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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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File: [Redacted]

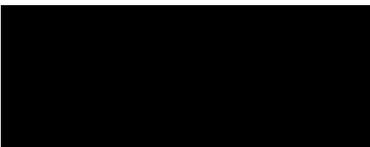
Office: Nebraska Service Center

Date: 12 FEB 2004

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 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 an alien of exceptional ability and as a member of the professions holding an advanced degree. At the time of filing, the petitioner was a doctoral student and a graduate research assistant at the University of Missouri-Columbia. 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 an M.S. degree in Plant and Soil Sciences from Tuskegee 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 petitioner also claims eligibility as an alien of exceptional ability. Because he qualifies as an advanced-degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner. 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.

Counsel summarizes the petitioner's work:

[The petitioner's] research has made **significant** contributions to our understanding [of] how bacteria cause plant disease and why the plant sometimes recognizes the bacteria as invaders and successfully fends them off. He isolated **for the first time** a gene that encodes a protein that triggers plant defense to an important bacterial pathogen *Erwinia carotovora*.

(Emphasis in original.) Counsel asserts that the petitioner's "findings have **great** visibility on both national and international levels" and could significantly increase food production capacity and may even have applications in human health care. Counsel states that the record establishes that the petitioner "has already contributed to US national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications because he has made these contributions and others have not." This reasoning is not persuasive on its face because, as a rule, doctoral-level research is expected to be original. We could just as easily point out the accomplishments of another graduate student, and conclude that the petitioner fails to qualify for the waiver because someone else made those findings and the petitioner did not. Therefore, we must consider the significance, not just the originality, of the petitioner's findings.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. Professor [REDACTED] of Tuskegee University describes the research that the petitioner undertook under Prof. [REDACTED] supervision:

In my laboratory, he worked on a NASA project to develop a genetically engineered sweetpotato variety with super high protein quality for space exploration. While in my laboratory, [the petitioner] was in the team that developed a system for the production of multiple plantlets from a tiny piece of sweetpotato leaf in the test tube. This achievement was an important breakthrough in sweetpotato biotechnology research. [The petitioner's] work in my laboratory is the basis for the methodology and development of transgenic sweetpotato containing the artificial *asp-1* storage protein gene that has resulted in over 500% increase in protein quality and quantity in this very important food crop.

Another Tuskegee professor, [REDACTED] states that the petitioner's work represents "a significant breakthrough in biotechnology of peanuts and sweetpotato. Also, his initial research has resulted in the development of transgenic plants containing virus disease resistance and edible vaccines."

Professor [REDACTED] who supervises the petitioner's work at the University of Missouri-Columbia, describes the petitioner's current work:

One of our goals is to better understand the regulatory mechanisms that control virulence of plant pathogenic bacteria. Our work has focused on bacteria belonging to [the] *Erwinia* group, which causes diseases in a wide variety of plant and plant products of considerable economic importance. . . . Recently we identified and characterized a new and truly global regulatory system that modulates gene expression by affecting stability of mRNAs. . . . During the past several years, [the petitioner] has played a key role in the development of two

major projects in my library. The first project . . . entailed the identification and characterization of the new global regulatory genes, *rsmA* and *rsmB*. . . . In the second project, he documented production of the quorum sensing signals, N-acyl homoserine lactones, by plant pathogenic fluorescent *Pseudomonas* species. . . . I am confident that his findings will significantly enhance our understanding of the mechanisms responsible for the development of diseases caused by *Erwinia* and *Pseudomonas* species.

Other University of Missouri-Columbia faculty members describe the above projects as well. [REDACTED] an associate professor at the University of Idaho, has collaborated with the petitioner but states that he was already familiar with the petitioner's published and presented work. [REDACTED] states that the petitioner "has been a highly productive individual" whose "findings of global regulatory mechanisms will significantly contribute to our understanding of plant disease" and "may lead to better way[s] of controlling soft rot."

[REDACTED] of the University of Wisconsin, who received his own doctorate under [REDACTED] states that the petitioner's "work has provided important insights into the regulation of pathogenicity factors at the genetic level" in the bacterial genera discussed above.

The petitioner submits documentation showing 25 citations of his published work. Five of these citations are self-citations by the petitioner's collaborators. This documentation, therefore, establishes some degree of interest in the petitioner's published work, but the petitioner has not shown that an aggregate total of 20 independent citations of eight published articles indicates an unusual level of interest in the field.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, counsel has argued that previously-submitted documents address the director's concerns.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner has not shown that the petitioner's contributions exceed those of others in his field to an extent that would justify a waiver of the job offer requirement that, by law, normally attaches to the visa classification which the petitioner chose to pursue.

On appeal, as in response to the director's earlier request for evidence, the petitioner submits no further evidence, instead relying on counsel's assertions to the effect that the director has failed to give due consideration to the evidence already submitted.

Counsel protests that the director's decision cannot stand because the director did not discuss in detail whether the petitioner's

past contributions justify projections of future benefit. We will address this issue here. Counsel quotes various witnesses, stating that the petitioner has made "a significant contribution to the agricultural interests of the United States," but the record contains nothing from the agricultural industry itself to establish the impact that the petitioner's work has in fact had (rather than what it might eventually have, in the opinion of the petitioner's supervisors). Similarly, reference has been made to NASA-sponsored research but there is nothing from the National Aeronautics and Space Administration to demonstrate that the petitioner's contribution stands out from the efforts of other doctoral students conducting similar grant-funded research for the agency.

Counsel asserts that "some US experts" have supported the petitioner's petition, but as we have shown, there is no evidence that the petitioner's work has had a significant impact outside of his and his professors' circle of collaborators. With regard to the witnesses of record, many of them discuss what may, might, or could one day result from the petitioner's work, rather than how the petitioner's past efforts have already had a discernible impact beyond the original contributions that are expected of every doctoral student at a respected university.

Counsel argues, in essence, that the witnesses' descriptions of the petitioner's work are *prima facie* evidence of eligibility for the waiver. While the petitioner has plainly impressed those who have supervised him and co-written his articles, the record does not show that the wider scientific community views the petitioner any differently from other doctoral students in the same field.

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 job offer requirement 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.