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U.S. Department of Justice

Immigration and Naturalization Service

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IMMIGRATION AND NATURALIZATION SERVICE  
WASHINGTON, D.C. 20536

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



30 JAN 2002

File: EAC 99 156 50483 Office: Vermont 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:



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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont 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 laboratory technician at Roswell Park Cancer Institute. 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 contest 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.

The petitioner submits documentation pertaining to the Human Genome Project ("HGP"), on which she works as a technician. This background documentation establishes the intrinsic merit and national scope of the project but does not establish why the petitioner's work as a laboratory technician serves the national interest to a greater extent than would the efforts of another fully qualified technician.

The petitioner also submits several witness letters. [REDACTED] of the Office of Biological and Environmental Research ("OBER") at the U.S. Department of Energy states:

The HGP is now rapidly closing in on its core goal, the complete sequencing and display of the human genetic code, the entire sequence of the deoxyribonucleic acid (DNA) that makes up the human genetic material. One of the most critically important (and difficult to produce) resources required during this period is recombinant DNAs, termed "BACs." . . . Even without the DNA sequencing itself, OBER's investment in BAC resources is nearly \$6 million/year. . . .

[The petitioner] has constructed the newest human (female) BAC library (RPCI-13) as well as a hamster library . . . [and] libraries for the cow and pig. She is highly skilled in this fastidious art, and is one of a very small number of people worldwide who have demonstrated such mastery. Under a current solicitation from this Office, further commissioning of BAC resources is intended.

[The petitioner's] departure would severely hinder needed expansion of BAC resources. Therefore, this Office recommends that she be granted a National Interest Waiver of the labor certification requirement.

██████████ a cancer research scientist and the petitioner's supervisor at Roswell Park Cancer Institute, states:

Roswell Park Cancer Institute, and consequently, the government financed Human Genome Project would suffer major disruption in its efforts to continue its PAC Library if [the petitioner] is not granted a Waiver of the labor certification process. To be exact, the loss of [the petitioner's] expertise would cause at least a two (2) year delay in the Roswell Park Cancer Institute's major contribution to the federally funded Human Genome Project. The entire effort of Roswell Park Cancer Institute to create a PAC Library would come to a standstill because there would be no other available worker who could categorize the PAC Library with the expertise and precision of [the petitioner]. . . .

[The petitioner] has unequalled expertise in categorizing Human PAC Libraries, which could not be replaced by an available United States worker.

██████████ does not explain how submitting the petitioner's position to the labor certification process would automatically or inevitably result in the termination of the petitioner's employment.

██████████ director of National Human Genome Research Institute, states:

[The petitioner] plays a key role in the construction of Bacterial Artificial Chromosome (BAC) clone collections for the human and mouse genome projects. Dr. de Jong's laboratory is the premier developer of these libraries in the world and the international scientific community depends on him for these libraries. [The petitioner] has become the most dependable and skillful person at Roswell Park Cancer Institute (according to Dr. de Jong) in preparing BAC collections. Such clone collections are the corner stone for the "Human Genome Initiative," a major program of the National Institutes of Health and the international genetics community. . . . [The petitioner's] work is critical to progress on the international human genome project and is therefore of national and international importance. If [the petitioner] were to depart from Buffalo, continued BAC library production would be in jeopardy, with serious negative consequences for a program of high national and international priority.

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 submitted arguments from counsel and additional documentation. Counsel observes that Matter of New York State Dept. of Transportation did not overrule an unpublished 1992 appellate decision which set forth seven suggested areas in which an alien could serve the national interest. Because the 1992 decision never had the force of published precedent, there was no need to supersede or overrule it. Furthermore, even these seven suggested guidelines did not constitute rigid grounds that mandated approval of a waiver if an alien's work touched on one or more of them.

Counsel claims:

If [the petitioner] were to leave this federally funded and recognized program, the entire government sponsored program would suffer an incalculable financial loss and significant delay which could last several years. In essence, the entire BAC/PAC Library program would have to be shut down until a person with the unique and extensive expertise of [the petitioner] could be found and trained.

Counsel does not explain why the labor certification process would trigger the petitioner's departure from the project. Many of counsel's comments are essentially paraphrased from previously submitted witness letters already discussed above. Counsel repeatedly emphasizes that the HGP is a federally funded, international effort. We do not dispute that the HGP is among the most significant international research efforts ever to take place. At issue is not whether the HGP is a worthwhile endeavor, but whether the fate of the project hangs on the continued employment of one particular laboratory technician, and whether that continued

employment would necessarily cease as a result of the labor certification process.

Most of the documentation submitted in response to the director's request duplicates material already submitted with the initial filing, or else provides peripheral information regarding the initial submission. The petitioner submits what appears at first glance to be a second letter from [REDACTED]. This letter, however, appears to be nothing more than the text of Dr. de Jong's first letter, reprinted with a new date. This letter therefore adds nothing of substance to the record.

The director denied the petition, stating that the petitioner has not shown the petitioner's individual impact as a laboratory technician is so great that her replacement by a qualified U.S. worker would have significant effects at the national level. The director also stated that the petitioner has not explained why the labor certification process would be inappropriate.

On appeal, counsel states that the director "erroneously believes that a Labor Certification Process is available." Prior to the appeal, neither the petitioner nor counsel had made any claim that labor certification was not available.

To demonstrate that labor certification is not available, counsel submits an excerpt from the Department of Labor's Technical Assistance Guide, pertaining to labor certifications. Counsel has highlighted the following passage:

When an employer has employed or currently employs the alien in the occupation for which certification is sought, the application for alien employment certification for the alien cannot include as a job requirement experience gained by the alien in that occupation while working for the employer. This is a valid exclusion since that experience was not required for the job when the alien was hired.

Counsel asserts that the petitioner would not be able to obtain a labor certification under the above guideline, because the Roswell Park Cancer Institute employed the petitioner before she had any expertise in BAC/PAC libraries, and therefore it could not now credibly claim that such expertise is a fundamental requirement for the job. This argument fails to support counsel's claim that the petitioner's on-the-job training at the institute represents an insurmountable barrier to the approval of a labor certification. It merely indicates that the employer cannot claim minimum requirements that exceed what the petitioner's own qualifications were at the time it hired her.

Counsel states that "numerous world renown scientists" have submitted letters to support the petitioner's claim, and identifies

three such witnesses as "examples." In fact, the three named scientists are the only individuals to provide letters in support of this petition; counsel's reference to them as "examples" of "numerous" witnesses falsely implies that the record contains other such letters from unidentified scientists.

Counsel specifically singles out "the previously submitted letter from the Director of the Human Genome Project who stated that [the petitioner] plays a 'key role in the construction of . . . BAC clone collections.'" Counsel refers to the letter from [redacted] Collins, discussed above. Counsel fails to point out that, according to [redacted] was [redacted] sole (or at least principal) source of information about the petitioner. [redacted] stated that his letter was "[b]ased on the information provided to me by [redacted]" and that the petitioner "has become the most dependable and skillful person at Roswell Park Cancer Institute (according to [redacted] in preparing BAC collections." [redacted] statements about the petitioner, therefore, represent second-hand assertions of Dr. de Jong's views about the petitioner rather than an independent assessment of the petitioner's value to the Human Genome Project.

We note that the HGP had already been underway for several years when the institute first employed the petitioner in 1997. There is no indication in the record that the institute's BAC/PAC library was "shut down" during the petitioner's own training (which the institute is clearly able to provide to new employees), or that the petitioner's own training period as a laboratory technician caused "the entire government sponsored program [to] suffer an incalculable financial loss and significant delay," as has been described as the inevitable consequence of replacing a laboratory technician at Roswell Park Cancer Institute.

Counsel's other arguments essentially repeat previous arguments already discussed above.

We acknowledge that the Human Genome Project, as a whole, is a significant research undertaking that collectively serves the national interest. At the same time, the very size of the endeavor implies the involvement of a large number of researchers, and an even larger number of support staff including laboratory technicians. Each of these support staffers provide valuable services to the laboratories in which they work, but the objective evidence of record does not indicate that the progress of the project as a whole is largely dependent on one particular laboratory technician. Indeed, the record indicates that the petitioner devotes only part of her time to the HGP, in addition to other projects involving the genomes of various other animals. The petitioner's tasks regarding the HGP therefore appear to represent only a fraction of her duties as one of countless laboratory technicians working at perhaps hundreds of institutions that are

participating in the project. Also, while the petitioner possesses advanced training regarding her work as a technician, there is no indication that she is responsible for any innovations or improvements on existing gene library technology or methods.

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.