

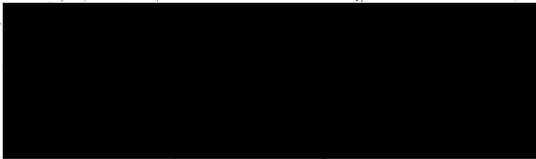


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U.S. Department of Justice
Immigration and Naturalization Service

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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: 08 FEB 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 which 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 which 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 open, 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 which 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. -- 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 petitioner holds a Master's degree in Biology from the National Taiwan Normal 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, 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.

We concur with the director that the petitioner works in an area of intrinsic merit, toxicology research, and that the proposed benefits of the petitioner's work, better monitoring of the environment, would be national in scope. It remains, therefore, to determine whether the petitioner has established that he will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications would.

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 he 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. Matter of New York State Dept. of Transportation, *supra*, note 6.

The director determined that the petitioner's projects had resulted in substantial contributions to his field, but that he had not established the role that he played in his research projects. On appeal, counsel asserts that the petitioner was the primary researcher for his projects.

Counsel also argues on appeal that the labor certification process would be contrary to the national interest because the petitioner is irreplaceable at Michigan State University but that institution cannot obtain a labor certification because the job is not permanent. With regard to this latter argument, the petitioner was not working at Michigan State University at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, according to the petitioner's own website, www.umar.edu/~huangy/personal.htm, the petitioner is currently employed as an assistant professor at the University of Missouri-Rolla. Therefore, the alleged importance of the petitioner to Michigan State's project was not only not relevant at the time of filing, it is no longer relevant.

Initially and in response to the director's request for additional documentation, the petitioner submitted several letters from professors and collaborators. [REDACTED] Environmental Contaminant Specialist in the U.S. Fish and Wildlife Service's Green Bay, Wisconsin Ecological Services Field Office writes that he met the petitioner when the petitioner contacted him about studying the ecotoxicology of PCBs in the Green Bay ecosystem. Dr. Stromborg indicates that the petitioner is "among the first" to study the effects of PCBs on amphibians and that his studies "might" prove useful in determining the extent of the problem and what would be needed for a clean up effort. [REDACTED] further indicates:

[The petitioner] is studying contaminants which mimic the effects of hormones, such as estrogen and other steroid hormones, to determine if they interfere with normal functioning of endocrine systems. If they do, then regulatory agencies such as the U.S. EPA and Wisconsin Department of Natural Resources will have a broader scientific data base for use in implementing their authorities for controlling such deadly toxicants in the environment.

While [REDACTED] notes the lack of data in this area, he does not indicate that the petitioner has produced any notable results so far.

[REDACTED] a wildlife toxicologist at the Wisconsin Department of Natural Resources who has collaborated with the petitioner, also discusses the importance of monitoring the effects of contaminants on amphibians. She states:

[The petitioner] has developed a technique that uses detoxification enzymes for early detection of contamination of the population. This approach has proven to provide quicker results at about 1% of the cost of conventional analyses, which usually cost about \$1,000 per sample. Furthermore, he has developed a toxicokinetic technique that provides more accurate predictions of contaminant exposure in a more ecologically appropriate manner. In his field studies, [the petitioner] has also gathered important data regarding the levels of dioxins, furans, and PCBs in amphibians caught in the wild in Wisconsin. This data has been

useful to the Wisconsin Department Natural Resources and the Environmental Protection Agency in their environmental risk assessments.

another wildlife toxicologist at the Wisconsin Department of National Resources, and several professors at the University of Wisconsin-Madison, where the petitioner was studying for his Ph.D., reiterate the information discussed above.

the petitioner's advisor at the University of Wisconsin-Madison, also reiterates much of the information above, stating:

[The petitioner] is essential to the advancement of knowledge on these topics because he has specialized training and experience that is unmatched in North America. There is no one with his combination of knowledge and skills about amphibian ecology on the one hand, and the interactions between contaminants and anuran physiology and biochemistry on the other hand.

It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Id.

Letters submitted in response to the director's request for additional documentation indicate that the petitioner obtained his Ph.D. after the petition was filed and expanded his endocrine toxicology research to include all wildlife and humans in the position of research scientist at Michigan State University. Chairman of Clinical Trials at Michigan State, asserts:

[The petitioner's] current U.S. EPA project in developing [an] innovative and cost effective system to screen and test suspected chemicals possessing estrogen function and [sic] possibly interrupt reproductive system across different animal species, including human[,] could very well lay the foundation [for] and revolutionize our approach toward the better understanding and eventual eradication of this and other cancer.

On appeal, the petitioner submits more letters from the same individuals who recommended the petitioner initially, reinforcing that the petitioner played a primary role in his research projects. We concur with counsel that the petitioner has established that he played a primary role in his Ph.D. research. The record does not establish, however, that this research had already influenced his field as a whole at the time of filing. The above letters are all from the petitioner's own colleagues, professors, and collaborators. While important in detailing the petitioner's work and his role in his projects, they cannot by themselves establish that he has influenced his field beyond his immediate circle of colleagues in Wisconsin.

On appeal, the petitioner submits two letters from new sources. Dr. Scott McWilliams indicates that he met the petitioner while working as a research fellow at the University of Wisconsin-

Madison. While the indicates that he has now incorporated the petitioner's published techniques into his own research on vertebrates, he is a former colleague of the petitioner's and appears to have begun using the petitioner's techniques after the date of filing. [REDACTED] a professor at a university in Argentina, is a more independent reference. [REDACTED] however, indicates only that he is currently doing research for which the petitioner's results are important. He does not indicate that the petitioner had already influenced him at the time of filing. It remains that the record does not reflect that independent researchers were evaluating or adopting the petitioner's efficient techniques at the time of filing.

The petitioner is a member of Sigma Xi, a scientific honor society, the American Association for the Advancement of Science (AAAS), and received a monetary award to attend the 15th Annual Meeting of the Society of Toxicology and Chemistry in 1994. The petitioner also received a fellowship around the time this petition was filed. AAAS is not an exclusive organization. These accomplishments, while commendable, do not demonstrate that the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

At the time of filing, the petitioner had authored four published abstracts, two articles accepted for publication, one article "in review," and two articles "to be submitted." 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 influential contributions; we must consider the research community's reaction to those articles.

In response to the director's request for additional documentation, the petitioner submitted the editorial reviews of the draft of one of his articles in which the reviewers find the research important and publishable with mandatory revisions. One reviewer stated that the petitioner's data was routinely obtained for other species, but, since there are "few" studies reporting such data in amphibians, the "data in this paper are an important contribution to the literature in this area." The petitioner's articles had yet to be published at the time of filing and there is no evidence in the record that independent researchers, or any researchers, had cited the petitioner's abstracts. On appeal, the petitioner submits several requests for reprints which praise the petitioner's work. These requests, however, are dated after the date of filing.

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.