



B5

U.S. Department of Justice

Immigration and Naturalization Service

...ing data del...
prevent clearly unwar...
invasion of personal

...ly unwar...
invasion of personal

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



File: [Redacted] Office: Nebraska Service Center

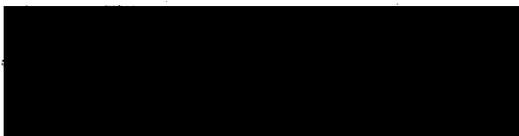
Date: 14 AUG 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

14 AUG 2002

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 seeks employment as a research associate at the Eppley Institute for Cancer Research ("EICR"), University of Nebraska Medical Center ("UNMC"). 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 of Science in Medicinal Chemistry from the Shanghai Institute of Pharmaceutical Industry. This degree has been independently evaluated as being equivalent to a Master of Science degree from an accredited U.S. institution. 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.

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.

We concur with the director that the petitioner works in an area of intrinsic merit, cancer drug research, and that the proposed benefits of his research 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.

The petitioner was accepted as a doctoral student at UNMC in 1995, and, at the time of filing, had not yet received his degree. The petitioner submits four witness letters. The petitioner's research supervisor, William Gmeiner, Associate Professor, EICR, UNMC, states:

Developing new treatment strategies for treatment of colon and other cancers is a matter of substantial health care and economic importance, and will impact the lives of countless Americans throughout the United States. According to figures from the American Cancer Society, nearly 100,000 new cases of colon cancer were diagnosed in the year 1996. In that same year, nearly 50,000 Americans died from colon cancer. Colon cancer thus ranks third among all cancers in its incidence and mortality. Current treatment strategies for colon cancer include surgery, at times combined with radiation. The role of chemotherapy in treating advanced cases of colorectal cancer is under study. Combinations of chemotherapy and immunologic agents may be beneficial in postoperative patients with cancerous lymph nodes. The one and five year relative survival rates for patients with colon cancer are 83% and 61%, respectively. The financial costs of cancer are great both for the individual and for society as a whole. The National Cancer Institute estimates overall costs for cancer at \$104 billion: \$35 billion for direct medical costs, \$12 billion for morbidity costs (costs of lost productivity), and \$57 billion for mortality costs. Because [the petitioner's] research is relevant to the treatment of all cancers, these broader figures are appropriate to consider. Additionally, the extension of [the petitioner's] research to other forms of cancer will help to reduce the total number of Americans that die from cancers, which are now more than 1,500 people each day.

Traditional therapies for colon cancer employ a drug known as 5-FU. Although 5-FU is the most potent colon cancer drug currently available, the response rate of patients to this drug is disconcertingly low (19-30%), and many patients develop an anti-drug resistance to 5-EU. Recognizing the limitations of 5-ELI as an effective anti-cancer drug over the long-term, my laboratory, and others, have been investigating alternative drugs in hopes of improving upon 5-FU. Before [the petitioner] arrived at the Eppley Institute, I conceptualized and researchers in my group synthesized a prototype drug known as FdUMP[10]. Initial evaluations of FdUMP[10] suggest that its potency is about 500 times greater than that of 5-EU when applied to colon cancer cell lines. Tolerance to the drug has been investigated preliminarily in *in vivo* mouse toxicity experiments. Moreover, while many tumor cell lines become resistant to 5-EU, as we discovered through a collaboration with another laboratory, FdUMP[10] offers the promise of coupling the drug to folic acid to overcome this resistance.

For the last three years, [the petitioner] has been primarily responsible for the advancement of this research. First, [the petitioner] has led the synthesis of the FdUMP[10] pro-drug. The synthesis process involves investigation of the drug on a cellular level and examining its toxicity and potency. These mechanistic studies reveal that FdUMP[10] causes a signaling process in the cell to occur, leading to degradation of the cell, and eventually cell death (apoptosis). These studies of the signaling patterns are important not only for our

research, but also for other investigations into the mechanisms of cancer. [The petitioner] has obtained data indicating he has successfully coupled the FdUMP[10] pro-drug to folic acid, although additional experimentation is required to substantiate these data. The purpose of this step in our research, as mentioned above, is to take advantage of the fact that many tumor cells overexpress the folate receptor, because tumor growth requires higher amounts of folic acid, an essential nutrient. Coupling FdUMP[10] with folic acid allows the pro-drug to gain entry into the cancer cell and to commence the signaling patterns leading to cell death. Importantly, many prior researchers had attempted this coupling of various cancer drugs with folic acid due to the tremendous promise of this technique. This challenging chemistry has, however, been completed only for a few anti-cancer drugs. [The petitioner's] coupling of FdUMP[10] with folic acid will constitute a substantial research accomplishment that requires laboratory skills greater than the majority of researchers working in this field of endeavor. This accomplishment will benefit not only our project, but other anticancer drug research projects throughout the country. Presently, [the petitioner] is working to confirm that FdUMP[10] coupled to folic acid is internalized by the tumor cell receptor.

Based on the foregoing, I must conclude that [the petitioner's] research benefits the United States more than the work ordinarily conducted by qualified researchers in his field of expertise. I would rank this project among the top 10-15% in the country based on grant support and publication of our results. As noted above, FdUMP[10] has exhibited about 500 times greater than traditional drug therapies. The full evaluation and implementation of this drug into cancer treatment strategies may potentially impact the lives of millions of Americans, and save our healthcare system substantial revenue. Even if the pro-drug approach that [the petitioner] is currently working does not become clinically useful, the knowledge gained in these studies and the experience gained by [the petitioner], myself, and others working in this field is a valuable national asset. There is no question that [the petitioner's] work is of substantial value to the interests of the people of the United States.

Compared with the abilities and accomplishments of other researchers in [the petitioner's] field (drug research), I would rank him among the top 5% of researchers. Based on his six years of experience beyond the attainment of his Master's degree, we were extremely pleased to have [the petitioner] begin his research here in 1995. [The petitioner] is currently pursuing research required for completion of his doctoral degree, as well as contributing to research projects beyond the scope of his dissertation. [The petitioner] has co-authored several articles which have been submitted to, and published, in the leading journals in our field, including Nucleic Acids Research. Without question, [the petitioner] possesses skills that are valuable to the present project deemed significant by the highest standards of the American research enterprise and [the petitioner] certainly is capable of contributing to other valuable research endeavors in the future.

Professor Gmeiner's letter addresses the undoubted importance of cancer research and the "potential" benefits of the FdUMP[10] development project at UNMC. Professor Gmeiner states:

“Before [the petitioner] arrived at the Eppley Institute, I conceptualized and researchers in my group synthesized a prototype drug known as FdUMP[10].” Professor Gmeiner’s letter indicates that the petitioner’s specific role in the ongoing project, while advancing knowledge, has not yet resulted in a substantial research accomplishment having a significant impact on the medicinal research field. Pursuant to published precedent, the overall importance of a given project or area of research is insufficient to demonstrate eligibility for the national interest waiver. While the Service recognizes the overall importance of cancer drug development 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. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that the petitioner’s employment as a cancer drug researcher inherently serves the national interest, Professor Gmeiner essentially contends that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect.

In concluding his letter, Professor Gmeiner states:

It is my understanding that the national interest waiver category is the only route to permanent residence for which [the petitioner] is currently eligible. Because he does not hold a permanent position, he is not eligible for other permanent residence categories, such as labor certification.

Participation in research projects in pursuit of one’s doctorate is, by nature, temporary. One does not expect to spend one’s career working on the same research project; these positions represent training for a future professional career. The petitioner was a student at the time he filed this petition; his continued participation in the FdUMP[10] development project at UNMC is already covered by his nonimmigrant student visa, and H-1B nonimmigrant visas are available to postdoctoral researchers. Therefore, his continued participation in his current project is obviously not contingent upon his obtaining permanent resident status.

Counsel argues that the director “ignored evidence that the petitioner was not eligible for labor certification.” Information provided by counsel on appeal indicates that the petitioner recently completed his Ph.D. and “is now a researcher for Tularik, Inc.” A review of Service records confirms that the petitioner is the beneficiary of an approved employment-based visa petition filed in his behalf by Tularik, Inc. The question necessarily arises as to why a national interest waiver would be necessary to waive a job offer requirement that has already been met.

Thomas Smithgall, Associate Professor, University of Pittsburgh School of Medicine, was the chair of the Cancer Research Training Program at UNMC until his departure in 1998. Professor Smithgall's letter describes the petitioner's background and experiences and repeats the assertions of Professor Gmeiner. Weixing Zhang, Nuclear Magnetic Resonance ("NMR") Facility Manager, St. Jude Children's Research Hospital, collaborated with the petitioner "on a daily basis" during his postdoctoral research fellowship at UNMC. Dr. Zhang's letter simply credits the petitioner for his skilled use of NMR techniques. Eric Trump, Associate Professor of Chemistry, Emporia State University, collaborated with the petitioner at UNMC in 1998. Professor Trump's letter describes his successful collaboration with the petitioner on the FdUMP(10) project, but he does not provide any information indicating that the petitioner's findings have had a significant influence on the medicinal chemistry field.

The above witness letters demonstrate that the petitioner is highly valued by UNMC for his effective use of NMR technology and other laboratory techniques in coupling FdUMP[10] with folic acid. However, the petitioner's four witnesses all have ties to UNMC and do not demonstrate his influence on the field beyond his research institution. The petitioner has not shown that his work has attracted significant attention from independent researchers in the field of cancer drug development.

In addition to the witness letters, the petitioner submits evidence of an award for second place in the Research Paper Competition of the Shanghai Institute of Pharmaceutical Industry in 1992 and a Norman and Bernice Harris Graduate Student Award in Cancer Research for academic achievement in 1998. University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's academic awards may place him among the top students at his educational institution, but receipt of such awards offers no meaningful comparison between the petitioner and experienced professionals in the field of cancer drug development. We further note that the petitioner's 1998 graduate student award came into existence subsequent to the petition's filing. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

As stated in Matter of New York State Dept. of Transportation, *supra*, the classification of exceptional ability normally requires a labor certification unless the director determines that a waiver of that requirement is in the national interest. Thus, in order to establish eligibility for the national interest waiver, even an advanced degree professional must demonstrate that the benefit he presents to his field of endeavor exceeds the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). A petitioner seeking a national interest waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. The labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. It cannot suffice to simply state that the

petitioner possesses useful skills, or a "unique background." The petitioner must clearly present a significant benefit to the field of endeavor.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director stated: "[The petitioner's] achievements at this stage of his career appear to fall within the norm expected of successful graduate students and professionals in the fields of science."

On appeal, counsel argues that the director erred by "failing to issue a Request for Evidence." At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request. The petitioner, however, offers no such additional evidence to address the deficiencies noted in the director's decision.

Counsel's brief cites several AAO decisions approving national interest waiver petitions. These synopses, prepared by the petitioner's attorney and including none of the original record documentation, do not present a complete picture of the approved petitions. Furthermore, the approvals in question do not represent published precedents and therefore are not binding on the Service in other proceedings.

Counsel states that the petitioner has authored numerous articles that have appeared in "internationally circulated peer-reviewed journals." The record contains no evidence that the presentation of one's work is a rarity in petitioner's field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's findings in their research.

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 are 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings.

Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner has failed to provide any evidence of independent citation of his published works.

Without evidence reflecting independent citation of the petitioner's articles, we find that the petitioner has not significantly distinguished his results from those of other researchers in the field. It can be expected that if the petitioner's published research was truly significant, it would be widely cited. The petitioner's participation in the authorship of published articles may demonstrate that his research efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that any of the petitioner's published works have garnered significant attention from other researchers in the scientific community.

Counsel cites the testimonial letters as evidence of the petitioner's impact on his field. We note that the petitioner's witnesses consist entirely of individuals who worked with him at UNMC. Such individuals, by virtue of their proximity to the petitioner's work, are not in the best position to attest to the petitioner's impact outside of UNMC. Research which influences the field of cancer drug development as a whole serves the national interest to a greater extent than research which attracts little attention outside of the institution that produced that research. In order to qualify for the classification sought, the petitioner must demonstrate that he has had some measure of influence on the larger field of cancer drug research. The opinions of experts in the field with whom the petitioner has worked, while not without weight, cannot form the cornerstone of a successful national interest waiver claim.

The petitioner's witnesses, such as Professors Gmeiner and Trump, assert their confidence in the future significance of his work. Professor Gmeiner states: "[The petitioner's] coupling of FdUMP[10] with folic acid will constitute a substantial research accomplishment." The witnesses' use of phrases such as "will benefit our project" and "may potentially impact the lives [of Americans]" in describing the petitioner's incremental research seems to suggest future results rather than a past record of demonstrable achievement. Professor Trump concludes his letter referring to the "promise" of the FdUMP[10] project. Other statements from witnesses attesting to the petitioner's expertise in NMR and other advanced laboratory techniques utilized at UNMC cannot suffice to demonstrate eligibility for the national interest waiver. Any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification.

The petitioner has not established that his research has consistently attracted significant attention beyond the institutions where he has worked. Clearly, the petitioner's current and former colleagues at UNMC have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While the witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have wide practical applications does not persuasively distinguish the petitioner from other competent researchers.

The issue in this case is not whether advances in cancer drug development are in the national interest, but, rather, whether this particular petitioner, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role. The petitioner must demonstrate that his contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in the field of cancer drug development, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations of the petitioner's associates may yet come to fruition, at this time the waiver application appears premature.

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.

ORDER: The appeal is dismissed.