

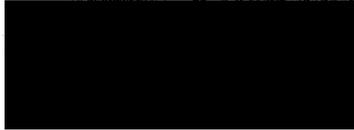


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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to
prevent clearly unwarranted
invasion of personal
information



File: [Redacted] Office: Nebraska Service Center

Date: 14 AUG 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 seeks employment as a research associate at the Northwest Center for Small Fruit Research ("NCSFR"), Horticultural Crop Research Laboratory ("HCRL"), Agricultural Research Service ("ARS"), United States Department of Agriculture ("USDA"), at Oregon State University ("OSU"). 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 petition was filed on August 17, 1999. At the time of filing, the petitioner held a Master of Science in Horticulture from OSU, where he was also pursuing his doctorate. The director acknowledged that the petitioner 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 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.

We concur with the director that the petitioner works in an area of intrinsic merit, horticulture, 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 submits several witness letters in support of his petition. Joseph Postman, Plant Pathologist, USDA/ARS National Clonal Germplasm Repository, describes the petitioner's research:

[The petitioner] has been involved in research that requires expertise in the areas of

genetics, plant breeding, tissue culture, and molecular biology. He has applied flow cytometry techniques to the determination of nuclear DNA content and has made significant achievements in adapting this technology to the determination of ploidy level in a number of important small fruit and tree crops. Detailed knowledge about the ploidy level (number of chromosomes) of a plant is critical to the appropriate selection of parental material in any plant breeding program, and is especially important with several of the small fruit crops. [The petitioner's] research has enabled the determination of *Rubus* ploidy level and genome size using flow cytometry. Through his efforts, a rapid and accurate protocol has been set up for the verification and determination of ploidy level and nuclear DNA content of *Rubus* germplasm - the fundamental raw material for the development of new raspberry and blackberry cultivars for our commercial industry. This technique is more convenient and less expensive than the microscopic techniques that have been used to determine ploidy levels in the past. The results of his research have recently been presented in scientific meetings and have also been accepted for publication in *HortScience* and *Acta Horticulturae*, two important international horticulture journals.

In his first letter, Dr. Chad Finn, Research Geneticist, USDA/ARS NCSFR, states:

[The petitioner's] work, while immediately applicable to our program, will be extremely valuable to breeding programs around the world. Determining chromosome number is critical when planning crosses in a breeding program, for determining the value of germplasm, and for planning strategies to incorporate new germplasm. His success in adapting flow cytometry to *Rubus* will allow us and other scientists to avoid the laborious traditional approach that involves a trained microscopist.

Jiang Liu, Associate Professor, Florida A&M University, describes the economic importance of blackberry and raspberry crops to the United States and their potential health benefits for consumers. Professor Liu then credits the petitioner with developing a method to improve the breed selection process for blackberries and raspberries. Professor Liu states:

I attended his oral presentation and felt that his method is really a breakthrough for ploidy study of blackberry and raspberry, and other potential horticultural crops... This method has the advantage of being rapid, accurate, convenient and inexpensive over the conventional method that depends on laborious procedures to prepare samples and the use of a microscope to count the number of chromosomes... I am also excited about the prospect of collaborating with the petitioner and am hoping to leverage his expertise and verify ploidy level and genome size in my research of grape...

OSU Professors Adriel Garay, Shawn Mehlenbacher, and Maxine Thompson repeat the assertions of previous witnesses and note the petitioner's academic accomplishments at their university. University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's scholastic achievement may place him among the top students

at OSU, but it offers no meaningful comparison between the petitioner and experienced researchers in the horticultural field.

Professors Zhang Zhiming and Zang Shuying of the Beijing Botanical Gardens, the petitioner's former employer in China, describe the petitioner's research responsibilities at their institution and briefly mention a single article that he co-authored in 1995.

The petitioner's initial eight witnesses include three professors from OSU (his educational institution), two researchers from USDA/ARS (his current employer), two researchers from the Beijing Botanical Gardens (his former employer), and a researcher who met the petitioner at a scientific conference in 1997 (Dr. Liu). The witnesses describe the petitioner's expertise and value to his current and former research projects, but do not demonstrate that the petitioner has significantly impacted the horticultural field. Other than Dr. Liu, the petitioner has not shown that his current efforts have attracted attention from independent researchers outside of Corvallis, Oregon.

In addition to the witness letters, the petitioner submits evidence of his educational credentials and proof of his professional association memberships. The witness letters and supporting documentation demonstrate the petitioner's exceptional ability as a horticultural researcher. However, in accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. Pursuant to Matter of New York State Dept. of Transportation, the benefit that the petitioner presents to his field of endeavor must greatly exceed 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 alien must clearly present a significant benefit to the field of endeavor.

The petitioner submits four articles discussing the health benefits of berries and related research. However, none of these articles even mention the petitioner or his specific contributions to the 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 developing improved raspberry and blackberry cultivars for commercial industry and the associated health benefits, 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 the petitioner's employment as a skilled horticultural researcher inherently serves the national interest, the witnesses for the petitioner essentially contend that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect.

The petitioner submits evidence of a single conference presentation and his co-authorship of five articles. The record contains no evidence that the presentation or publication 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 work 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 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." 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.

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: "While the record indicates that the alien petitioner is a productive researcher, the record does not establish that the contributions of the alien petitioner are such that they measurably exceed those of his peers at this time." The director found the evidence did not show that the petitioner's work is "known and considered unique outside his immediate circle of colleagues."

On appeal, counsel argues that the grounds for denial cited by the director do not comply with law and thus constitute an abuse of discretion. Counsel's brief cites several AAO decisions approving national interest waiver petitions. Counsel's attempt to apply statements from previous AAO findings to the current case is flawed. Without the original record of documentation, counsel cannot 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.

The petitioner submits seven new letters on appeal. However, these letters merely echo the assertions of previous witnesses. All of the letters credit the petitioner as the first to "apply flow cytometry to studying *Rubus* ploidy level and DNA content." Counsel asserts that five of these letters are from individuals who should not be construed as members of the petitioner's "immediate research circle." Three of the new letters are from employees of USDA/ARS, one is from a faculty member at OSU, and one is from an individual who met the petitioner at a conference in 1997. Only three of the new letters seem to offer independent recognition of the petitioner's research efforts raising doubt as to the extent of the petitioner's contribution.

Counsel cites the testimonial letters as evidence of the petitioner's impact on his field. The petitioner's witnesses consist mostly of his current and former research supervisors, educators, and collaborators. 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 the laboratories where he has worked. Research which influences the horticultural field in general serves the national interest to a greater extent than research which attracts little attention outside of the institution that produced such research.

Dr. Freddi Hammerschlag, Research Leader, USDA/ARS Fruit Laboratory, describes his collaboration with the petitioner on research presented at the ASHS conference in July 2000. Dr. Max Zong-Ming Cheng, Associate Professor at North Dakota State University, and Professor John Clark of the University of Arkansas mention the petitioner's genetic engineering research regarding Marionberry and its freezing-resistance gene. This research was also presented at the ASHS conference in July 2000. These events 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. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

In order to qualify for the classification sought, the petitioner must demonstrate that he has had some measure of influence on the horticultural field as a whole. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful national interest waiver claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. We note that the record reflects little formal recognition or awards for the petitioner's research, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence that would have existed whether or not this petition was filed is more persuasive than the subjective statements from individuals selected by the petitioner.

Counsel asserts that that the petitioner's record of publication has established his reputation as an outstanding researcher. The petitioner, however, has not provided a citation history of his

published works. Without evidence reflecting independent citation of his 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 co-authorship of five published articles prior to the filing of the petition may demonstrate that his 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 the petitioner's five published works have garnered significant attention from other researchers throughout the scientific community.

Several of the witnesses, such as Dr. Guenter Staudt and Dr. Barbara Reed, assert their confidence in the future significance of the petitioner's work. The witnesses' use of phrases such as "will make a significant contribution" and "will be a significant influence in improving blackberry and raspberry cultivars" in describing the petitioner seem to suggest future results rather than a past record of demonstrable achievement. Dr. Chad Finn asserts: "The petitioner's future research will improve our efforts thus increasing the competitiveness of the U.S. small fruit industry on a national level."

Clearly, the petitioner's colleagues at USDA/ARS and OCU have a high opinion of the petitioner and his work, as do other researchers who know the petitioner from encounters at professional conferences. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of the petitioner's findings, there is no indication that these applications have yet been realized in the agricultural industry. 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 practical applications does not persuasively distinguish the petitioner from other competent researchers.

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. Without evidence that the petitioner has been responsible for significant achievements in the horticultural field, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations of the petitioner's witnesses 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.