B5

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: [redacted] Office: Nebraska Service Center Date: AUG 16 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 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. At the time she filed the petition, the petitioner was a doctoral student and graduate research assistant at the Finch University of Health Sciences/Chicago Medical School ("FUHS/CMS"). 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 director did not dispute that the petitioner qualifies as a 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,

[redacted]

> 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, and that the proposed benefits of her 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. Dr. Lisa Ebihara, Associate Professor, Department of Physiology and Biophysics, FUHS/CMS, is the petitioner's research supervisor. Dr. Ebihara states:

> For the past several years, my colleagues and I have been studying the biophysical and pharmacological properties of gap junctional channels in the lens of the eye and other tissues. There have been several types of gap junctional proteins identified in the lens. One of the current areas of interest in the field of eye research is to understand how these

gap junctional proteins contribute to lens homeostasis and how cataracts arise. It has been recently shown that mutations of lens gap junction proteins are associated with the formation of cataracts.

[The petitioner] is a leading researcher in the Department of Physiology and Biophysics at Finch University of Health Sciences who has been working in my laboratory for the past three years. The main focus of her research has been to understand the molecular mechanisms of gap junctional protein mutations that are associated with congenital cataracts by expressing these mutant proteins in two different heterologous expression systems and studying their functional properties using molecular biological and electrophysiological techniques.

In a recent study, she used PCR mutagenesis, an innovative molecular biological approach, to successfully generate a missense mutation in the gene for mouse Cx5O. She designed the right primers and optimized the PCR conditions in order to generate the mutation. This mutation results in a substitution of aspartic acid for alanine at amino acid 47 in the first putative extracellular domain of Cx5O, and has been linked to congenital cataracts. She then expressed this mutation in paired oocytes and tested the oocyte pairs for gap junctional coupling using dual two-micro-electrode voltage-clamp technique, a complex electrophysiological approach. Her study shows that this mutation leads to loss of gap junctional channel function. These results suggest that people carrying these gap junctional channel mutations probably develop cataracts as a consequence of reduced intercellular communication. This work has been recently published in *Investigative Ophthalmology and Visual Science (IOVS)* which is the most frequently cited journal in the field of eye research. She has also carried out studies on co-expression of lens connexin proteins and is co-author on a paper that examines the effect of co-expression of lens fiber connexins on hemi-gap-junctional channel behavior. This paper was published last year in the *Biophysical Journal*, a highly respected journal in the field of membrane biophysics with a calculated impact factor of 4.524.

I am impressed by [the petitioner's] zeal, patience, independence and ability to master and innovatively apply difficult techniques quickly. Because of these traits, she has succeeded in making a significant contribution to the field of eye research. Her work on the functional properties of connexin mutations associated with congenital cataract has resulted in a better understanding of the role of gap junctions in the lens of the eye, and helps broaden the knowledge of gap junction-related health diseases. It is this type of basic biomedical science research that is so vital in ultimately developing a way of curing gap junction-related cataracts.

In conclusion, [the petitioner] is an excellent researcher who has played an essential role in my NIH funded research program due to her profound insights and great creativity.

Dr. David Mueller, Professor, Department of Biochemistry and Molecular Biology, FUHS/CMS, states:

In 1998, I was one of the committee members for her doctoral qualification examination. Her performance on the qualification examination was excellent, showing a full understanding of the field and clearly answering my questions. This shows that [the petitioner] has broad and solid knowledge in the biochemistry field as well as the specific area in which she directly conducts research, physiology and biophysics.

I know that [the petitioner] is a very hard-working, honest and highly motivated person. She investigates the molecular mechanisms underlying congenital cataracts associated with connexin mutations, applying biochemistry, electrophysiology and molecular biology techniques and taking advantage of two expression systems, Xenopus oocytes and mammalian cell lines. As a senior graduate student, she has published her critical research in the field's leading journals, i.e., *Biophysical Journal* and *Investigative Ophthalmology and Visual Science*. Also she has presented her research results at the conference of the Association for Research in Vision and Ophthalmology, which is the premier organization in the vision and ophthalmology field. Her research results suggested that heteromeric channels, channels made of more than one type of connexin, are formed in chick lens and that the formation of heteromeric channels is critical to the eye's differentiation, development and lens' transparency. Her research results also indicated that a missense mutation in mouse connexin causes partial loss and decrease of gap junction-mediated intercellular coupling, which causes congenital hereditary cataracts. According to these research findings, it is clear that gap junction-mediated intercellular coupling plays an active role in maintaining the lens' normal function, and that the cataracts associated with connexin mutations are due to the loss of intercellular coupling. In summary, due to her hard work and talent, her research has helped better understand the molecular mechanisms of congenital hereditary cataracts associated with connexin mutations.

Dr. Xu Chunehe, Associate Professor of Biophysics, Shanghai Institute of Plant Physiology, states:

I have known [the petitioner] since she joined the High Performance Liquid Chromatography Laboratory at Shanghai Institute of Plant Physiology in July 1992, after she earned her Master's Degree from East China Normal University. At that time, I was her supervisor. She expanded the HPLC lab by installing a new set of HPLC machines bought from Pharmacia Company. She was given full charge of various HPLC machines. Her research focused on optimizing the separation and purification conditions for protein samples. Her work was very important because it led to collecting pure proteins for further studies. The optimal purification conditions included using the most efficient type of HPLC columns based on the hydrophobic or hydrophilic properties of protein samples, correct salt concentration of the running solution, and the most efficient running rate. She efficiently purified protein samples extracted from biological organisms, including rice, wheat, corn, bacteria, patients with disease, etc. She successfully established the optimal purification conditions for numerous protein samples for research groups in the Institute, which made it

possible to determine the characteristics of pure proteins, thereby making a significant contribution to research in the Institute.

Professor Chen Jiasen, Department of Physics, East China Normal University, supervised the petitioner's research in his laboratory while the petitioner was pursuing graduate studies at the university.

> During her graduate study, [the petitioner] studied the contraction mechanism of frog fiber cells stimulated by an electrical field. She showed enormous skills and great creativity during her research. She designed a test chamber, where the dissected fiber cells could be maintained at physiologic conditions and the electric field was applied on the cells. This chamber made it possible to observe the effect of electric field on cells at physiologic conditions. Also, she mastered ellipsometric methods. Some of her results were published in *Acta Biophysica Sinica* in 1993, a leading Chinese journal in biophysics. This project provided a theoretic basis for potential rehabilitation methods using physical equipment. The project was successfully finished and she was granted her MS degree.

Dr. Eric Beyer, Professor, Department of Pediatrics, University of Chicago, states:

> My laboratory has ongoing collaborative studies with [the petitioner]. These studies are critically focused on investigating the significance of connexin mutations in the development and inheritance of cataracts in people. I am well aware of [the petitioner's] scientific work which has been published in *Investigative Ophthalmology* and *Visual Sciences* and has been presented at the national meetings of the Association for Research in Vision and Ophthalmology and at the International Gap Junction Congress. [The petitioner's] work used state-of-the-art electro-physiological investigations to examine the abnormalities of intercellular communication due to cataract mutations. These studies revealed that the mutant connexins are critical for the loss of function of the lens in these patients. [The petitioner] works at a neighboring institution here in Chicago. I have met with her frequently over the last two years to discuss her work. Therefore, I know her work very well.
>
> In summary, [the petitioner] is a highly skilled and accomplished cellular biologist and electro-physiologist. She has contributed very significantly to studies of abnormal ion channels in the lens and their role in the development of human disease. I am confident that she will continue making seminal contributions to biomedical science.

The letters from Professors Mueller and Jiasen include information regarding the petitioner's academic accomplishments. University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's scholastic achievement may place her among the top students at her educational institution, but it offers no meaningful comparison between the petitioner and experienced biomedical researchers.

The above witness letters demonstrate that the petitioner is valued by her by research institutions for her diligence and mastery of advanced laboratory techniques and equipment. The petitioner's five witnesses include her current research supervisor, two former supervisors, a former professor and committee member for her doctoral qualification examination, and current research collaborator. The witnesses describe the petitioner's expertise and value to her current and former research projects, but do not demonstrate the petitioner's influence on the field beyond her collaborators. The petitioner has not shown that her work has attracted significant attention from independent researchers in the biomedical research field.

The petitioner submits evidence of four published articles. However, 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 provides no evidence that her articles have been heavily cited.

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 indicated that the witness letters did not establish that the petitioner's work was "known and considered unique outside her immediate circle of colleagues." The director also noted: "While the record indicates that the alien is an experienced and productive researcher in biophysics and physiology, the record does not establish that the contributions of the alien are such that they measurably exceed those of her peers."

On appeal, counsel states that the petitioner's "distinguished record of achievement and accomplishment" includes publication in three scientific journals. The petitioner, however, has not provided a citation history of her published works. Without evidence reflecting independent citation of the articles, we find that the petitioner has not significantly distinguished her 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 five published articles prior to the filing of the petition may demonstrate that her 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 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 her field. We note that the petitioner's witnesses consist entirely of her current and former research supervisors 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 she has worked. Research which influences the biophysics field in general serves the national interest to a greater extent than research which attracts little attention outside of the institution that produced that research.

Witness statements, such as the one from Dr. Ebihara, attesting to the petitioner's expertise in applying difficult laboratory techniques cannot suffice to demonstrate eligibility for the national interest waiver. We note that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification.

Counsel states: "Because of her stellar achievements and contributions to the field, [the petitioner] received a Second Place Award for Progress in Science and Technology in 1989." The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner offers no first-hand evidence confirming her direct receipt of this award. Furthermore, according to the letter from Professor Jiasen, the award appears to have been given to his laboratory, rather than to the petitioner as an individual. We note that the record contains 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 subjective statements from individuals personally acquainted with the petitioner.

Examination of the record indicates that the petitioner's contributions have arisen from her work on ongoing research projects such as her current work at FUHS/CMS. The petitioner has not been shown to have initiated research projects which yielded significant findings. As a research assistant, the petitioner's duties involve assisting the professor with research which, in many cases, had been underway for years before the petitioner arrived in the laboratory. The petitioner has not shown that her individual work has had significant repercussions throughout the biomedical field. Thus, the petitioner's contributions to congenital cataract research appear to be incremental rather than fundamental.

Clearly, the petitioner's professors, collaborators and supervisors have a high opinion of the petitioner and her work. The petitioner's findings, however, do not appear to have yet had a

measurable influence in the larger field. While some of 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 her 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. In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches itself to the visa classification sought by the petitioner.

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.