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U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted] Office: Nebraska Service Center

Date: AUG 29 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:
[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. The Associate Commissioner for Examinations summarily dismissed a subsequent appeal. The record now demonstrates that the summary dismissal was issued in error, because a timely submission from the petitioner had not reached the record of proceeding. The matter is hereby reopened on the Service's motion. The appeal will be sustained and the petition will be approved.

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 of filing, the petitioner was a research associate and doctoral student at Michigan State University ("MSU"). 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, 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 describes his work:

Dairy nutrition is the study of milk production. The goal of dairy nutrition is to explore the most efficient strategy to feed lactating dairy cows (i.e. what to feed and how to feed). . . .

It is known that the maximum feed intake of dairy cows is often limited by the physical limits of the rumen [the largest of a cow's four stomachs]. . . . One approach to maximized feed intake is to feed more digestible fiber. . . . This approach enables the cow to eat a sufficient amount of fiber to maintain their health. This has a huge impact on the productivity of dairy cows and profitability of dairy producers.

Fiber digestibility is determined in part by plant genetics. . . . [T]he effects of fiber digestibility on productivity of dairy cows have not been well investigated. In a series of research trials that I have conducted, brown midrib 3 mutant in the corn plant was found to consistently increase fiber digestibility of corn plants and improve feed intake, energy utilization efficiency, and milk production of dairy

cows. Further research is still needed to optimally implement this specialty corn hybrid in dairy diets.

The petitioner asserts that his work in this area will have an economic benefit through the export of improved feed grain to Japan.

Along with copies of his published work, the petitioner submits several witness letters. A number of these letters are from MSU faculty members. A representative letter from the MSU group is from Professor David K. Beede, chair of Dairy Management and Nutrition, who states that ruminants, such as dairy cattle, "are significant and efficient suppliers of food for human consumption" because of their ability to digest high-fiber foods, such as hay, that humans cannot consume, and produce milk which is more readily digestible for humans. Prof. Beede asserts that research into improved corn silage "has been of major interest among dairy farmers." Prof. Beede continues:

The research conducted and reported by [the petitioner] also has been of major interest to several major commercial agriculture companies in the United States and abroad, because the fundamental concepts . . . demonstrated in [the petitioner's] research have potential for being used with other feedstuffs (e.g., sorghums and other grasses) commonly fed to ruminants to produce human food efficiently. . . .

[The petitioner] has been able to develop a role as a technical advisor and consultant to the dairy and feed industries of Japan; transferring knowledge about the latest advances and practices of U.S. dairy production. . . .

[The petitioner] is in a strategic position to provide information about U.S. dairy technology to Japan. This position is advantageous particularly for United States agriculture because it can increase the potential to market feedstuffs, innovative technologies, as well as human edible products to other countries in the Pacific Rim, including Japan.

Hideo Sekiguchi, president of Analytech Associates, Nippon, and technical advisor to the National Federation of Dairy Cooperatives Association, was associate director of the U.S. Feed Grains Council/Japan from 1990 to 1997. He offers various background observations, and states:

[The petitioner] is a vital researcher, and his research program on efficient utilization of forages has recently drawn extensive international attention because of its huge impacts for the dairy industry.

In addition, it is obvious that [the petitioner] is extremely well connected with the leaders of Japanese industry and has an excellent understanding of [the] dairy industry. Because of his wide acceptance and respect in Japanese industry, he is in

the best position to carry out the role of organizing the technology-transfer extension activities. . . .

Japan is the major importer of feed grains, hay, and other products related to animal industry from the U.S.A. However the other countries such as Canada, Australia, and China are competing with the U.S.A. in this area of industry. The establishment of [a] technology-transfer relationship between the U.S.A. and Japan will surely increase the competitive edge of the U.S. feed industry. . . .

Hiroshi Ito, editor of *Dairy Japan*, "one of the most popular monthly magazines in [the] Japanese dairy industry," states:

[The] Japanese dairy industry currently faces a dramatic structural change. Japanese dairy producers have been subsidized by the government and protected from competition in the free market. However, milk and dairy products are in transition to free market economy, and dairy producers are required to be more competitive for survival. . . . Japan will never compete with the US for international dairy market because of significant limitation in agricultural land and other resources. . . . [The] existence of [a] strong dairy industry in Japan is mutually beneficial for both Japan and the US, and will contribute to the sound US economy now and in the future. . . .

Regardless of its importance in our dairy industry, applied dairy nutrition research is not well funded by our government.

Therefore, we are asking the source of technical information on dairy nutrition for the United States. . . .

We have been frequently asking [the petitioner] to write articles on dairy nutrition for our magazine, *Dairy Japan*. [The petitioner] has already published 18 nutritional articles [in] *Dairy Japan* for [the] last 3 years. The information that [the petitioner] provided [to] us has been getting extensive attention [from] dairy producers as well as [from] extension agents and veterinarians in our industry.

The record contains copies of several of the petitioner's articles, as well as articles by others discussing the petitioner's work. This discussion went beyond typical citation; one article in *Feedstuffs* appears to be devoted mostly to the petitioner's research findings.

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 additional witness letters and published materials, as well as arguments from counsel to the effect that this evidence establishes the petitioner's eligibility.

Dr. Richard A. Kohn, assistant professor at the University of Maryland, states:

[The petitioner's] research has shown that corn silage made from genetically altered plants was utilized more efficiently by cattle than that from unaltered plants, and consequently it resulted in greater milk production per cow, and greater milk production per unit of feed consumed. His research also helped define how the diet should be changed when using these modified plants. . . .

[The petitioner's] research contributes greatly to our national interest because the cost of producing feed for dairy cattle adds up to nearly half the total cost of milk and meat production. . . .

[The petitioner's] research also contributes to our national interest by helping to protect the natural environment. . . . When less feed is required to maintain production, the amount of nutrients excreted to manure is decreased and the subsequent losses to water after manure application are reduced. In addition, fewer crops are needed resulting in a further reduction of fertilizer application and loss of nutrients to water.

Dr. Katharine F. Knowlton, assistant professor at Virginia Polytechnic Institute and State University, states that the petitioner's "research focusing on improving the digestive and nutritional value of foodstuffs in dairy cattle is critically important to the national interests of the United States." Dr. Knowlton states that the petitioner's "work has given new insight into the mechanisms that affect fiber digestibility." Dr. Charles J. Sniffen, president of the W.H. Miner Agricultural Research Institute, states that the petitioner "is among the top of the scientists working in the area in this country and internationally" and that the petitioner's "research is beginning to have and will continue to have a significant positive impact on the dairy industry."

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated that, while "the alien petitioner has played an important role in the work done in Dr. Allen's laboratory," and "he is in a position in which he can share information with the Japanese dairy farmers," this information does not establish the petitioner's eligibility for the waiver because "original contributions, publications and presentation or research work are inherent to the position of a researcher" and the record does not establish the required track record of past impact on the field.

On appeal, counsel states that the record amply demonstrates the petitioner's past achievements in the form of a significant publication record and "work that is considered novel, original, and seminal by experts in the field . . . from universities, private research institutions, and dairy publications" (emphasis in original).

Counsel states "the director stated on page six that 'The record shows that the petitioner is in a unique position to share information acquired in the U.S.'" No such statement, however, appears on page six or anywhere else in the director's decision. At the bottom of page five and top of

page six, the director did state that the petitioner "is in a position in which he can share information with the Japanese dairy farmers" (a quotation which counsel accurately repeats elsewhere in the appellate brief), but the director did not deem this position "unique."

Notwithstanding shortcomings in counsel's appellate brief, the record demonstrates that the petitioner's research has attracted attention both in the United States, where it has featured prominently in independent articles, and in Japan, where a major dairy industry publication regards the petitioner as a respected authority in his field. The petitioner has disseminated his work not only through scholarly articles, but also directly to the industry in Japan via dozens of popular articles in the trade press. While the petitioner's methods are not yet in widespread implementation, experimental results have confirmed the petitioner's hypotheses and set the stage for future contributions that will benefit the U.S. environmentally and economically.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the dairy science community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.