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: 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 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, 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. At the time he filed the Form I-140 petition, the petitioner was a postdoctoral research assistant at the University of Maryland Cancer Center. The petitioner has since relocated to the Karmanos Cancer Institute at Wayne State University. 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. degree in Medical Science from Hiroshima University, Japan. The petitioner's admission into a U.S. postdoctoral program indicates that competent authorities have accepted this degree as the equivalent of a doctorate from a U.S. institution. 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 application for a national interest waiver cannot be approved. The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the petitioner cannot be

considered for a waiver of the job offer requirement. We will consider the merits of the petitioner's national interest claim because the director's decision does not mention the absence of this required document.

The petitioner describes his past and present research work:

The main project of my doctoral research in Japan [was] to study the cellular membrane proteins in neurons and brain tumor cells. . . . This work has resulted in five papers in the world's leading journals. The findings I have made during these studies provided some important information to understand the roles of membrane transporter proteins in brain tumor and other neurological disorders.

My research work in USA was focused signal transduction in cancer cells, especially leukemia and breast cancer cells. During my stay [at the] University of Minnesota, I studied the role of some membrane proteins, like nucleoside transporters, in signal transduction in cancer cells. After [I] transferred to University of Maryland Cancer Center, I focused on retinoid-induced signal transduction and apoptosis in cancer cells and cloning of new retinoid receptor. . . .

Vitamin A (retinol) and its derivatives, the retinoids, are essential regulators of many biological events including cell growth and differentiation, development, homeostasis and carcinogenesis. They have proved to be cancer preventive and chemotherapeutic agents. . . . Apoptosis is a naturally occurring form of cell death. . . . The recent evidence has shown that retinoids can induce apoptosis in cancer cell lines. But unfortunately, some cell lines are resistant to the regular retinoids. We have found a novel retinoid 6-[3-(1-adamantyl)-4-hydroxyphenyl]-2-naphthalene carboxylic (CD437) which . . . induces apoptosis in cancer cell lines . . . which are totally resistant to the antiproliferative effects of all trans retinoic acid (tRA). . . . This novel retinoid shows promise as [a] novel direct therapeutic agent for the treatment of cancer. My research includes three projects: (1) CD437-induced signal transduction in cancer cells; (2) the mechanism of CD437-induced apoptosis in cancer cells; (3) cloning of a novel retinoid receptor for CD437. . . .

Initial studies attempting to characterize the CD437 receptor utilizing fraction on a G-100 Sephadex have revealed that the receptor is a 95 Kda monomeric protein, but is extremely unstable, with loss of activity upon storage or freezing the fractions. This instability will make purification of the receptor utilizing standard protein purification techniques extremely difficult. I am currently isolating the receptor using an alternative approach, ligand blotting. . . . Cloning

of the receptor will not only give us a new model for designing anticancer drugs, but also deepen our understanding of the mechanism of cancers.

Along with copies of his published research articles, the petitioner submits five letters from faculty members of the University of Maryland (UM) and Hiroshima University. Professor Joseph A. Fontana, then of UM, describes the petitioner's research¹ and asserts that the petitioner "is an accomplished and conscientious scientist whose research and application skills are effective and thorough. He has made notable contributions to cancer research." Other UM assistant professors and associate professors describe the petitioner's work in varying levels of technical detail.

Professor Shigenobu Nakamura, chairman of the Department of Internal Medicine at Hiroshima University School of Medicine, states that the petitioner "has made notable contributions to cancer research." Prof. Nakamura states "[t]he findings [the petitioner] has made during [his doctoral] studies provided some important information to understand the roles of membrane transporter proteins in brain tumor and other neurological disorders."

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 stated:

During the last nine months since I [submitted] the petition for [m] I-140, I have published or submitted three papers (*Exp. Cell Research*, *J. Neurol. Science* and *Cancer Research*). My work was selected and presented in the special symposium in the American Association for Cancer Research (AACR) meeting, April 10-14, 1999. Only a few very important works had a chance to present in the symposium.

In addition to copies of the above-mentioned articles, the petitioner submits two new letters. Prof. Fontana, now of the Karmanos Cancer Institute,² states:

¹Some of Prof. Fontana's language is identical, word for word, to passages in the petitioner's opening letter. Because Prof. Fontana's letter is dated two months earlier than the petitioner's letter, it appears that the petitioner copied the description of his work from Prof. Fontana's earlier letter.

²Prof. Fontana's relocation to the Karmanos Cancer Institute precipitated the petitioner's own move there.

[The petitioner] is now an established investigator in cancer research and has now developed expertise in cancer research. He has established techniques to examine the biological effects and potential therapeutic efficacy of a novel retinoid CD437 which his work helped discover. This compound led to the discovery of a new class of compounds which are now under development for the potential treatment of breast cancer as well as leukemia and potentially other malignancies as well. . . . [The petitioner's] work has led to the patenting of this compound and the interest of several pharmaceutical companies in the further development of this class of compound. . . .

[The petitioner's] vital role in the development of that unique class of retinoid compounds certainly emphasizes his importance to further research in this area in my laboratory and the importance of his research to the development of a new potential therapeutic agent in the treatment of cancer. It would be virtually impossible to overemphasize [the petitioner's] importance to the ongoing research in this area.

The other letter is from Dr. Arun K. Rishi, associate professor at the Karmanos Cancer Institute,³ who states:

My scientific interactions with [the petitioner] have been close and very fruitful. In our laboratory, [the petitioner] has successfully carried out some of the demanding scientific projects involving a very careful and accurate approach to science both at the intellectual as well as execution levels. . . . [The petitioner] has been successful in establishing state-of-the-art molecular biology and signal transduction techniques related to cancer research that was required in several of our research projects.

The director denied the petition, stating that the petitioner has established that he is a talented and productive researcher, but not that he offers any special benefit which his field is unlikely to see from a qualified U.S. worker. The director noted that simply listing the petitioner's achievements does not establish the importance of those achievements relative to those of other qualified researchers.

On appeal, the petitioner requests oral argument. Oral argument, however, is limited to cases where cause is shown. The petitioner must show that a case involves facts or issues of law which cannot be adequately addressed in writing. In this case, the petitioner has shown no cause for oral argument; the petitioner simply

³Dr. Rishi, like the petitioner, followed Prof. Fontana from UM to the Karmanos Cancer Institute.

expresses a desire to make his case in person. Consequently, the petitioner's request for oral argument is denied.

The petitioner discusses his research and states "I am confident that purification and cloning of this protein [CD437] will give researchers a new model to develop drugs against cancer, including leukemia, breast cancer and prostate cancer." The petitioner does not specify what progress had been made toward purifying this substance as of the petition's filing date in October 1998. The petitioner asserts that, once purified, CD437 may provide new cancer drugs; but there is no indication that the petitioner has yet purified this substance, let alone that any researcher has created even prototype drugs from it. The petitioner's personal expectations about what might, one day, arise from the study of CD437, provided certain conditions are eventually met, appear to amount essentially to informed speculation.

The petitioner's witnesses have all worked with him directly. There is no documentary evidence that the petitioner's work has attracted significant interest outside of his circle of mentors and collaborators. For instance, there is no evidence that other researchers have heavily cited his published work. Prof. Fontana has referred vaguely to interest within the pharmaceutical industry, but the record does not even identify the companies, let alone establish the level of interest expressed by them. In addition, we cannot determine from the record that pharmaceutical companies only take an interest in medical research of special significance. Likewise, the petitioner's claim that only "very important" works were chosen for oral rather than poster presentations at a 1999 symposium has no evidentiary support (such as documentation from the symposium's organizers, showing the criteria for selection of oral presentations).

Regarding the publication of the petitioner's work, we note that 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 was 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 postdoctoral work to be "expected," rather than a special mark of significance or recognition.

Cancer research, in the aggregate, is certainly important to the United States and to all nations. But the construction of the statute and regulations do not suggest that every qualified scientist engaging in cancer research qualifies for a national interest waiver. While the petitioner's work is clearly of value to Prof. Fontana's laboratory, there is no independent or objective evidence in the record to show that the petitioner's research is

inherently of greater value or importance than that of cancer researchers at other laboratories.

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.