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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: [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:
[Redacted]

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, Nebraska Service Center, and the director affirmed that decision on motion. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

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/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 a Master's degree in animal science from the University of Idaho, Moscow. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, animal science, and that the proposed benefits of the petitioner’s work, improved pregnancy tests for livestock and wild ruminants, would be national in scope. It remains, then, to determine whether the petitioner 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 he 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.

Initially, the petitioner provided letters from the Oregon Department of Fish and Wildlife, the Alaska Department of Fish and Game, a professor at Washington State University who fails to explain how he came to know the petitioner’s work, and a professor at the University of Idaho who praises the petitioner’s work in another professor’s laboratory at that University. On motion from the director’s first decision, the petitioner submitted letters from a member of the Idaho

House of Representatives and the Dean of the University of Idaho. While these letters all attest to the importance of the petitioner's projects, the authors do not appear to have first hand knowledge of the role the petitioner played in these projects. On appeal from the director's final decision, the petitioner submits a joint letter from Dr. R. Garth Sasser and Dr. Nancy S. Sasser, in whose laboratory he worked at the University of Idaho and who jointly own BioTracking, the company where the petitioner works. The letter provides:

BioTracking has the best pregnancy test for ruminant animals, worldwide. However, the assay is a radioimmunoassay and involves use of radioisotopes; thus, it has to be conducted in a restricted area in a central laboratory. The petitioner is the only person who has successfully developed a different form of the assay (enzyme linked immunosorbent assay, ELISA). Therefore, hazardous radioisotopes have been eliminated. This will benefit workers and improve the working environment. The new assay is even more accurate and sensitive. Because radioisotopes are not used, this assay can be extended to other laboratories and the technique will become available nationally and worldwide. This assay developed by the petitioner is groundbreaking work in the animal pregnancy diagnosis field.

Dr. R. Sasser and Dr. Nancy Sasser continue that prior to the petitioner's arrival, BioTracking had been unable to lower the false positive rate below 20 percent despite years of research. The petitioner, however, reduced the rate to a commercially acceptable 3 percent. The petitioner was also the first and only person to develop a specific pregnancy test for elk and moose which can predict the age of the fetus and whether there is more than one.

Now that the petitioner has established his leading role at BioTracking, the earlier letters from independent researchers discussing the importance of this work can be considered. James Noyes, Wildlife Research Biologist with the Oregon Department of Fish and Wildlife writes:

[The petitioner's] research to quantify a pregnancy-specific protein in the blood of elk may allow wildlife managers to estimate the dates of conception without having to sacrifice the animal. An additional outcome of his research may be the development of a field kit that biologists could use to test for pregnancy without sending samples to a lab. This could represent a substantial savings in time and money, and make a significant contribution to elk management.

Dr. Thomas R. Stephenson, a research wildlife biologist with the State of Alaska Department of Fish and Game, writes:

[The petitioner's] research efforts proved to be invaluable in developing a quantitative blood assay for determining the pregnancy status of ruminants. [The petitioner's] abilities in the field of microbiology and biochemistry were essential to the successful development of this assay. . . . Reproductive output of wild animals can be particularly difficult to obtain but this technique provides a tool by

which we can determine an animal's pregnancy status by collecting blood during routine captures.

Dr. Stephenson continues that the petitioner's technique is beneficial for monitoring moose populations, wild and captive deer populations, and cattle. Professor Jerry J. Reeves of Washington State University asserts that the petitioner's assay "is the only one that I know of in the world which can tell if the ruminant animals are pregnant as early as 28 days after becoming pregnant." He continues, "This is a very important tool for wildlife, conservation and management."

Idaho State Representative Tom Trail, also an animal scientist, asserts that in addition to the benefits discussed above, the petitioner is currently working on the development of an important "side test" for pregnancy.

On appeal, the petitioner submits another evaluation of his project by an independent expert. Dr. H. Glenn Gray, National Program Leader of USDA- Cooperative State Research, Education and Extension Service, writes:

Through individual studies, [the petitioner] appears to have overcome the problem of false positives using the ELISA tests; a goal that eluded other well trained scientists possessing Ph.D. degrees in animal physiology. His breakthroughs in reducing false positives now makes the technology feasible for commercialization by the BioTracking Company. . . .

Original research by [the petitioner] was exceptional in that a reagent was developed which has virtually eliminated false positives from test results. Thus, he has demonstrated creativity and originality of effort that sets him apart from the typical young scientist. The results of his work has led to an ELISA based pregnancy test, which is expected to be marketed in the near future to research laboratories, veterinary labs, and commercial diagnostic labs as a management aid to improve food animal productivity. Hopefully, the progress made with an ELISA testing approach will permit BioTracking, with [the petitioner's] future research, to make a further step in the commercialization of this technology. Efforts can be directed toward a true on-farm field test kit that can be purchased directly and utilized by farmers/ranchers, perhaps within a couple of years.

The detection of pregnancy has been a long standing management problem in production of food animals, and a practical on-farm diagnostic test is needed world-wide. There is a huge potential global market for such a product.

At the time of filing, the petitioner's articles had not yet been published. Thus, the petitioner cannot rely on these articles as evidence of his influence on the field as a whole. Nevertheless, the letters in support of the petition, especially those submitted on appeal, reveal that the petitioner's work goes beyond having the potential to be important. Rather, his work has

resulted in a new test which others had tried and failed to develop and which is deemed extremely important by two different State agencies with no apparent connection to the petitioner and a National Team Leader at the USDA.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest which is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.