



B5

U.S. Department of Justice
Immigration and Naturalization Service

identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

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



File: [Redacted] Office: Nebraska Service Center

Date: 10 APR 2002

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:



Public Copy

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 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/or 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.

Counsel argues that the petitioner is eligible for the desired classification both as an advanced degree professional and as an alien of exceptional ability. The petitioner obtained a bachelor of medicine degree from the Capital Institute of Medicine in Beijing, majoring in "stomatology." The petitioner submitted a letter from the Foundation for International Services, Inc., evaluating this degree plus the petitioner's five years of experience as a dentist as the equivalent of a U.S. doctor of dentistry and a Master's degree in science, specializing in dentistry. At the time of filing, the petitioner was a Ph.D. student majoring in nutrition at Oregon State University. The only degree obtained by the petitioner prior to filing the petition relates to dentistry. This degree is unrelated to her current field of nutrition. The petitioner does not have five years of progressive experience in nutrition which might be considered equivalent to an advanced degree in her field.

In light of the above, the petitioner has not established that, at the time of filing, she had an advanced degree in the profession she intends to pursue in the United States.

The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below. As with the advanced degree, however, the petitioner must demonstrate that she has exceptional ability in the field she intends to pursue, nutrition.

The regulation at 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered.” Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.” The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

At the time of filing, the petitioner had no degree in nutrition. Even if we considered her dentist degree, this degree is required for the practice of dentistry. A degree required in one’s field is not evidence that one possesses expertise significantly beyond that ordinarily encountered in the field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

While the petitioner has several years of dentistry and periodontal experience, at the time of filing, she had no experience in nutrition beyond her three years of academic research while pursuing her Ph.D.

A license to practice the profession or certification for a particular profession or occupation

On the petitioner’s Form ETA 750B, the petitioner indicated she received a periodontology certificate in 1994. As with the petitioner’s dentistry degree, this certificate is not related to nutrition. In addition, the record does not establish whether periodontists in China must have this certificate to practice in this field. If so, this certificate does not represent expertise beyond that ordinarily encountered among periodontists.

Evidence of membership in professional associations

The petitioner is a member of the Chinese Students and Scholars Association, Oregon State University, the American Oil Chemists Society (AOCS), and the American Society for Nutritional Sciences (ASNS). The only associations related to nutrition are AOCS and ASNS. The record reveals that the petitioner is a student member of ASNS. The record contains no information regarding the membership requirements for AOCS or the student membership

requirements for ASNS. As such, the petitioner has not established that her membership in these associations represents expertise beyond that ordinarily encountered in the field of nutrition.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

As evidence for this criterion, counsel refers to the petitioner's fellowships and scholarships at Oregon State University, recognition for the petitioner's management of an International Night and a China Night at Oregon State, recognition for the petitioner's leadership for the international students at Oregon State, her selection for a competitive graduate research assistantship at Oregon State, awards pertaining to the petitioner's periodontal research, and an excellence award for the English speech competition of Beijing University in 1988.

Fellowships and scholarships are not recognition for achievement or significant contributions to one's field. Rather, they are based on academic achievements. In fact, the letter advising the petitioner of her selection for the Woodburn Graduate Fellowship specifically states that it is for those who "show potential in making significant contributions to the profession," not in recognition for previous contributions.

Recognition for student association activities unrelated to one's field fail to meet the plain language requirements for this criterion. A graduate research assistantship is simply a job offer. A job offer, even if competitive, is not sufficient recognition to meet this criterion. Awards pertaining to the petitioner's previous field cannot demonstrate her exceptional ability in nutritional science. Finally, the petitioner's English ability is not relevant to her nutritional science expertise.

As the petitioner has not demonstrated that she is an advanced degree professional or an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

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.

We concur with the director that the petitioner works in an area of intrinsic merit, nutritional science, and that the proposed benefits of her work, improved nutrition awareness, would be national in scope. It remains to determine whether the petitioner has established that she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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. 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. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at note 6.

Counsel asserts on appeal that the reference letters establish that the petitioner has substantial experience and a demonstrated record of achievement. [REDACTED] an associate professor for whom the petitioner works as a research assistant at the University of Oregon, discusses the petitioner's work investigating the role of LDL in atherosclerosis. Specifically, Dr. Wander states:

[The petitioner] is investigating the role of dietary fatty acids in the modification of LDL oxidative susceptibility and cytotoxicity and the effect of oxidized LDL

enriched with long chain polyunsaturated fatty acid on apoptosis.

Dr. Wander asserts that “a complete understanding of the role of fatty acids in the development of the atherosclerotic plaque is lacking” and continues:

[The petitioner] has established a cell culture model, several cytotoxicity assays, and an apoptosis method. She will now use these assays as well as several others that she will be developing to make measurements critical to our studies for understand[ing] the development of atherosclerosis. She has contributed many successful and innovative ideas to our investigations. Her academic performance is also exceptional.

In addition to the contributions [the petitioner] has made to our laboratory, she presented a research paper based on her own work at the 1998 Experimental Biology Conference in San Francisco. Her data was also presented at the FASEB summer conference on Free Radical and Antioxidants Defenses held recently in Colorado. Her presentations were well received by others. She has submitted these data for publication in a professional journal. A second paper will be written and submitted to a peer-reviewed journal from data gained from the project she currently has underway.

provided a second letter asserting that the petitioner is vital to the work proposed in a recent grant application to the American Heart Association. a professor and Head of the Nutrition and Food Management Department at Oregon State, provides general praise of the petitioner’s abilities. Associate Dean at Oregon State, also provides general praise of the petitioner. further discusses the importance of the petitioner’s project as it is one of the few studies in this area using human subjects. asserts that the petitioner is a “key participant” in this study.

an assistant professor at Tufts University, cooperated with the petitioner in China and recently met the petitioner again at the Experimental Biology Conference of 1998. asserts that the petitioner provided him with “intelligent and well thought-out suggestions” for his own work on apoptosis. continues that the petitioner plays a key role in her project at Oregon State. does not provide any examples of how his own research has been influenced by the results of the petitioner’s project.

Dr. Yu Sun, a research associate with the National Institute of Occupational Safety and Health and former fellow student of the petitioner’s, writes:

[The petitioner] has established several LDL oxidation and apoptosis methods. She has already got some very convincing result[s] showing that fish oil enriched LDL has less oxidative susceptibility compared to N-6 fatty acids enriched LDL. She used new and unique methods to test the lipid peroxides of LDL. Her methods were recognized [as] the most accurate by professional experts at the

1998 Experimental Biology Conference in San Francisco in 1998. She is working on explaining further on [sic] the relationship between fish oil enriched LDL and atherosclerosis at [the] molecular and cellular level, and she is investigating how n-3 fatty acids enriched LDL influence cell apoptosis. This is a very hot field. One of the reasons why atherosclerosis develops is because the genes that promote programmed cell death or apoptosis, are being up-regulated. A better understanding of how these genes are functioning to cause cells to die and how these genes are regulated and influenced by oxidized LDL is extremely important to conquer cardiovascular diseases.

provides general praise about the petitioner's work in China, prior to her involvement in the nutritional science field. a professor at the Institute of Nutrition and Food Hygiene in China, indicates that he has known the petitioner since she assisted in his laboratory while a dental student. He discusses the importance of her periodontal research and asserts that he has continued to follow her work in the United States. He asserts that the petitioner's area of research is important.

The above letters are nearly all from the petitioner's immediate colleagues and collaborators. While such letters are useful in detailing the petitioner's role in various projects, they cannot by themselves establish that the petitioner has influenced her field as a whole. The letters from researchers who have not collaborated with the petitioner do not reflect that she has a track record of achievements which have influenced the nutritional field as a whole.

On appeal, counsel further argues that the petitioner's abilities are beyond exceptional and that she exceeds the normal achievements of doctoral students. At the time of filing, the petitioner had authored three published articles relating to her periodontal research. She had also presented her nutritional research at two conferences and had presented original and reviewed material at several seminars at Oregon State. At the time of filing, the petitioner had not authored any published articles regarding her nutritional research, nor does it appear that the conferences published the petitioner's abstracts. The petitioner asserts that her presentations at the Experimental Biology Conference will be cited in USDA project, an article co-authored by Dr. Wander, and a research proposal being prepared jointly by the petitioner and Dr. Wander.

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." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of influential contributions; we must consider the research community's reaction to those articles.

Even if we considered the petitioner's conference presentations to be equivalent to published articles, potential future citations by the petitioner and her advisor are not evidence that her work has been influential outside her immediate circle of colleagues. There is simply no evidence that independent researchers have been influenced by the petitioner's work.

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.