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U.S. Department of Justice
Immigration and Naturalization Service

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*OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536*



File: WAC 99 242 50529 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 06 2002**

IN RE: Petitioner:
Beneficiary:



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: SELF-REPRESENTED

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, California 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 postdoctoral researcher at the University of California, Berkeley (“UCB”). 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 has 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 requirements 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, 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.

The petitioner describes his work as “isolation, characterization and functional analysis of gene[s] involved in stress tolerance and ‘Signaling’ in higher plants using various molecular and biochemical approaches.” Along with documentation pertaining to the petitioner’s educational background and copies of his published articles, the petitioner submits several witness letters. Professor J.C. Gray, who supervised the petitioner’s doctoral studies at Cambridge University in the United Kingdom, states that the petitioner “worked on the characterisation of a plant protein, and its gene, involved in the control of gene expression in plants. He gained considerable experience of a wide range of molecular biology techniques, which are the basis of the rapidly growing biotechnology industry.” Prof. Gray asserts that the petitioner’s completion of a master’s degree and a doctorate in only three years “was a remarkable achievement” but does not comment on the significance of the petitioner’s findings except to say that the petitioner’s “research was very successful.”

Dr. Sheng Luan, assistant professor and supervisor of the petitioner’s work at UCB, states “[u]nderstanding the role of phosphorylation in plants will provide critical information to manipulating plant growth and development for agricultural purposes. . . . [The petitioner] has done an outstanding job in our group. He is industrious, cooperative, and creative. He has published several papers on plant molecular biology.” UCB Professor Lewis Feldman states that the petitioner “is an impressive individual” who “has managed to develop significant insights into aspects of the stress induced signal transduction cascade in plants. Such observations are fundamental to our development of plants able to tolerate and prosper under conditions of environmental stress, such as drought.”

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 asserted that his research accomplishments are unique and significant. The petitioner has submitted three additional witness letters. Professor Richard Malkin, dean of UCB's College of Natural Resources, states that the petitioner's work at Cambridge "was highly productive as evidenced by a substantial number of reviewed publications." He adds:

[The petitioner's] specific project has involved him in determining regulatory processes in plants that involve modification of key amino acids, known as tyrosine residues, that are essential in the control of protein function. This is an important area in biology as evidence has pinpointed key enzymes, known as tyrosine phosphatases, as critical elements in regulating a variety of cellular processes. [The petitioner] is one of the first to find this class of enzymes in plants and thus to demonstrate the widespread distribution of this regulatory process.

Prof. Malkin adds that the petitioner's work is directly relevant to efforts to produce more stress-resistant crops. UCB Professor Bob B. Buchanan states:

[The petitioner's] expertise in critical molecular and biochemical techniques is extensive and can be a major advantage for the rapidly growing biotechnology industry. . . .

[The petitioner] has published research papers in leading international journals that have advanced the fields of plant biochemistry and molecular biology. . . .

[The petitioner] and his co-workers have cloned genes of a functional tyrosine phosphatase and dual-specificity tyrosine phosphatase for the first time from a higher plant. These results are a milestone in 'tyrosine signaling' and have opened a new era in the field of signal transduction in higher plants.

Prof. Buchanan concludes by asserting that the petitioner's work "in the long term may well have a significant impact on American agriculture." The third new witness is, like the other two, a professor at UCB. Professor Russell L. Jones states that the petitioner's discovery "is crucially important" because it "has given us insights into how crops may be made less sensitive to environmental stress."

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 observed that nearly all of the witness letters are from UCB faculty members, with the lone exception of a letter from the petitioner's doctoral advisor at Cambridge. The director also found that the assertions regarding national benefit are largely speculative in nature.

On appeal, the petitioner argues that he had responded to the director's request for evidence with letters "from well known scientists representing different organizations/institutes." The

petitioner states that Prof. Buchanan and Prof. Jones are both former presidents of the American Society of Plant Physiologists (“ASPP”). We note that Prof. Jones, in his letter, makes no claim to have been president of that organization, and he specifically states that he writes “as a Professor of Plant Biology . . . [at] the University of California” rather than on behalf of any other institution or organization.

It remains that all three witnesses are UCB professors, and there is no indication that Prof. Buchanan wrote his letter on behalf of the ASPP or any other organization. The record contains no direct evidence that any researchers outside of UCB regard the petitioner’s work with a comparable degree of enthusiasm. Attestations regarding the originality of the petitioner’s research do not establish eligibility because to produce original findings is a basic goal of scientific inquiry. Even the petitioner’s strongest supports state only that the petitioner’s work “may” prove to be significant “in the long term.” The record does not establish the extent, if any, to which the petitioner’s work has already influenced his field outside of UCB. The petitioner has made his work available through publication, but he has not shown (through, for instance, citation records) that these publications have attracted an unusual amount of attention.

The petitioner states that a waiver of the job offer requirement is in order because his postdoctoral position is temporary. This raises the question, however, of why the petitioner requires permanent immigration benefits for a temporary position for which an adequate nonimmigrant classification already exists.

The petitioner has made original findings in a promising field of inquiry, and his academic performance has won the admiration of his mentors. The record, however, does not show that the petitioner had, as of the petition’s filing date, accumulated a track record of achievements sufficient to show that the national interest demands his permanent admission before he has even completed his postdoctoral training.

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.