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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 2007

IN RE: Petitioner:
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. At the time of filing, the petitioner was a doctoral student and research assistant at Michigan State University. 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 director did not dispute 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.

Counsel describes the petitioner's work:

[The petitioner] has a proven track record of concrete critical contributions to the field of medical science. He has an exceptional ability to bridge both western medicine and traditional Chinese medicine thereby making him a critical contributor to research in both China and the United States. [The petitioner's] research in China centered on neurodegenerative disease which is a varied assortment of central nervous system disorders characterized by gradual and progressive loss of neural tissue. Among neurodegenerative diseases are included Alzheimer's disease, demyelinating diseases, stroke, etc. . . . [The petitioner] has conducted critical research relative to two neurodegenerative diseases in particular: stroke (in China) and glaucoma (in the United States).

With regard to the labor certification procedure, counsel states that "[t]he process is lengthy, cumbersome, expensive and, it has been asserted [counsel does not specify by whom], bears no authentic relationship to the business reality inherent in testing of a labor pool for able, qualified, willing and available U.S. workers." Counsel adds that "[t]he labor certification process is a sterile procedure" that is not applicable to jobs such as the petitioner's, where "the very essence of the work is creativity, ingenuity, inventiveness, imagination, and sagacity. . . . It is respectfully suggested that the fact that in certain cases the situation is not amenable to the labor certification process is the reason that Congress provided for the National Interest Waiver." It remains that,

by law, advanced degree professionals and aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement, and that advanced degree professionals were not even eligible for the waiver in the original legislation (the statute has since been amended). The Administrative Appeals Office lacks the authority to declare that Congress made a mistake when it specifically applied the job offer/labor certification requirement to aliens working in the sciences. As long as the labor certification requirement is part of the statute, we have no discretion to disregard that requirement. The Immigration and Naturalization Service has no jurisdiction over the labor certification process itself. Arguments for reform should be directed to the Department of Labor; arguments for its outright abolition should be directed to Congress, which has the sole authority to modify or remove the requirement.

We note Congress' creation of a blanket waiver for certain physicians (the recently enacted section 203(b)(2)(B)(ii) of the Act). This amendment demonstrates that Congress did not envision blanket waivers as an integral part of the original statute; otherwise, the creation of a specific blanket waiver would have been superfluous. We will give due consideration to evidence regarding the petitioner's contributions and abilities, but for the above reasons we cannot agree with counsel's contention that the occupation itself demands a waiver.

Along with copies of the petitioner's research articles and abstracts, and background documentation pertaining to his field of research, the petitioner submits several witness letters. [REDACTED] the assistant professor who has supervised the petitioner's doctoral work at the University of Michigan, states:

In my laboratory, [the petitioner's] research has focused on the development of treatment strategies for delivering neuroprotectants to the diseased visual system, another area of study with equally wide-ranging, health- and social-related, benefits. . . .

My current research concerns the structure-function relations of neurons in the primate visual system following elevation of intraocular pressure, a risk factor commonly associated with glaucoma, a leading cause of blindness. A central goal of this work is to relate the clinical stages of the disease with the actual neuronal damage that occurs within the eye. . . .

[The petitioner] has played a major role (scientific design, surgical manipulation, measurement/comparison, statistical analysis) in studies aimed at determining the extent to which direct application of a known neuroprotectant (BDNF) to the injured eye might reduce nerve cell loss, and thus reduce visual deficits. . . . Based on [the petitioner's] work, which examined the effect that different doses of BDNF have on the survival of retinal ganglion cells in the cat eye following controlled compression of the optic nerve, we now understand the level of BDNF we need to apply to the damaged eye. This is not a trivial matter, since it is well known that neurons in different areas of the brain respond differently to the same substances. Thus, it is important that one establish for their system the level of

drug application that is most beneficial. . . . [The petitioner's] current work is of significant importance to ophthalmologists interested in preventing the long-term loss of vision commonly associated with glaucoma.

Professor William M. Falls, associate dean of Student Services at Michigan State University, taught a neuroscience course for which the petitioner acted as a graduate assistant. Most of Prof. Falls' comments pertain to the petitioner's teaching work in that capacity. Regarding the petitioner's research work, Prof. Falls states that the petitioner "is developing therapeutic strategies that hopefully will allow neuroprotectants in conjunction with a reduction in intraocular pressure to mitigate or reverse the pathological consequences of glaucoma in non-human primates and eventually in humans." Prof. Falls indicates that this work could be highly beneficial "[i]f these therapeutic strategies come to fruition."

The third witness, also at Michigan State University, is Professor [REDACTED] a member of the petitioner's doctoral guidance committee, states that the petitioner "is one of the most competent and industrious graduate students I have known in my 41 years of participation in graduate education." He offers no comment as to the significance of the petitioner's graduate work, nor does he even describe that work in any detail; he limits his comments to his perception of the petitioner's abilities as a graduate student.

The final letter in the initial submission is from Professor Peichun Zhu of Beijing University of Traditional Chinese Medicine, where the petitioner had studied for his master's degree. Prof. Zhu states that the petitioner "developed a novel animal model of hypertensive intracerebral hemorrhage (ICH), which involves two separate microsurgeries on each animal." Prof. Zhu describes this as "the first reproducible hypertensive ICH animal model. His data showed that hypertension has a great impact on the pathology of ICH and this new model is closer to human ICH and serves as a better tool for pharmacological research seeking new treatments." Prof. Zhu adds that the petitioner's "research involves the death of neurons and the reaction of glia cells (supporting cells of the nervous system) to neuronal injury. . . . Evidence shows that glia cells can determine the fate of neurons after various insults to the nervous system."

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 observed the absence of "corroboration from disinterested parties"; all of the petitioner's initial witnesses have been directly involved in the petitioner's graduate training (which, at the time of the denial, was still ongoing).

On appeal, counsel notes that the petitioner has continued to publish and present his work, and that the petitioner has joined "Phi Beta Delta, the International Scholars Honor Society." Honor society memberships may help to demonstrate exceptional ability, but a plain reading of the statute and regulations shows that aliens of exceptional ability are, generally, subject to the job offer/labor certification requirement. The petitioner submits no independent evidence (such as citation records) to show that his published and presented work has had greater impact than that

of others in his specialty, nor has he otherwise shown that his particular findings have had a greater or wider overall impact than those of others conducting comparable studies.

We cannot rely on counsel's descriptions of the evidence and its significance. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, some of counsel's assertions are simply insupportable. For instance, counsel states that the petitioner's "[m]embership in the AAAS [American Association for the Advancement of Science] is further evidence of [the petitioner's] stature in the scientific community as a result of her [sic] critical contributions to the field." Counsel submits no evidence to show that the AAAS has any significant restrictions regarding whom it admits as members. A complicated membership application process is not evidence of such restrictions. The AAAS itself states "[m]embership in AAAS is open to all individuals who support the goals and objectives of the Association and are willing to contribute to the achievement of those goals and objectives."¹

Three new letters accompany the appeal. [REDACTED] of the University of Wisconsin-Madison Medical School, who first met the petitioner at a 1997 professional meeting, states that the above-described research regarding the use of BDNF to protect nerve cells in and near the eye "could not have been possible without the extraordinary expertise [the petitioner] provided." [REDACTED] indicates that he was closely involved with the petitioner's research because "my laboratory produced and clinically managed the glaucoma in the experimental primates, allowing me to see first hand the creativity, insights and importance of [the petitioner's] ideas and work."

Dr. Wu Zhou, an assistant professor at the University of Mississippi Medical Center, states that the petitioner "is the first scientist who demonstrated the beneficial effect of BDNF in human-sized eyes." The final witness letter is from [REDACTED] founder of International Biotech & Systems, Inc., who "met [the petitioner] when he visited the NIH [National Institutes of Health] campus in Bethesda, Maryland, in 1998." [REDACTED] specifies, with regard to the petitioner's work with "human-sized eyes," that the effects of BDNF on rat eyes were already known when the petitioner began experimenting with cat eyes. [REDACTED] indicates that the petitioner's "data set defined a starting point for any future clinical trials for BDNF. These data would not be available without [the petitioner's] contribution." [REDACTED] also indicates that the petitioner's most important work took place in 2000, after the petition's November 1999 filing date.

While witnesses have described the petitioner's research work, the record does not establish how that work is of greater impact or importance than the work of others in the same field. Also, it is not clear how much of the petitioner's work involved original concepts and directions rather than performing tasks assigned by others who conceived the basic idea of studying BDNF's role in preventing neural damage. The petitioner has clearly fulfilled a useful role in his graduate studies, and in so doing impressed many of his mentors and collaborators, but the record as it is now constituted does not demonstrate that the petitioner's actual results have substantially exceeded

¹ www.aaas.org/membership/m-cat.shtml, accessed May 20, 2002

those of others in his field. Assertions about possible future applications of the petitioner's findings, or about the potential future direction of the petitioner's research, are necessarily speculative and do not demonstrate a track record of prior success. While the petitioner's research appears to be promising, at this stage the record does not persuasively demonstrate that a waiver of the job offer/labor certification requirement would appreciably serve the national interest.

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.