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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

[Redacted]

File: [Redacted] Office: Nebraska Service Center

Date: JUL 26 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:

[Redacted]

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 sustained and the petition will be approved.

In this decision, the term "prior counsel" shall refer to David M. Kramer, who represented the petitioner prior to the filing of the appeal. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks to classify the beneficiary 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 of filing, the petitioner was a postdoctoral fellow at the University of Chicago ("UC"). 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 a Ph.D. degree in Biochemistry and Molecular Biology from UC. 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.

Prior counsel describes the petitioner's work:

[The petitioner's] primary research contributions have come in the areas of protein dynamics and folding at the molecular level. More specifically, [the petitioner] has been the first to elucidate protein dynamics over comparatively long time sequences and thereby show the pathways that lead to specific protein folds and misfolds. . . .

Since proteins play a fundamental function in disease processes, understanding the way it [sic] takes on its shape (which determines its final function) is critical in designing pharmaceutical products. . . . Similarly, because protein misfolding can lead to such devastating conditions such [sic] as Alzheimer's, Parkinson's and cystic fibrosis, finding the triggers that cause misfolding is one of the most efficacious means to finding a treatment for these diseases. In that regard, [the

petitioner] is currently studying the energy landscapes that cause the misfolding of the amyloid protein involved in plaque formation in Alzheimer's.

Using computer models . . . [the petitioner] has been able to show the protein folding process in more realistic detail and over the duration of the process, which has provided answers that have eluded other scientists. [The petitioner's] development of a new theoretical approach to the calculations means that computational intensity can be dramatically reduced . . . without sacrificing accuracy or physical realism. . . .

The practical results of [the petitioner's] research will be a better understanding of the specific trigger of protein folding in amyloid diseases such as Alzheimer's and thereby the design of new drug therapies that will strike at the root of such diseases instead of just using treatment regimens that merely slow down deterioration as is currently the case.

The intrinsic merit and national scope of medical research of this kind are immediately apparent. It remains to be shown that this particular researcher, to a greater extent than others performing similar research, qualifies for a special exemption from the job offer/labor certification requirement which, by law, normally attaches to the visa classification that he has chosen to seek.

The petitioner submits evidence relating to his published research. Citation information submitted with the petition indicates that most of the citations of the petitioner's work as of the time of filing were self-citations by the petitioner or by the petitioner's collaborators, K.F. Freed and A. Perico.

The petitioner submits several witness letters. Professor Karl F. Freed, who had supervised the petitioner's doctoral work at UC, states:

I am highly impressed with [the petitioner's] doctoral work in the area of protein dynamics. [The petitioner] has developed a theory for predicting and characterizing the long time dynamics of flexible peptides and proteins. . . .

Many aspects of our knowledge of these protein motions were limited before [the petitioner] started his work on the project. There existed a large number of unanswered questions with great practical significance. . . .

[The petitioner's] work in the past six years has led to significant break-throughs in answering many of these questions. He has developed techniques for predicting the long time dynamics of flexible peptides in solution on time scales far exceeding those accessible to large scale computer simulations. These methods are essential for a full description of protein folding. . . .

[The petitioner] is pursuing [a postdoctoral] fellowship with Professor R.S. Berry in Chicago to study protein folding, one of the "holy grail" problems in molecular biophysics whose solution is with enormous practical significance for improving health care in the U.S. Understanding and controlling how proteins fold will enable devising "magic bullet" cures for a wide variety of diseases. . . . [The petitioner] is already making excellent progress with his postdoctoral research and is the leading researcher on this project.

Other researchers at the University of Chicago attest to the significance of the petitioner's contributions. The majority of the letters are from researchers outside of UC. Dr. Gary S. Grest, distinguished member of Technical Staff at Sandia National Laboratory, states that he and the petitioner "began a collaboration to test [the petitioner's] theoretical model with our simulation data. Over the next year, we collaborated on a project which clearly demonstrated that the theoretical approach previously developed by [the petitioner] accurately described all of our data. This was a major accomplishment since no previous theoretical models could account for the long time dynamics."

Professor Graham R. Fleming of Lawrence Berkeley National Laboratory, who served on the petitioner's thesis committee, states that the petitioner "has made very important strides in developing theoretical descriptions of the internal motions of peptides." Prof. Fleming contends "[i]f the program he has initiated develops its full potential, [the petitioner] will have radically changed the way we predict and understand protein function and its relation to structure. . . . He has now developed the theory to the point where important biological information can be obtained from his calculations." Prof. Fleming's biographical information lists a very impressive string of honors and accolades, lending added weight to his opinions regarding the importance of the petitioner's work.

Dr. Adrian Roitberg, now a research chemist at the National Institute of Standards and Technology, had periodic contact with the petitioner while studying in the Chicago area. Dr. Roitberg states "[i]t is clear for anyone in this field that [the petitioner's] thesis was a product of his own work, because his graduate advisor, Dr. Freed, was not and still is not, an expert on proteins." Dr. Roitberg states:

[The petitioner] has personally shown that it is possible to extend the domain of current computer simulations between 10 and 100 times. This is an [sic] fantastic achievement, that allows researchers to examine the dynamics of a biomolecular system in domains not previously allowed. Prior to his work, we were lucky if we could follow a protein on time scales close to 10 nanoseconds at enormous computational expense. To put this in perspective, the fastest biologically relevant event occurs in time scales closer to 1 microsecond [i.e. 1,000 nanoseconds]. . . . This means that his research is not a publication curiosity, but is actually an extremely useful tool.

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.

On appeal, prior 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. As it stands, prior counsel requested additional time to prepare and submit a brief, but then withdrew from the proceeding before making any further submission. The appellate brief is from the present counsel.

On appeal, counsel asserts that the director's "decision contained several factual errors, including crucial misrepresentations of the most basic facts." For instance, the director stated that Prof. Freed supervised the petitioner's current research, and that Prof. Berry oversaw the petitioner's graduate studies, when in fact it was the other way around. Counsel asserts that this error, and other comparable mistakes, "reaffirm that the examiner failed to carefully review the record."

Some of counsel's arguments are not persuasive, such as counsel's assertion that the petitioner is "independent" of the University of Chicago, because his research is funded by an outside grant. While this grant may establish the petitioner's financial independence from UC, the petitioner nevertheless remains closely tied to UC because he is working at UC under the supervision of a UC professor, after having spent several years at UC as a graduate student. Letters from UC faculty and researchers are not from witnesses who are "independent" of the petitioner; their close professional relationship with the petitioner is unaffected by the specific source of the petitioner's funding. The Service values letters from independent witnesses not because of any perceived financial conflict of interest, but to show that a given alien's work has attracted attention and is perceived as valuable beyond the walls of the institutions where the petitioner has worked.

Counsel, on appeal, asserts that several of the initial witnesses are clearly independent because they are employed outside of UC. Nevertheless, the record shows that a number of these witnesses had previously worked or studied alongside the petitioner at UC before moving to other universities or facilities. Similarly, counsel observes that the citations of the petitioner's work have tripled since the filing of the petition, but like the original list of citations, the newly expanded list consists mostly of self-citations by the petitioner and a small number of his collaborators. Thus, just like the director's decision, counsel's brief contains omissions and distortions. The outcome of the decision must ultimately rest on the evidence itself rather than on counsel's interpretation thereof.

Carrying greater weight on appeal are new witness letters from individuals who appear to have had minimal contact with the petitioner. For example, Dr. Vukica Šrajer at Argonne National Laboratory indicates that he learned of the petitioner's work through his published articles. Dr. Šrajer deems this published work "a pioneering effort to understand the long time dynamics of

macromolecules,” and asserts “[w]ithout any doubt [the petitioner’s] scientific expertise and accomplishments, depth of knowledge and insight, and ability for innovation rank him among the top researchers in his field. His contributions are highly significant and are recognized as such by the wider scientific community.”

Other witnesses on appeal have stronger ties to the petitioner, generally by virtue of having worked at UC. We conclude, nevertheless, from the totality of the evidence that the petitioner’s reputation is by no means confined solely to UC, and indeed continues to grow throughout the field. While the petitioner’s career is at an early stage, and the national interest waiver claim would likely have been more clearly approvable had the petitioner filed the petition a year or more after he did, the evidence currently in the record appears to be sufficient to warrant approval. The petitioner has produced strong support from witnesses, a small number of whom (while not entirely independent of the petitioner) are demonstrably major authorities in their respective fields. The record of proceeding in this matter does not put forward the strongest possible national interest claim, but nevertheless its strengths outweigh its weaknesses and, on balance, the claim is strong enough to merit approval of the petition.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the scientific community recognizes the significance of this petitioner’s research rather than simply the general area of research. The benefit of retaining this alien’s services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.