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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: JUL 18 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: 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, 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 seeks employment as a research assistant at Kansas State University ("KSU"). 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. -- 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 Food Science from KSU. 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 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 describes her work:

[At] the Institute of Crop Breeding and Cultivation, Chinese Academy of Agricultural Sciences . . . I did research on corn smut disease caused by a plant pathogenic fungus. One year later, I became a Research Associate and worked on leaf diseases of corn . . . set up the Corn Tissue Culture Laboratory and worked on corn tissue culture for screening resistance. . . . I was also a project leader on Genetics of Corn Ear Rot Disease caused by *Fusarium moniliforme*. . . . I published 6 research papers and wrote three book chapters (in two books) in the field of forecasting and management of corn diseases and pests. . . .

[At KSU, my] thesis project was Control Foodborne Pathogens (*E. coli* O157:H7, *Salmonella typhimurium*, *Listeria monocytogenes*, and *Staphylococcus aureus*).

In April 1999 right after my graduation, I started my work as a Research Assistant in microbiology laboratory in Food Animal Health and Management Center, Kansas State University. I am the Lab Supervisor on USDA (United States Department of Agriculture) projects: (1) Ecology of *E. coli* O157:H7 in Beef Cow-Calf Operations from Ranch through Feedlot. (2) Ecological Distribution of *E. coli* O157:H7 Strains in Agricultural environments.

The petitioner establishes the intrinsic merit of her research into *E. coli* O157:H7, indicating that the bacterium is a major cause of sometimes-fatal food poisoning. The petitioner observes that

there is, at present, no cure or vaccine for the bacillus and therefore prevention of infection is our principal line of defense against it. The petitioner's projects at KSU are intended to reduce the occurrence of the pathogen "at the farm level."

Along with documentation pertaining to her field of research, the petitioner submits seven witness letters. Six of the witnesses are KSU faculty members; the seventh is an outside collaborator. We will consider examples of these letters here.

██████████ then director of the Food Animal Health and Management Center at KSU, states that the petitioner "has master[ed] the standard techniques for isolating foodborne pathogens, and in addition, she has made refinements and improvements on standard techniques." ██████████ adds that the petitioner "provides critically needed microbiology technical skills to the field of food safety. There are few persons in the United States with her capacity to do this work satisfactor[il]y, and it is very difficult to recruit and retain colleagues with her abilities." ██████████ does not discuss any specific contributions that the petitioner has made to the field. Instead, he emphasizes the overall importance of the area of research as well as the petitioner's high level of technical skill.

██████████, assistant professor at KSU, describes the *E. coli* project, which "involves the collection [and testing] of 15,000 samples including free-flowing and standing water, and feces from cattle and wildlife." ██████████ states that the petitioner's "role is to oversee all aspects of the laboratory," and that the petitioner "provides an important role in consulting on laboratory methods." Like ██████████ discusses the importance of the project and praises the petitioner's technical skill without enumerating any specific ways in which the petitioner has contributed not only to the operation of the laboratory at KSU, but also to overall efforts to combat *E. coli*-related illnesses.

██████████, associate professor at Tufts University School of Medicine, supervises some of the testing of samples collected by the petitioner at KSU. He deems the petitioner to be "very reliable, conscientious and meticulous in the work she is doing." Other KSU faculty members offer similar assessments of the petitioner's work.

The only witness to identify any specific contribution by the petitioner is Professor ██████████, the petitioner's former thesis advisor at KSU, who states that the petitioner's "pioneer work on an important food in the Orient – sufu – indicated that proper fermentation of soy bean based food will eliminate the presence of *Escheria coli* O157:H7" and other food-borne pathogens. ██████████ is also the only witness to offer any comment on the petitioner's work in China, stating that the petitioner worked "on detection and control of many mold diseases in major crops in China."

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner has not established the national scope of her work, or that her particular contribution warrants a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek.

The director determined that the petitioner's work lacks national impact because the petitioner has not "demonstrated that her research is impacting a wider area." The director's conclusion appears to rest on assertions to the effect that the petitioner's work consists largely of administrative duties, operating the lab at KSU where the project in question is underway. The petitioner, however, is also conducting research in her own right. Some of the petitioner's findings were in preparation for publication at the time of filing, and the petitioner had presented her work at conferences. To this extent, the petitioner's work is national in scope, owing to the nature of the work itself and the existence of means for national dissemination of her findings, and we hereby withdraw the director's finding to the contrary.

Separate from the scope of the petitioner's occupation is the question of whether the petitioner has had, or is likely to have, a nationally significant impact. The director observed that a shortage of qualified U.S. workers (to which some witnesses had alluded) is an argument for obtaining, rather than waiving, a labor certification.

On appeal, the petitioner argues that she plays a major role in three federally funded projects. The source of the projects' funding is not, in itself, strong evidence of eligibility for a waiver, because such funding addresses the projects themselves rather than the individual researchers involved with the projects. The petitioner has not shown that any of the federal funding is contingent on her involvement.

The petitioner discusses the economic and medical toll wrought by *E. coli* infection, and asserts that her work is therefore important because she seeks to reduce these costs. The same can be said, however, of every researcher studying *E. coli* infection; these general statements do not distinguish the petitioner from others in her field. The petitioner submits copies of published articles by third parties, to demonstrate the importance of *E. coli* research, but these articles serve to prove that the petitioner is not the only researcher in the field. The articles submitted by the petitioner do not cite her own published work, nor do they otherwise reflect that the petitioner has had greater impact or influence in her field than others conducting similar work.

The petitioner submits three new letters on appeal. The first is from [REDACTED] who is now executive director of the Joint Institute for Food Safety Research. [REDACTED] discusses the Institute's work, and makes general comments about the importance of food safety (which we do not dispute). [REDACTED] states that the projects on which the petitioner works "are dependent on the unique (and rare) skills of [the petitioner] to isolate and identify these pathogens." The petitioner cites [REDACTED] letter, stating "there would be very few people in the United States who can replace me," but she then denies that she is "filling a local labor shortage." Whatever term the petitioner applies to the unavailability of other workers, it would appear that a labor certification could readily be approved if "very few people in the United States" are qualified for the position.

The second letter on appeal is from [REDACTED] interim director of KSU's Food Animal Health and Management Center. [REDACTED] states that the petitioner "has made significant contributions to the understanding of epidemiology of *E. coli* in farm animals in the United States," but does not specify what those contributions are. It remains that the record



contains no evidence to show that researchers outside of the petitioner's own circle of collaborators (mostly at KSU) have taken significant notice of the petitioner's work, let alone regard it as being especially significant.

The third witness is KSU associate professor [REDACTED] who states that the petitioner "has contributed to the design and implementation of experiments, hired and trained laboratory technicians and students, written standard operating procedures to fulfill the guidelines of the Good Laboratory Practices Act, and developed rapid and cost-effective techniques for identifying microorganisms." These contributions, while valuable to researchers at KSU, have not been shown to be especially significant at a national level; they appear to be largely administrative tasks that affect only the progress of the particular laboratory where she works. With regard to the petitioner's research, [REDACTED] states that the petitioner's "technique has survived the critique of the peer reviewers of scientific journals." Peer approval of this kind may be indicative of acceptance of the petitioner's methods and findings, but it does not follow that the petitioner's work stands out from that of other researchers to an extent that would justify a waiver of a requirement that, by law, normally applies to the immigrant classification the petitioner seeks. To hold otherwise would be, in effect, to conclude that the only scientists who should be held to the job offer/labor certification requirement are those whose work does not withstand peer review.

While the petitioner's innovative laboratory techniques have allowed her laboratory at KSU to run more quickly and smoothly, there is no indication that these innovations have translated to so broad an impact that the country as a whole has benefited from the petitioner's work more than it stands to benefit from the work of other skilled researchers in the 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 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.