



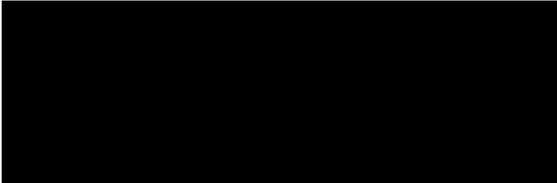
U.S. Department of Justice

Immigration and Naturalization Service

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FILED

OFFICE OF ADMINISTRATIVE APPEALS
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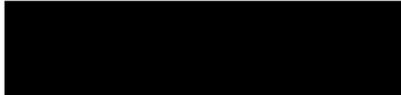


File: EAC-99-111-53209 Office: Vermont Service Center

Date:

NOV 14 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:



NOV 14 2001
U.S. DEPARTMENT OF JUSTICE
OFFICE OF PERSONAL IDENTITY

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 an alien of exceptional ability and 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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Master's degree in Biochemistry from the University of Hawaii. 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 is a biomedical researcher. This is an area of intrinsic merit and the *proposed* benefits of the petitioner's research would have a national impact. The remaining issue, then, is whether the petitioner will serve the national interest to a substantially greater degree than would an available worker with the same minimum qualifications.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. 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.

In his initial letter, David Lambright, an assistant professor at the University of Massachusetts, where the petitioner was studying for his Ph.D. at the time of filing, and member of the petitioner's Ph.D. thesis committee writes:

[The petitioner's] [research] proposal was outstanding and it became clear during his oral examination that he had not only a detailed and comprehensive knowledge of biochemistry but also an unusually broad perception of the entire field of Biomedical Sciences. Beyond this [the petitioner] has an aptitude for physics and mathematics that is well above the norm. Although such a combination of abilities is quite rare in the biological sciences, it is precisely what

is required for successful research in the field of structural biology. In addition, having obtained a Masters degree in Biochemistry and Biophysics from the University of Hawaii, [the petitioner] has a level of education and research experience beyond that of a typical graduate student at his stage. I would rank [the petitioner] amongst the top few percent of individuals I have known at his stage, including students at Stanford and Yale.

...

[The petitioner's] thesis research is the cornerstone of my laboratory's research on G protein signaling. He was primarily responsible for much of the preliminary data for and also had significant intellectual input into the development of the specific aims for my NIH grant. This grant was given a very high priority score (5th percentile) from the scientific review panel at the NIH, reflecting the quality and significance of the work that we are doing. [The petitioner] has proposed a novel hypothesis regarding the mechanism of G protein activation. In particular, he identified a potentially generally determinant by which exchange factors regulate the activation of G proteins. If correct, this would have important implications for the entire field of G protein signaling. To test his hypothesis he has developed a novel combination of molecular biological, biochemical and biophysical experiments. His unique multidisciplinary approach is extremely powerful and I expect that fundamental insights will emerge. As far as I am aware, [the petitioner] is the only scientist in the world who is taking such a multifaceted approach to the study of G proteins.

In a subsequent letter, Professor Lambright writes:

[The petitioner] has played a key role in solving and interpreting the high-resolution structure of Rab3a. This is the first crystal structure of Rab family protein and it reveals many unexpected insights. In particular, [the petitioner] has identified a novel mechanism of G-signaling. [The petitioner] presented his findings at the "G-protein Signaling Workshop", a national meeting on G-proteins where it was well received. A manuscript entitled "Structural basis of activation and GTP hydrolysis in Rab proteins", on which [the petitioner] is a co-author, has recently been accepted for publication in the peer-reviewed journal *Structure*. In addition, [the petitioner] is on the verge of solving the structure of Mss4, an important regulator of Rab3a. This structure is essential for understanding the mechanism by which Rab3a is activated.

[The petitioner's] research has practical significance with respect to cancer and a variety of neurological disorders including Alzheimer's disease. Mutant forms of G-proteins are the cause of 30% of all human cancers. The system [the petitioner] is studying is essential for long term potentiation, a neural phenomenon thought to form the basis of learning and memory. His research in this area forms the basis

for rational design of therapeutic agents.

Dr. Michael Green, a professor at the University of Massachusetts Medical Center reiterates much of the above, asserting that the petitioner's research with Rab3a "will" have a major impact and that the petitioner's unique combination of expertise is essential to his work. Michael Czech, director of molecular medicine at the University of Massachusetts, discusses the prestige of the molecular medicine program, the complexity of the petitioner's project (requiring expertise in structural biology, molecular genetics, and computer science) and the significance of the petitioner's "breakthroughs." Associate Professor Duane Jenness, and Assistant Professor William Royer, Jr., both faculty at the University of Massachusetts, make similar assertions.

The above letters mostly focus on the importance of the petitioner's area of research and assert that the petitioner has the unique skills to perform such research. 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. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

Professor Richard Guillory, who observed the petitioner's work at the University of Hawaii, asserts that the petitioner was a "conscientious student, competent and intent upon his studies." Professor Guillory then goes on to reiterate the importance of the petitioner's work with Rab3a. Glynis Hamel, an instructor at Worcester Polytechnic Institute (WPI) writes that the petitioner was a good student at that institution and that he "suspects" the petitioner will be one of only a handful of researchers in the biotechnology field with an advanced degree in computing. Finally, Mr. Hamel asserts that there is a shortage of qualified computer scientists in the U.S. These letters do not reflect that the petitioner made any major contributions to his field while studying at the University of Hawaii or at WPI. The assertion of a labor shortage should be tested through the labor certification process and is an issue under the jurisdiction of the Department of Labor. See Matter of New York State Dept. of Transportation.

Dr. John I Manchester, a staff scientist at Camitro, where the petitioner began working as a scientific software development consultant after the petition was filed writes:

At Camitro, [the petitioner] has utilized his training very effectively to develop a sophisticated algorithm for automating the prediction of drug metabolism using one of the company's computational models. In addition, he has taken a highly innovative approach to improve the overall performance of this calculation, resulting in a speed-up of several orders of magnitude over that which we had previously achieved. We are now at a point where [the petitioner] is applying his insights from structural biology to streamline and automate the second of our computational models. It would not be possible for the Engineering group to

proceed at its current pace without [the petitioner's] timely contributions.

While Dr. Manchester indicates that the petitioner is respected by his own employer, he does not indicate that the petitioner has influenced his field as a whole.

The record contains only one letter from a disinterested expert, Dr. Jinsheng Liang, a research investigator at Millenium, a biotech company based in Cambridge. Dr. Liang asserts that he has known the petitioner since he began studying at the University of Massachusetts from scientific meetings and poster sessions. Dr. Liang reiterates the importance of the petitioner's area of research while at the University of Massachusetts, asserting "this work definitely put him on the top of his field." Dr. Liang does not indicate that the petitioner's contributions to his field have influenced Dr. Liang's own research.

The record reflects that the petitioner was selected to participate in the "Computational Genomics" course at Cold Spring Harbor Laboratory in the fall of 1996 based on academic excellence. That the petitioner has excelled academically is not evidence that he has already established a track record of making contributions to his field.

As evidence of the importance of the petitioner's area of research, counsel refers to a press release announcing the decision to award Alfred Gilman and Martin Rodbell the Nobel prize in Physiology or Medicine in 1994 for their discovery of G-proteins and the role of these proteins in signal transduction in cells. This information only serves to emphasize that others are involved in the same area of research and have received the highest honor in recognition for their contributions. The petitioner, by focusing on the same area of research, cannot establish that his work is as influential as the work of those who won the prize.

In response to the director's request for additional documentation, the petitioner submitted a copy of his article regarding Rab3a, published after the petition was filed and two requests for reprints from a professor at Columbia University and a scientist at Harvard Medical School. The record does not reflect that the petitioner had any articles published in peer-reviewed journals prior to his Rab3a article. The petitioner appears to rely on his work with Rab3a as his only major contribution. The petitioner, however, had not even published his article in this area until after he filed the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Two requests for reprints are not particularly noteworthy. Regardless, they represent the community's response to the petitioner's article after the date of filing the petition.

On appeal, counsel merely reiterates the claims made in the letters discussed above and now asserts that the petitioner's models could reduce the time and cost of developing drugs. This new assertion is not supported by the record. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research,

in order to receive funding, be accepted as a thesis, or to be published in a journal must present some benefit to the general pool of scientific knowledge. It does not follow that all such research inherently serves the national interest to an extent which justifies a waiver of the job offer requirement. Without evidence of extensive citations prior to the date of filing, letters from experts beyond the petitioner's own colleagues attesting to how the petitioner has influenced his field, or other evidence of a record of contributions with a national impact, we cannot conclude that the petitioner would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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.