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U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: 12 JUN 2002

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. 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.

On appeal, counsel argues that the director erred by failing to request additional documentation prior to issuing the denial. The appropriate remedy for this alleged error is to consider on appeal any documentation that would have been submitted in response to such a request. We will consider the new documentation submitted on appeal below.

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 Master's degree in Biochemistry and Agricultural Science from Shandong Agricultural 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 remaining issue 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.

We concur with the director that the petitioner works in an area of intrinsic merit, researching large viral structures, and that the proposed benefits of his work, improved understanding of large viruses, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are

of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at note 6.

whose laboratory the petitioner worked at Purdue University, discusses the petitioner's work analyzing the structure of two large viruses using cryo-electron microscopy includes that the petitioner is "rapidly becoming" a world expert of structural studies of large viruses. notes that the petitioner has collaborated with four "internationally recognized" laboratories and will soon collaborate with Hyatt of the Australian Animal Health Laboratory and of the Canadian Food Inspection Agency. The record does not include letters from these doctors attesting to how they selected the petitioner as a potential future collaborator.

head of the Department of Biological Sciences at Purdue University, asserts that the petitioner was able to help determine the structure of an algal virus with continues:

> This is one of the largest and most complicated viruses ever purified and studied for three-dimensional work. It requires the highest level of capability with the electron microscope as well as outstanding computational skills.

a member of the petitioner's graduate committee at Purdue and member of the National Academy of Sciences, writes that he is preparing a manuscript for publication in *Nature* with the petitioner as lead author continues:

> [The petitioner's] training in biology and the physical sciences gives him an unusually strong background for the research he has undertaken using cryo-electron microscopy as a major tool. It is my strong anticipation that this form of microscopy will emerge as one of the most important tools in structural biology during the next decade and, hence, will be essential in the developing biotechnology industry. At this time, there are only a few individuals who have had training in this area and still fewer laboratories where such training is feasible.

While the opinion of a member of the National Academy of Sciences carries significant weight, is the petitioner's collaborator and his letter fails to explain how the petitioner has already influenced his field as a whole. simply discusses the petitioner's rare skills with cryo-electron microscopes, skills that could be enumerated on an application for a labor certification.

a professor at the University of Nebraska, Lincoln, writes:

> For the past 19 years my laboratory has studied viruses that infect certain strains of algae. These viruses, which were originally discovered by myself and a colleague in 1980, are among the largest and most complex viruses found to date. For example, these viruses contain about 375 genes; as a point of reference the HIV virus which causes AIDs has about 12 genes. These algal viruses are members of a new family of viruses - called Phycodnaviridae.
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> . . .
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> My laboratory has a joint research project with [the petitioner] and his colleagues and at Purdue University, to study the ultrastructure of an algal virus. These experiments rely on a technique called cryo-electron transmission microscopy (cryoTEM) and computer assisted image reconstruction, a technique that was largely developed at Purdue University. Our joint experiments have produced the successful three-dimensional reconstruction of an algal virus; this is the largest virus ever imaged by this technique. A research paper on these experiments is being prepared for submission to the journal Nature.
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> [The petitioner] was the lead scientist on these experiments and is the senior author of the paper describing the results. Our experiments were successful because of [the petitioner's] intellectual input and diligent efforts to interpret the massive amount of data that resulted from this large virus. [Note: attempts to conduct these experiments with the Purdue group a few years ago were unsuccessful because the computer and software at Purdue could not handle all of the data.] Using similar techniques, [the petitioner] has also recently determined the structure of the insect virus CIV, which, although not quite as large as the algal virus, is another very large virus. Comparative structural studies between these two viruses will provide much needed information on how large viruses including the medically important pox viruses and the agriculturally important African swine fever virus [a quarantened [sic] virus].

a professor at Purdue University, writes:

> The independent research carried out by [the petitioner] involves the assembly and structure of several large double-strand DNA viruses. Understanding the atomic details of the assembly process is necessary for the development of anti-virals and vaccines to combat the ever-present threat of viral infections. [The petitioner] has been studying this process

> using a powerful technique known as cryo-electron microscopy and image reconstruction. This technique allows one to image the structure of a virus at near atomic resolution and provides an intimate portrait of the proteins and nucleic acid that make up he virus particle.

[redacted] provides general praise of the petitioner's laboratory, academic success, skills, and discusses the lack of scientific talent in the United States.

[redacted] a postdoctoral researcher at the National Institute of Health and former classmate of the petitioner's, and [redacted] an assistant professor at Purdue University, both reiterate the above information.

On appeal, the petitioner submits new letters from [redacted] Etten which essentially reiterate the above information. [redacted] now asserts that the petitioner is "the world expert on structural studies of some of the largest viruses known to mankind." (Emphasis in original.) The above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole. The record remains absent letters from independent researchers who have been influenced by the petitioner or independent experts at distinguished institutions or relevant government agencies confirming that the petitioner has influenced his field.[1]

The petitioner also submitted evidence that the Microscopy Society of America (MSA) awarded him the Presidential Student Award in 1998 and that his poster was selected for the MSA's traveling exhibit. On appeal, the petitioner submits evidence that he received an honorable mention in the 1999 Procter and Gamble research competition for students at Purdue University. Recognition from one's peers is one of the factors required to establish exceptional ability, a classification that, by statute, normally requires a labor certification. We cannot conclude that establishing one of these factors is evidence that the labor certification should be waived.

The petitioner submitted evidence that he has authored two one-page articles published in that *International Congress of Electron Microscopy* and the *Proceedings of Microscopy and Microanalysis*. On appeal, the petitioner submits evidence that he has subsequently been published in *Natural Structural Biology* and that the reviewers provided favorable comments. Every article in a peer reviewed journal must receive positive comments from the reviewers to be published.

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[1] The letter from the National Institute of Health (NIH) is from a postdoctoral researcher who is a former classmate of the petitioner's. His opinion does not appear to represent the official opinion of NIH.

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

Counsel asserted in his initial brief that exhibit M constituted "extensive citations of [the petitioner's] publications by other research scientists in the field." Exhibit M is simply a statement that the petitioner's article co-authored wit[redacted]and [redacted] published in the *Proceedings of Microscopy and Microanalysis* was cited in an article [redacted]nd a second article b[redacted]and [redacted] Assuming this information is correct, two self-citations by the petitioner's co-authors are not evidence that the petitioner's work has been widely cited by independent researchers.

On appeal the petitioner submits a photocopy of an article published on an unknown date in an unknown newspaper discussing the virus research at Purdue. The article includes the petitioner as a member of the team. Review of the surrounding stories, including a public interest story about members of the Purdue Football team attending a [redacted] reading event at a local library and an obituary for a man who died on March 1, 2000, it appears that the article appeared in a local paper after the petition was filed in November 1999. As such, it cannot be considered evidence that the petitioner had influenced his field outside Indiana as of the date of filing.

Finally, counsel argues on appeal that the labor certification process is not applicable to the petitioner's intended position because the position requires elements that cannot be articulated on a labor certification application such as independent creativity, initiative, and experience gained with the same employer. Scientific research in general requires creativity and is in the national interest. There is nothing to suggest that Congress intended the national interest waiver as a blanket waiver for all scientific researchers. Regarding the training by the employer, the petitioner seeks to work as a postdoctoral researcher at a university laboratory. University laboratories are staffed by a constantly changing group of graduate students and temporary postdoctoral researchers. Training the staff is inherent to a university research laboratory. We cannot conclude that every graduate student who seeks to continue as a postdoctoral researcher in the laboratory where he trained is eligible for a national interest waiver.

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.