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U.S. Department of Justice
Immigration and Naturalization Service

Administrative Code Section 101
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



12 FEB 2002

File: WAC 99 025 52939 Office: California Service Center Date:

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: 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.

In this decision, the term "prior counsel" shall refer to Ronald Y. Wada of Berry, Appleman & Leiden, who represented the petitioner through the filing of the appeal but who has since withdrawn as the petitioner's representative.

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 she filed the petition, the petitioner was a postdoctoral research fellow at the Ernest Gallo Clinic and Research Center ("Gallo Clinic") at the University of California, San Francisco. 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.

Prior counsel, in a letter submitted with the petition, claims that the petitioner "has already distinguished herself as one of the foremost researchers in her field," i.e. the study of dementia, particularly frontotemporal dementia ("FTD"). Prior counsel offers this explanation as to why the petitioner should receive a national interest waiver:

Researchers build upon the foundation of their current knowledge. Assuming Gallo Clinic could find another one-of-a-kind researcher, it would be neither practical nor useful to train new researchers. Medical research in modern time

advances too quickly and is too highly competitive to allow for such a loss of time and human resources. The dragging labor certification process would be detrimental to the United States as well as the scientific community in general. It cannot be said that labor certification should be used in this instance.

Along with background documentation, the petitioner submits letters from three witnesses. [REDACTED] assistant professor at the Gallo Clinic, offers background information about the clinic and the various forms, symptoms, and causes of dementia, and describes the petitioner's work:

In very basic terms, frontotemporal dementia is a progressive brain disease distinct from Alzheimer's disease. . . . Scientific literature suggests that FTD accounts for up to 20% of dementia and a higher fraction of presenile dementia.

Before [the petitioner] joined the laboratory, genetic analysis of families with FTD I conducted demonstrated that the defective gene causing this disease is located on chromosome 17. The specific goals of [the petitioner's] project were to accurately locate the position of the defective gene on chromosome 17 and to identify the gene defect (mutation) in families with FTD. [The petitioner] was very successful in achieving the goals of this project. In collaboration with the laboratories of [REDACTED] Schellenberg and [REDACTED] we have discovered mutations in a gene called 'Microtubule-associated protein tau' that produces a protein important for the survival of brain cells. [The petitioner] is the primary author of the paper that will announce this breakthrough [which] will presently be published in *The Proceedings of the National Academy of Sciences, USA*. The discovery of the gene defect that causes FTD is very important contribution to the field of Neuroscience and our understanding of Alzheimer's disease and dementia. . . .

[The petitioner's] work is very important to the ongoing efforts of this investigation.

In a separate letter, Dr. Wilhelmsen asserts that he is also "assembling a team for the identification of genes that contribute to the genetic susceptibility of alcoholism." There is no evidence that the petitioner ever conducted research with this team before leaving the Gallo Clinic. We will discuss the petitioner's departure from the clinic in greater detail below, in the context of the appeal.

[REDACTED] director of the Gallo Clinic, deems the petitioner to be among the clinic's "most productive post-doctoral fellows," and states that "[t]here are very few people in the world that have as much practical experience in positional cloning as [the petitioner]." Dr. Diamond adds that "the field of human

genetics is currently expanding more rapidly than the United States can produce qualified researchers."

██████████ senior lecturer in Molecular Genetics at the University of Manchester, supervised much of the petitioner's doctoral research. ██████████ states:

[The petitioner's] research during her doctorate studies was instrumental in identifying the mutation on human chromosome 4q35 associated with facioscapulohumeral muscular dystrophy (FSHD), a neuromuscular disorder. She then went on to investigate the evolution of this region, particularly in primates. She developed excellent technical skills in molecular biology techniques, especially fluorescent *in situ* hybridisation to visualise the location of genes on chromosomes and gene cloning. During her time as a post-doctoral fellow in ██████████ laboratory she has made important contributions to the identification of genes involved in neurodegeneration. . . .

She would be a pivotal person in ██████████ study of alcoholism, both directly in her technical expertise and in training new personnel. Thus, she would contribute greatly to the understanding of this important healthcare issue.

The petitioner submits copies of her published articles and unpublished manuscripts, all of them co-authored by either Dr. Hewitt or ██████████. The petitioner's initial submission does not document the reaction of outside researchers to the petitioner's work.

The director denied the petition, stating that the petitioner has not shown "that her work has set her apart from other medical researchers" to an extent that would justify a national interest waiver.

On appeal, the petitioner submits additional background information about the disorders she studies and the institution where she works; further research papers; three new witness letters; and other evidence. The petitioner also submits a brief from prior counsel.

Prior counsel asserts that the director applied a standard that "lacks any basis in law" by finding that the evidence of record "fails to establish that the beneficiary's work is so unique or important that nobody else is working or has the ability to work in the same research and have the same results." While the wording of parts of the director's decision is questionable, there is no indication that the director's decision rested entirely or primarily on the director's reliance on the contested standards. The contested wording appears to result from an effort to articulate the director's conclusions, rather than the foundation of those conclusions.

Counsel correctly states that published citations are a good indicator of the impact of a researcher's published work, and asserts that the petitioner's published articles, in the aggregate, have been cited several hundred times. The petitioner, however, offers no evidence (such as a printout from a citation index) to support this claim; the petitioner's preparation of her own table of citations is not first-hand evidence of citation, and the petitioner's table does not even cite the source from which the incorporated data were drawn.

[REDACTED] editor of Nature Genetics, devotes most of her letter to a discussion of that journal. The petitioner is mentioned only in the final two sentences of the letter: "[The petitioner] is an expert on fronto-temporal dementia. She has published some of her work in Nature Genetics and is a regular advisor in the area of neurodegeneration." [REDACTED] makes no comment about the importance of the petitioner's work relative to that of other researchers in the field.

Prior counsel asserts that [REDACTED] letter supports the assertion that the petitioner's work is heavily cited, because Dr. Cohen makes the general claim that "[t]he journal's impact factor of over 40 [is] the highest of any journal publishing primary biomedical research." This general assertion does not imply or prove that the petitioner's work has been especially heavily cited. Only one of the petitioner's articles appeared in Nature Genetics (the petitioner was fourth of thirteen authors), and any statement regarding that journal's impact factor cannot even indirectly suggest that the petitioner's work in other journals has been heavily cited.

Professor [REDACTED] in St. Louis states that the petitioner's discovery of certain gene mutations "has increased our understanding of the process of neurodegeneration. . . . This work should not be underestimated and will ultimately lead to the development of pharmaceuticals and treatment for numerous debilitating diseases." We note that, in the early 1990s, [REDACTED] was a senior research fellow in the Department of Biochemistry and Molecular Genetics at St. Mary's Hospital Medical School, while the petitioner was a research assistant in the same department.

[REDACTED] associate professor of Pathology at Columbia University College of Physicians and Surgeons, states that the petitioner "has very recently joined my research group here at Columbia University." He continues:

My laboratory has made a number of major discoveries, most recently in the areas of genomic imprinting and gene regulation in childhood cancers. . . . I am highly experienced in making judgements about the qualifications of young scientific investigators and therefore of evaluating [the petitioner] in comparison with many other scientific trainees. . . .

[The petitioner's] work has made a major contribution to the field of dementia. She has identified mutations in a gene called 'Tau' that is important for the function of brain cells. In families with dementia she has demonstrated that these mutations affect the function of the protein made by the gene in brain cells leading to abnormal death of cells and aging. . . . [T]his initial discovery by [the petitioner] has allowed researchers to develop mouse models of the disease to test pharmaceuticals and treatments. . . .

[The petitioner] is therefore an expert in molecular biology and the human genetics of dementia and aging. As her work continues in our department, I expect that she will continue to make first-rate contributions to another, related, area of molecular biology that is critical for human health - that is, the molecular biology of human cancer.

Prior counsel, on appeal, offers further statistics about dementia, even though the record shows that the petitioner has left the Gallo Clinic and has ceased her research into FTD. Because the petitioner is obviously no longer studying FTD, any past arguments which stressed the importance of continuing studies into dementia lack significant force. The petitioner's past publications in that area are already available and will remain so regardless of the petitioner's immigration status. The petitioner's future work in other areas of genetics offer no prospective benefit relating to FTD. Considering that many of the initial arguments in this matter focused not on the petitioner's skill as a researcher, but on the need to study the causes of dementia, this is not a trivial point. If a primary initial argument was that the Gallo Clinic can ill afford to lose the petitioner's services in the fight against FTD, then the petitioner has nullified this argument by moving to another university to study a problem unrelated to FTD.

Obviously, as a genetics researcher, the petitioner is capable of making contributions in areas outside of FTD, but the same can be said of any competent genetics researcher. By focusing his arguments so heavily on the problem of FTD, prior counsel has neglected to separate the petitioner's specific contributions from that overall problem, or to show what contributions, if any, the petitioner has made outside of the area of FTD.

We note that the petitioner's post-doctoral position at the Gallo Clinic was, by nature, a short-term temporary position, more akin to advanced training than a career position. Because post-doctoral positions are inherently temporary, and the petitioner has obviously been able to secure a nonimmigrant visa to perform this temporary work, the question necessarily arises as to why the petitioner would require permanent immigration status to hold such a temporary position.

Those who have worked directly with the petitioner clearly hold her abilities in high regard. The record, however, contains no

evidence that researchers other than the petitioner's collaborators and supervisors share this opinion. The petitioner has provided some impressive citation figures but, as noted above, they appear on a document prepared specifically for submission in support of this petition. The record lacks first-hand evidence of such citations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner need not submit copies of all the articles that cite her work, but it is not unreasonable to require at least copies of entries from citation indices, or printouts from online indices, to support the petitioner's claim. If the petitioner does not have a first-hand source for her citation information, then she has no credible basis for claiming specific citation figures.

Also, we note that (as prior counsel has repeatedly stressed) the petitioner has conducted postdoctoral work at some of the nation's most prestigious medical schools, with established experts as her mentors. These individuals are also the co-authors of the petitioner's published papers. If the work of these experts is heavily cited as a matter of routine, then it would be appropriate to submit additional types of evidence to distinguish the petitioner's reputation from the reputation of the laboratories where she has worked. Such evidence could, for instance, take the form of letters from independent experts (witnesses who have not worked directly with the petitioner or her superiors), which would show that scientists other than the petitioner's collaborators view her work as especially significant.

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.