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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: 11 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 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.

On appeal, counsel asserts, among other things, that the director erred by failing to issue a request for additional evidence prior to issuing the notice of denial. The remedy for this failure, however, would be for us to consider evidence that might have been submitted in response to such a request on appeal. The petitioner submits no additional evidence on appeal. Counsel's remaining arguments will be discussed below.

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. in Chemistry from Queen's University in Ontario, Toronto. The petitioner submitted a letter from Foreign Credential Evaluations, Inc. reflecting that the degree is equivalent to a Ph.D. from an accredited university in the United States. 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, chemical research, and that the proposed benefits of his work, reduced damage from strokes, would be national in scope. It remains to determine whether the petitioner has established that he meets the final prong.

Counsel initially argued that Matter of New York State Dept. of Transportation provides for two “alternative” means to meet the final prong, by either demonstrating that the labor certification process is inapplicable or that the petitioner will serve the national interest to a substantially greater degree than an available U.S. worker with the same minimum qualifications. Matter of New York State Dept. of Transportation, however, states:

The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Id. at note 5. As such, counsel's arguments that the labor certification is inapplicable for postdoctoral researchers and that the national interest waiver is a means by which these researchers can work in those positions is not persuasive and the director did not err by concluding that the temporary nature of postdoctoral appointments was insufficient to warrant a waiver of the labor certification process. Beyond the binding language of Matter of New York State Dept. of Transportation, non-immigrant visas are available for researchers who do not have a permanent job offer. Moreover, while Congress has created blanket waivers for other professions, Congress has not indicated an intent that the national interest waiver be applied as a blanket waiver for all postdoctoral researchers. As stated by the director, we do not find that every postdoctoral researcher is eligible for a national interest waiver; the petitioner must demonstrate that he will benefit the national interest to a greater extent than available U.S. workers with the same minimum qualifications.

On appeal, counsel cites several non-precedent cases, concluding that a petitioner must demonstrate "a proven track record of achievement and experience distinguishing the Petitioner from newcomers to the field" or "evidence of the Petitioner's superior talents which mark him as one of the few people at the top of his field." While Matter of New York State Dept. of Transportation does require that the petitioner demonstrate a track record of achievement with some degree of influence on the field as a whole, id. at note 6, it does not provide that a petitioner may alternatively provide evidence of the petitioner's "superior" talents, a necessarily subjective determination. Thus, we will evaluate the evidence as to whether it demonstrates that the petitioner has a track record of achievement with some degree of influence on the field as a whole.

██████████ an associate professor at the University of Wyoming and the petitioner's project director, asserts that the petitioner is "a key investigator" at that institution of a reactive cytotoxin, peroxydinitrite, thought to be responsible for the damage caused by strokes and heart attacks in the days after the event. Dr. Bohle explains that in order to study peroxydinitrite, which degrades quickly, it was necessary to synthesize this chemical as a stable salt. Dr. Bohle continues:

[The petitioner] has been charged with the task of improving the purity of our peroxydinitrite salts. Using pure forms of peroxydinitrite, he will then take on the important task of determining whether it is peroxydinitrite, or some other cytotoxin, such as nitric oxide, which is the culprit causing damage after stroke and heart attack.

[REDACTED] further states that the petitioner will determine if peroxydinitrite is independently toxic, allowing for future development of treatments. This work, however, had not yet produced any results as of the date the petition was filed, and, thus, cannot be considered evidence of the petitioner's influence on his field at that time. [REDACTED] however, also discusses the petitioner's previous project at the University of Wyoming.

[The petitioner's] first project here studied the use of hyponitrite as a substitute rocket propellant which would not release chlorides into the Earth's atmosphere. Specifically, [the petitioner's] work involved the synthesis and characterization of high-energy anions of nitrogen called oxyl and peroxy anions. The present generation of rocket propellants are made of chlorine-containing perchlorates which, when used to propel missiles into the atmosphere, release a stream of many tons of ozone-depleting chemicals which remain above Earth for as long as 100 years. These materials are catalytic, and over this period can cause very substantial damage to Earth's ozone layer. Because the Air Force Office for Scientific Research was concerned about the contribution of rocket propellants to ozone depletion, that office supported our efforts to develop an alternative fuel. [The petitioner] made an important contribution to the development of a new fuel that is much less polluting than present rocket fuels because it is more closely related to natural compounds. Rockets using this propellant will cause less ozone degradation in the Earth's atmosphere.

Dr. Donald H. Macartney, a professor at Queen's University, writes:

Pursuant to obtaining his Ph.D. in chemistry in 1995 from Queen's University, [the petitioner] designed, synthesized, and characterized transition metal complexes, studied the kinetics and mechanisms of electron-transfer reactions in the presence of cyclodextrins and calixarenes, determined binding and stability constants, and investigated inorganic and bio-inorganic reaction mechanisms. Queen's University was so impressed with [the petitioner's] research that upon the completion of his Ph.D. he was offered a position as a chemist in the Cortec DNA Service Laboratories at Queen's University. There, his research focused on the synthesis of DNA and its purification using a number of sophisticated analytical techniques, including HPLC, TLC and UV-visible spectrophotometer.

The above letters are all from the petitioner's immediate circle of colleagues. While such letters are useful in detailing the petitioner's role in various projects, they cannot by themselves demonstrate that he has influenced his field as a whole.

[REDACTED] a former fellow student of the petitioner's at Queen's University in Ontario, provides general praise of the petitioner.

[REDACTED] an assistant professor at Purchase College, State University of New York, asserts that the petitioner's research overlaps with his own, that the petitioner's work with peroxydinitrite is significant, and that the petitioner is one of only a very few with the skills necessary to perform such work. [REDACTED] does not explain how he became aware of the petitioner's work or that he has been influenced by the petitioner's work.

The petitioner submitted a list of four publications and six manuscripts either submitted for publication or in preparation. The petitioner failed to submit evidence to support this list, such as the first pages of the published articles. Moreover, 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. The petitioner has not submitted any evidence that these articles, assuming they were published, have been cited by independent researchers.

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.