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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

[redacted]

File: [redacted] Office: Nebraska Service Center Date: APR 29 2002

IN RE: Petitioner:
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 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 to classify the beneficiary 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 is a health care corporation that seeks to employ the beneficiary as a research analytical chemist. 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 beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has 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 director did not dispute that the beneficiary qualifies as member of the professions holding an advanced degree. The sole issue in contention 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 submits a substantial quantity of background evidence, establishing the intrinsic merit and national scope of the beneficiary's occupation in pharmaceutical research. This background information, however, says nothing about the specific merits of this particular beneficiary as opposed to other qualified workers in the same field. The petitioner also submits copies of the beneficiary's published articles and conference presentation abstracts. These documents establish that the beneficiary is an active and productive researcher, but by themselves they do not show the field's reaction to her work.

[redacted] senior paralegal with the petitioning company, explains the beneficiary's duties, stating that the beneficiary "provides critical research analytical services which is [sic] needed in [the petitioner's] development of new pharmaceutical drugs. She has made significant contributions by monitoring new products from manufacture through stability studies and clinical trials." [redacted] describes in detail the three facets of the beneficiary's job duties, specifically "lead analyst for all erythromycin products methods development and transfer," "physical characterization of excipients," and "analytical operations support." [redacted] then explains why each of these functions is important to the petitioner. The explanation of the beneficiary's duties establishes the overall importance of her occupation, but it cannot show that anyone qualified to hold that job must also qualify for a national interest waiver. The petitioner must show that the national interest would be substantially better served by the beneficiary than by another qualified worker in the same position.

To establish the beneficiary's "past record of achievements which justifies projections of future benefit to the national interest, the petitioner cites the beneficiary's academic and employment experience and submits three witness letters. [redacted] manager of the Analytical Development Center at the petitioner's Pharmaceutical Analytical Research and Development Division, states:

> [The beneficiary] is currently working as a Research Analytical Chemist in my group, and performs vital method development functions for existing formulations and new chemical entities. Her work has a direct impact on the overall research and development efforts related to bringing breakthrough and cost-effective new medicines in the field of anti-infectives. She is also a licensed pharmacist. . . . Such combined expertise is rare. . . .
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> [The beneficiary] is our lead analyst for erythromycin products and primary contact person for all USP methods regarding these products. As a result, she is responsible for the development of both potency and related substances HPLC methodology for this product lines. This is critical as the compendial requirements are upgrading these antibiotic assays to chromatographic methods. [The beneficiary] also provides analytical support to the process development center and the operations area, especially in the area of troubleshooting. [The beneficiary] has been part of the team responsible for setting up a new research lab in Puerto Rico.

Professor James W. Ayres of Oregon State University states:

> I was [the beneficiary's] major advisor while she was a Postdoctoral Scholar and then a Research Assistant Professor at Oregon State University. . . . She is in the top 1% of all the scientists who have taught and conducted research in Pharmaceutics, Biopharmaceutics, and Pharmacokinetics at Oregon State University. Her projects included development of a novel tablet dosage form with increased drug stability for the antibiotic combination (amoxicillin/clavulanate) most widely prescribed in the world. She also conducted bioavailability and Pharmacokinetics studies with statistical analysis for her formulations as compared to the current standard in the field. This research has been accepted for publication in two very prestigious pharmaceutical sciences journals. . . .
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> In addition, the fact that [the petitioner] has chosen [the beneficiary] as a "trouble shooter" to interface between analytical methods, product formulation, and production is testimony to the quality of her expertise in these areas. . . .
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> In my professional opinion, [the beneficiary] has clearly demonstrated that this country has already benefited and will continue to benefit from her original contributions to the pharmaceutical sciences.

[redacted] research investigator at the petitioning company, states:

> [The beneficiary] has joined my group during 1997, leading the physical characterization project team. I am extremely impressed with all aspects of [the beneficiary's] work. She collaborates not only with other scientists in our department but also with colleagues from other departments in the company as well as outside scientists. [The beneficiary's work] has been instrumental in our efforts in solving many of [the] technical issues associated with manufacturing of our currently marketed products. Her outstanding efforts over a relative[ly] short time period not only has [sic] resulted in solving the problems and significant cost saving for the company but also has led to the discovery of a novel mechanism for the sustained release of oral dosage formulation. . . .
>
> In summary, it is evident that [the beneficiary] is a leader in the field of Pharmaceutical Sciences. She has outstanding expertise in the area of material characterization and analytical method development. Her background is unusually specific and strong in these areas and it would be difficult, if not impossible to find someone else with such [a] high level of technical expertise.

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 submitted a lengthy letter from [redacted] who discusses the importance of developing new drugs and improving existing ones. We do not contest the importance of these tasks, but these tasks are inherent to the occupation, and the Service held in Matter of New York State Dept. of Transportation that the pertinent statute and regulations do not create blanket waivers for a given occupation. (Recent legislation has created an exception for certain physicians, but that exception does not apply in this instance).

[redacted] states that the beneficiary has contributed significantly to the development of these products, although the beneficiary has not been directly involved in discovering or formulating them; her duties appear to be more akin to quality control. [redacted] lists some of the beneficiary's specific activities at the petitioning company, but she does not indicate which, if any, of these activities would not have been possible with a different qualified professional in the beneficiary's place [redacted] discusses, for instance, a project involving efforts to improve the absorption of a drug called fenofibrate. Neither the beneficiary nor the petitioner were involved in the invention of this drug, which the petitioner licenses from a French laboratory. Also, the beneficiary does not appear to be directly involved in the efforts to develop improved delivery methods to enhance the body's ability to absorb the drug. Rather, the beneficiary appears to be in charge of evaluating the results of those efforts, undertaken by others at the petitioning company.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary's work, but concluding that the petitioner has not shown that the beneficiary has substantially influenced the field or established "that those outside the [beneficiary's] circle of colleagues and acquaintances consider the work important." The director also concluded that the beneficiary "is not described as being the major force behind any pharmaceutical products."

On appeal, counsel argues that the petitioner has amply demonstrated that the beneficiary's "past achievements justify the projection of future significant benefits," and that a waiver of the job offer/labor certification requirement is in order. Counsel states that "[w]hile it is hoped that scientists publish their research results, it is not necessarily inherent to their responsibilities," and that many scientists publish only enough material to satisfy degree requirements, while the beneficiary has produced "*numerous significant publications and abstracts*" (emphasis in original) and that the beneficiary's "contributions have influenced her field of study to a much greater extent than those of other qualified researchers having the same basic qualifications."

To support this last argument, counsel cites specific projects in which the beneficiary has participated. As noted above, the beneficiary's involvement appears to result from the basic nature of her job duties. The record contains nothing to indicate that the beneficiary has had a significantly greater impact on the pharmaceutical industry, or health care in general, than others employed in similar positions at the petitioning company and other major pharmaceutical companies. Simply describing the beneficiary's various achievements, and declaring them to be especially significant, cannot meet the burden of proof in this proceeding. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Also, the assertion by the beneficiary's employers and mentors that she is very good at what she does is not, in itself, a qualification for the national interest waiver because, by statute and regulation, exceptional ability by itself does not exempt aliens from the job offer requirement.

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.