



B5

U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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



File: [Redacted] Office: Nebraska Service Center Date: 06 DEC 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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 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.

(i) . . . the Attorney General may, when the Attorney General 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's degree in pathology from Dalhousie University. 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, 22 I&N Dec. 215 (Comm. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, cancer research, and that the proposed benefits of her work, improved understanding and treatment of Hodgkin's Disease and Leukemia, 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 will.

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 219, note 6.

Dr. Wing Chan, the petitioner's supervisor at the University of Nebraska Medical Center, asserts that the petitioner is studying the mutation of the immunoglobulin heavy chain gene in non-Hodgkin's lymphoma and the relationship between concurrent large cell lymphoma and Hodgkin's disease in the same patients. Dr. Chan notes that persons with these diseases have

only a 50 percent survival rate, concluding that additional research is necessary in this area. He predicts that the petitioner's work "should" contribute to an understanding of these diseases at the molecular level and that it "would provide important information that may help to improve the treatment of lymphoma in the future." He concludes that the petitioner is "performing cutting edge research currently in our program." He does not identify a specific contribution, however, that has influenced other researchers in the field.

Dr. Yuri Persidsky, director of the Center for Neurovirology and Neurodegenerative Disorders at the University of Nebraska Medical Center, asserts that the petitioner "has found that hypermutation is present in some special variant lymphoma." He concludes that this finding "may very well lead to a very effective treatment and prevention of the disease." He continues:

Transplantation is regarded [as] a very promising treatment for cancer and many other diseases. Viral infection, however, has been the major cause of graft failure and death after transplantation. The conventional viral culture is time consuming and significantly delays the lifesaving treatment. [The petitioner] and her colleague successfully applied the state-of-the-art techniques in molecular biology and developed [a] very sensitive, and fast test for adenovirus detection. [The petitioner's] accomplishments could significantly benefit the success of the organ transplant program.

...

Since joining our research team at UNMC, [the petitioner] has instituted studies in the important areas of the transplantation and cancer research. Due to her strong academic background and research skills, [the petitioner] brings special experience to the project. She is a rare individual who possesses such expertise in health research, and who is eager and able to apply her skill to a question of direct application to human health. Thus, [the petitioner] is in a position to make a substantial breakthrough in the [sic] transplantation and cancer research.

Dr. Persidsky does not indicate that the petitioner's test for adenovirus has been adopted or is even in clinical trials for use in transplants. His assurances that the petitioner "is in a position" to contribute to her field in the future is insufficient.

Dr. James Wright, in whose laboratory the petitioner worked while working on her Master's degree at Dalhousie University, asserts that the petitioner was the top student in the program, receiving the competitive Killam Scholarship. He continues:

[The petitioner's] work in my laboratory resulted in authorship or co-authorship on four papers. Most of these pertained to studies on combined pancreatic islet and liver transplantation as well as the possible role of islet-derived hepatotropic factors in a heterotopic liver transplant model in rats. The latter paper was an exceedingly important contribution to science; in fact, Dr. Tom Starzl described

this paper to me in a letter as “the most complete assessment that I have seen of these complex physiologic relationships.” That is very high praise coming from the most productive transplant scientist of all times, a man with several thousand publications. Another paper was equally important. In the early 1990’s, the University of Pittsburgh Transplantation Institute began to report very good results with islet transplants performed in patients undergoing upper abdominal exenteration for malignancy and receiving simultaneous orthotopic liver and intraportal islet transplants. Their results with these patients were outstanding compared to the results of any other clinical islet transplant center in the world and suggested that orthotopic liver transplants (OLT) might actually promote same donor islet allograft survival. Because analogous animal studies had not been performed prior to this clinical trial, [the petitioner] examined the effect on islet allograft survival of simultaneous same-strain OLT in rats. She used a Wistar-Furth to Lewis strain combination because arterialized OLTs were spontaneously tolerated (i.e., uniform graft survival > 100 days) and because islet grafts were quickly rejected (6 days.). Combining the two procedures in the same rats did permit markedly prolonged islet allograft survival in the absence of any immunosuppression but eventually precipitated lethal liver allograft rejection. This paper is the first confirmation in animals of the results of a very controversial study in man.

The record contains a 1992 letter from Dr. Starzl, director of the Transplantation Institute at the University of Pittsburgh, in which he thanks Dr. Wright for a copy of the petitioner’s paper and containing the above quote referenced in Dr. Wright’s letter to the Service. Dr. Starzl does not indicate that he will apply the results reported in this paper to his own work. The actual impact of this paper, as demonstrated by citation evidence, will be discussed below.

Dr. Weiming Yu, Dr. Wright’s co-investigator at Dalhousie University, provides similar information to that provided by Dr. Wright.

In response to the director’s request for additional documentation, the petitioner submitted new letters. Dr. Dennis Weisenburger, a professor of pathology at the University of Nebraska Medical Center, asserts that the petitioner’s research group is currently the leading program for the study of gene expression and molecular classification of lymphoma. Dr. Weisenburger continues that the program has the potential to identify new disease entities, prognostic factors, therapies, and mechanisms of drug resistance relating to lymphoma. Dr. Weisenburger continues:

Although she joined our team not long ago, [the petitioner] has achieved several milestones in her research. Her research findings were presented and well received at several recently held national and international conferences. One of her findings was actually published in a leading medical journal, the *American Journal of Clinical Pathology*. Also, she recently wrote and submitted three more papers about her findings to several other medical journals.

(Italics added.) Dr. Weisenburger does not identify a specific contribution or explain how other research has been influenced by the petitioner's work.

Dr. Lesley Alpert, in whose laboratory the petitioner worked at the Lady Davis Institute (LDI), discusses the petitioner's work on the effect of prostaglandin on colon cancer. Dr. Alpert states:

Evidence has been accumulating the prostaglandin inhibitor and related agents (such as aspirin) taken orally can significantly delay the onset of colon cancer and thus prevent its occurrence in some cases. There is tremendous potential for reducing the incidence of colon cancer from gaining more understanding of the action of prostaglandin on the colon. [The petitioner's] rich knowledge in molecular biology and immunology and her exceptional diagnostic and analytical abilities made her not only a valuable but also a key researcher for the success of this research. . . . Her work not only resulted in publications or conference presentations, but also laid the groundwork to several other research projects that we are currently conducting at LDI.

While Dr. Alpert indicates that the petitioner's work has led to other research projects at LDI, it is typical for a laboratory to continue to build on its previous work. Most medical research is aimed at improving the understanding of the relationship between some factor and a disease. All such research has the "potential" to improve treatment and prevention. Dr. Alpert fails to identify a specific contribution to the field made by the petitioner.

The above letters addressed to the Service are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole. While counsel argues on appeal that Dr. Weisenburger is a disinterested expert since he works in a different program at the University of Nebraska Medical Center, evidence that the petitioner is known and respected within the medical center where she works is simply not evidence of an influence on the field as a whole.

The petitioner did submit a letter from Dr. Ziding Feng, an associate member of the Cancer Prevention Research Program at the Fred Hutchinson Cancer Research Center, who indicates that he met the petitioner at an international conference. Dr. Feng writes:

As a cancer research scientist, I was fascinated by her research findings. Her finding, that there is a common clonal origin from follicle center cells in lymphomas with follicular and monocytoid B-cell components, is definitely a breakthrough in understanding the pathogenesis of lymphoma. In my opinion, the finding will not only provide critical information in finding better treatments for lymphoma, but also contribute to a better understanding of lymphoma etiology.

While Dr. Feng is a disinterested expert, he does not explain how the petitioner's results influenced the field as a whole. He does not identify research that is building upon the petitioner's results; nor does he indicate that his own research has been influenced by the petitioner's results. The record does not reflect that clinical trials for new treatments have been initiated based on the petitioner's work or even that pharmaceutical companies have expressed an interest in the work.

In addition, the petitioner submitted a letter from Mike Johanns, the Governor of Nebraska. Governor Johanns indicates that he met the petitioner at a holiday social event and that she impressed him. He discusses the prestige of the University of Nebraska Medical Center and asserts that "according to several experts, her work shows great potential for our future." There is no indication that Governor Johanns has any expertise in the petitioner's field or that he has information about the petitioner's work not contained in the file. His assurances that the petitioner's work has the potential to contribute to her field is insufficient.

Finally, we note that the petitioner submitted two character references from friends. We simply note that the petitioner's character is not in question.

In addition to reference letters, the petitioner submitted five published articles and an abstract. 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." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

The petitioner submitted her own list of citations reflecting eight independent citations for her 1992 article and a total of three citations for her two articles published in 1994. While the petitioner failed to provide supporting evidence of this self-serving list, the director did not request supporting evidence in his request for additional documentation; nor did the director contest that the petitioner's work was cited as claimed in his final decision.

While the petitioner's 1992 article clearly received some attention, eight citations is not evidence that the article was "widely" cited as claimed. In addition, her other articles have not received significant attention. Thus, the citation history does not reflect a consistent track record of influence on the field.

The record shows that the petitioner is respected by her colleagues and has made useful contributions to the projects on which she worked. The record contains little in the way of specific evidence to show what major improvements the petitioner has wrought in her field of

endeavor. While the petitioner has published useful research, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. The record is absent evidence that these articles have been significantly influential.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.