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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 30 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 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 scientist at the Howard Hughes Medical Institute ("HHMI"), using facilities at the University of Washington. 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 a Ph.D. degree in Biology from the University of Michigan ("UM"). 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.

Along with background information regarding HHMI, copies of the petitioner's published work, and documentation of two citations of that work, the petitioner submits several witness letters. Professor [REDACTED] who served on the petitioner's Ph.D. dissertation committee at UM, states:

[The petitioner's] area of expertise is the genetic control of animal development, and she is a recognized expert in this field. . . . One major finding of [the petitioner's] thesis research was that she identified a network of genes that are absolutely required to build the [fruit] fly heart. This work has generated great excitement in the field. . . .

The outcome of this work that is probably most important to human health is that [the petitioner] has demonstrated convincingly that at least one of the genes she has identified as important in the fly has a very close counterpart that is involved in the development of the human heart. This finding is likely to rather directly account for some rare human genetic diseases that cause early embryonic death, and is likely, in the long run, to be relevant to the issue of enabling damaged human heart tissue to be replaced.

[REDACTED] associate professor at UM, states that the petitioner's "pioneering work has also significantly enhanced our understanding of lineages and signal transduction pathways that are important for the establishment of developmental patterns." [REDACTED] an assistant professor at UM, states that the petitioner "made a major contribution by determining how genes

that regulate early development also help induce formation of the heart in fruit flies.” Another UM assistant professor, [REDACTED] states that the petitioner’s “research . . . has shown that the fruit fly is an excellent model system with which we can hope to learn more about heart development and congenital abnormality in humans.”

Professor [REDACTED] who supervises the petitioner’s postdoctoral work at HHMI, states that the petitioner’s work at UM has produced “several impressive publications.” Prof. Moon further states:

[The petitioner’s] current projects focus on two questions – how do Wnt signaling pathways work, and second, what is the significance of Wnt signaling in embryonic development. Her background in Wnt signaling has been invaluable in studying the first question, and she is already making interesting new contributions to understanding whether or not Wnt signaling works in a G-protein-coupled manner. Her background in genetics is important to the second question, as she has been working with two other senior fellows in the lab to identify and characterize genetic mutations in Wnt and related genes in the zebrafish. Once these genes are isolated, we will be able to further answer how Wnt signaling plays an important role in development.

I should note that this Wnt signaling pathway which [the petitioner] studies has been implicated in causing a range of human diseases, including colo-rectal cancer, melanoma, prostate cancer, and possibly contributing to some breast cancers.

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 shown “why the labor certification process is inappropriate in this case,” and that the petitioner’s “achievements at this stage of her career appear to fall within the norm expected of successful graduate students and professionals in the fields of science.”

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.

The new material submitted on appeal, which the petitioner would presumably have submitted in response to a request for further evidence, consists of three letters from previous witnesses. A new letter from Dr. Ronald Ellis is largely identical to his first letter, and contains no substantive new information. Professor Rolf Bodmer states:

In my laboratory, [the petitioner] has made two most significant discoveries: First, she established that the Wnt signaling pathway is one of the three most essential components necessary for heart formation. Second, she established that the

genetic components that lead to the formation of a heart have conserved functions in the entire animal kingdom. The insights gained from these studies, which have been published in several highly acclaimed articles in top biomedical journals, have completely revolutionized our understanding of how the heart forms. Consequently, [the petitioner's] studies had an enormous impact on the field of pediatric cardiology.

[REDACTED] not a cardiologist himself, does not cite any source for the assertion that the petitioner's "studies had an enormous impact on the field of pediatric cardiology." The petitioner submits no first-hand evidence (such as letters from pediatric cardiologists, articles from cardiological journals, a citation index showing heavy citation of the petitioner's work in cardiology journals, etc.) to support this claim. 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).

[REDACTED] states that the petitioner "has made striking discoveries that have never been observed before in the US or elsewhere, and she is making and will continue to make significant contributions to the ongoing research and efforts of the laboratory." We do not dispute the originality of the petitioner's work. Indeed, if a given observation has been made previously, then arguably it no longer qualifies as a "discovery" in the usual sense of the word. What is lacking is evidence that anyone outside of the University of Michigan and HHMI's laboratories at the University of Washington share [REDACTED] sincere assessment of the petitioner's work. [REDACTED] lists some of the petitioner's specific achievements at HHMI. Because the petitioner had only been at HHMI for a short time when she first filed the petition, and because [REDACTED] made no mention of this work in his initial letter, it appears that these accomplishments took place after the petition's filing date. See Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel asserts that the petitioner's "contributions to the field of Wnt signaling pathways has influenced the field to a substantially greater extent than that of other minimally qualified researchers in Wnt signaling pathways based on her pioneering research . . . , her recognition by leading researchers in the field, and by her being selected to present her work at the prestigious Howard Hughes Medical Institute, the nation's largest private philanthropy." We disagree with counsel's designation of Wnt signaling as a "field" in its own right, as opposed to a narrow subspecialty within the field of biology. Also, we cannot accept the assertion that the reputation of the petitioner's employer (in this case HHMI) is evidence of eligibility for the waiver. Furthermore, the petitioner has not shown that "her being selected to work at" HHMI reflects that she "has influenced the field to a substantially greater extent" than other researchers.

Counsel asserts that the petitioner's eligibility is evidence from "recognition by her peers," but such recognition has not been shown to exist outside of UM and HHMI. All of the witnesses of record have worked with the petitioner at those institutions. Thus, the range of witnesses does not directly suggest that, as of the petition's January 1999 filing date, the petitioner's work was particularly well known or influential outside of those two institutions.

The petitioner has disseminated her work via journal publications. The petitioner has submitted evidence of two independent citations of her work prior to the filing date.¹ She has also submitted excerpts from a citation index to show that her work has appeared in influential and heavily cited journals. The impact figures are based on average citation rates for articles in the respective journals; they do not in any way imply heavy citation of every article in those journals. Indeed, citation indices provide not only journal-by-journal averages; they also list the citations by author. The petitioner, despite her demonstrable access to *SCI Journal Citation Reports*, has not submitted the portion that would reveal her own citation record. If the average article in, for instance, *Developmental Biology* is cited five times a year, but the petitioner's article from that journal has been cited only twice, then the available evidence suggests that the petitioner's article is considerably less influential than the average article in the journal. Two citations certainly cannot suffice to support the contention that the petitioner has "revolutionized" her specialty.

The witnesses clearly expect that the petitioner's work will one day have significant bearing on cancer research and other areas of research. At this stage, however, the evidence is simply not sufficient for us to conclude that the petitioner's work has, thus far, had measurable impact or influence outside of the institutions where she has worked or studied.

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.

¹ One of these citations is by Professor Moon. The reference is independent because it dates from 1997, before Prof. Moon was the petitioner's mentor at HHMI, and therefore Prof. Moon's use of the petitioner's work clearly did not derive from that future professional relationship.