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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



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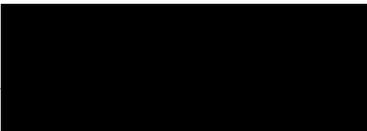
File: [Redacted] Office: Nebraska Service Center

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

for 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. At the time she filed the petition, the petitioner was a research assistant at the University of Iowa College of Medicine. She has not specified where she intends to work in the future. 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 Muscle Biology from Iowa State 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 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 states that the petitioner "seeks employment in the research field of ion transport system, especially the research aims to fight deafness and thyroid disorders. . . . Recently, she made a significant contribution to this research by successfully cloning the gene of a novel protein in which mutations lead to deafness, developing a protocol for its purification, and generating antibodies." Counsel asserts that the petitioner's work "has received tremendous attention from scientists in the field of biomedical sciences." Elsewhere in the same introductory letter, counsel refers to the petitioner as a "plant pathologist." This reference appears to be an erroneous insertion, perhaps pertaining to another of counsel's clients.

The petitioner describes her research:

The main research goal in this laboratory is to identify and characterize membrane transport proteins, whose abnormalities can cause various diseases, such as kidney stones, Pendred syndrome (deafness with goiter), and diastrophic dysplasia (dwarfism).

Since joining the lab, I have purified a kidney membrane protein (sat-1) that is responsible for the exchange of sulfate/bicarbonate/oxalate. The abnormal sat-1 may play a role in formation of kidney stones. . . .

I also assumed primary responsibility for our major work on studying the function of the membrane transport protein that is related to Pendred syndrome (PDS). Pendred syndrome is an autosomal recessive disorder characterized by sensorineural hearing loss and a defect in iodide organification which typically results in thyroid enlargement (goiter). It is the most common form of syndromic hearing loss. . . . The Pendred syndrome gene . . . produces a protein known as pendrin. . . . By performing functional studies, I was able to show that pendrin is a transporter for both iodide and chloride, which is a breakthrough discovery. . . . Meanwhile, I developed a specific protocol to purify the recombinant pendrin protein and generated antibodies against pendrin. These unique antibodies allow us to confirm the presence of pendrin protein in thyroid gland, inner ear and kidney and will help to determine the role of pendrin in these tissues.

The petitioner does not describe her studies of diastrophic dysplasia in any detail, saying only that the related gene "is similar to the sat-1 gene" and therefore has a "possible function as a membrane transporter."

The intrinsic merit and national scope of the petitioner's research is beyond dispute in this matter. The key issue is not the importance of the petitioner's research specialty, but rather the significance of the petitioner's specific contributions within that specialty.

Counsel asserts "the United States has more interest in improving the quality of its health care system than in protecting the job opportunity of a US worker." Counsel here presumes a blanket waiver for researchers whose work has implications for health care. While Congress has recently created such a blanket waiver for certain physicians (via the newly created section 203(b)(2)(B)(ii) of the Act), there is no comparable clause for researchers. The existence of the clause for certain physicians demonstrates that such blanket waivers are not implied in the initial statute that created the waiver. Furthermore, the original statute did not indicate that waivers were available at all to members of the professions holding an advanced degree; eligibility was only granted to aliens of exceptional ability. Given this legislative history, it is not credible for counsel to suggest that medical researchers, as a class, implicitly qualify for the waiver.

Counsel also observes that the petitioner's work at the University of Iowa is federally funded. Grant funding of university research products appears to be routine within academia, and some of this funding derives from federal sources as well as private organizations. The petitioner has not shown this circumstance to be highly unusual, or inherently indicative of the particular importance of the funded project. The petitioner submits copies of grant proposal documentation submitted to the National Institutes of Health. One such document contains a section headed "Personnel Engaged on Project, Including Consultants/Collaborators." The petitioner's name does not appear on the list of personnel under this header. The list does identify another research

assistant, so research assistants are obviously not omitted from such lists. The form provides room for seven names, and only three of the spaces have been used; lack of space would not explain the omission of the petitioner's name. Another section, "Key Personnel," shows only one name, that of principal investigator Dr. Lawrence P. Karniski, an associate professor at the University of Iowa College of Medicine. The grant documents are undated, but the omission of the petitioner's name from the list of personnel suggests that the grant was obtained before the petitioner's arrival in Dr. Karniski's laboratory. The petitioner's acceptance into an already-funded, ongoing research project does not establish that the federal government has taken a special interest in the petitioner's work; to argue otherwise would presume the funding agency's foreknowledge of the petitioner's eventual future involvement in the funded project.

Counsel states that "Exhibit F" accompanying the petition establishes that the petitioner's "work on developing gizzard smooth muscle has made great impact in her field." Exhibit F consists of anonymous reviewer comments pertaining to a manuscript that the petitioner had submitted for publication in the *Journal of Histochemistry and Cytochemistry*. While the comments are generally positive ones, they also list shortcomings in the manuscript. These comments, by their nature, preceded the publication of the article, and they do not in any way show that the petitioner has influenced the work of other researchers. Of considerably greater weight in establishing the impact of the petitioner's written work would be evidence of heavy independent citation of the petitioner's published work. Such evidence (absent from the record) would help to establish the research community's reaction to the petitioner's work after it was published, rather than the reaction of a handful of evaluators before it was published.

Along with copies of her published articles and manuscripts, the petitioner submits several witness letters. We will consider examples of these letters here. Professor John B. Stokes, III, director of the Laboratory of Epithelial Cell Transport at the University of Iowa, states that the petitioner is the "most prominent member" of Prof. Lawrence Karniski's research team. Prof. Stokes says that the petitioner's work "greatly assisted and accelerated progress" on the laboratory's various projects. Prof. Stokes also asserts that the petitioner "played a critically important role in discovering that [an] anion transport protein [involved in congenital deafness] produced defective iodide transfer across cell membranes . . . [and] also produces thyroid disease," and therefore the petitioner will provide "heavy support" for the research team's efforts "to explain the linkage between thyroid disease in this syndrome and deafness."

Prof. Stokes states "[i]f [the petitioner] were to leave or to be unable to continue her laboratory activities, the impact to these projects would be very severe," but he does not indicate the nature of the permanent position, if any, that the university has offered or intends to offer the petitioner. If the petitioner is a temporary employee, then her employment there will terminate whether or not she becomes a permanent resident. On the Form I-140 petition itself, under "[a]ddress where the person will work," the petitioner did not name the University of Iowa. Instead, she stated "[t]o be determined." This information suggests that the petitioner accepted employment with the University of Iowa with the mutual understanding that such employment is temporary. The petitioner holds an H-1B nonimmigrant visa, which allows her to work at the University of Iowa. That nonimmigrant visa would not be invalidated or otherwise affected by the outcome of the

present visa petition; the period for which the visa is valid would not be shortened or altered by the denial of this petition.

Dr. Lawrence P. Karniski, identified above as the petitioner's supervisor, states that the petitioner began working for him "approximately two years ago," and that his "laboratory has received continuous funding through the National Institutes of Health and the Veterans Administration for 17 consecutive years." This assertion further supports our conclusion that the laboratory's federal funding has not been contingent on the petitioner's involvement there. Dr. Karniski states that the petitioner "and a co-worker were able to clone the gene of a novel protein in which mutations lead to deafness and thyroid disorders. She was able to identify the function of this protein, develop a protocol for its purification, and generated antibodies." Dr. Karniski asserts that several other laboratories had been pursuing the same project, but that the petitioner helped his laboratory obtain its results more rapidly.

Professor Val C. Sheffield of the University of Iowa states "[w]ith [the petitioner's] assistance we have determined that pendrin functions as a transporter of both iodide and chloride, a result which gives us insights into both the pathophysiology of Pendred syndrome and the normal transport processes of the thyroid." He adds that the petitioner "has also been working to develop anti-pendrin antibodies which will play a key role in future studies designed to confirm our hypotheses about the location and function of pendrin."

Other individuals offer similar endorsements of the petitioner's skill and speed. All of these witnesses are affiliated with the University of Iowa or with other universities where the petitioner has worked or studied.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated that the petitioner has not established that her work is of significantly greater benefit to the U.S. than that of other qualified research assistants.

On appeal, counsel asserts that the director erred by failing to issue a request for evidence in accordance with 8 C.F.R. 103.2(b)(8). At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request. In this instance, that evidence consists of four new letters, all from faculty members at the University of Iowa.

Counsel asserts that the writers of the petitioner's letters "uniformly attested to the [petitioner's] vital position in the field," and that the petitioner's evidence "clearly demonstrated [the petitioner's] superior achievements." We cannot ignore, however, that all of the initial letters, and the new letters submitted on appeal, are from individuals at universities where the petitioner has studied or worked. These letters, however sincere, are not first-hand evidence that the petitioner's work has attracted any significant notice in the United States outside of the Iowa universities where she has conducted that research. Counsel states that it is these professors

“who best know the impact of her research.” While these individuals will obviously have the most detailed knowledge of the petitioner’s work, the impact of that work is very limited if one must be at one of two specific universities to be aware of it.

Given the limited pool from which the petitioner has drawn these witness letters, we cannot concur with counsel’s assertions that the letters show that the petitioner “is recognized by her peers as a leading researcher.” Counsel observes that the petitioner has published her work, but the record contains no evidence that the petitioner’s published work has influenced the work of other researchers outside of Iowa State University and the University of Iowa. Clearly the individuals in these laboratories value the petitioner’s contributions but the record does not establish that the petitioner is responsible for advances that are viewed as significant elsewhere in the field.

One of the newly submitted letters, from Professor Jean Y. Jew, indicates that the university’s faculty has “found it virtually impossible to find even minimally qualified applicants for research assistant positions.” Given that an application for labor certification is likely to be approved if no minimally qualified applicants compete for the job, it is not clear why this assertion would be a strong argument in favor of granting the waiver. It certainly appears to contradict the implied assertion that requiring a labor certification in this case would be tantamount to removing the petitioner from her position.

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.