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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: JUN 17 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 F. 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.

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 [REDACTED] 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, AIDS research, and that the proposed benefits of his work, improved treatment of AIDS, 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. The director concluded that the petitioner had not established that his contributions measurably exceed those of his peers.

On appeal, counsel asserts that it is impossible to compare the petitioner with every other researcher with similar qualifications and that the director failed to consider the petitioner's "unique qualifications, [which], by themselves, necessarily establish the existence of a lack of other equally-qualified US workers."

A petitioner need not demonstrate the abilities of every other researcher with the same qualifications. At issue is whether the 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. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6. Moreover, 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. Finally, it cannot suffice to state that the alien possesses useful skills, or a "unique

background.” Regardless of the alien’s particular experience or skills, even assuming they are unique, the benefit the alien’s skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

In his initial brief and again on appeal, counsel asserted that the petitioner “has individually made a number of vital findings unearthing what were once mysteries with respect to HIV replication and infection.” Counsel continues:

Specifically, [the petitioner’s] focus on the development of antiviral agents for the chemotherapy of AIDS has resulted in significant findings with respect to finally developing a mechanisms for precluding HIV replication. In addition, [redacted] the first licensed drug approved for the treatment of HIV infection in 1985, thanks to [the petitioner’s] research, other new drugs have recently been developed designed to thwart further HIV replication. Examples of such drugs include five dideoxynucleoside drugs aimed at inhibiting [redacted] transcriptase and three peptidomimetic compound which inhibit [redacted]

(Emphasis in original.) This claim is utterly unsupported by the record. The record does not include any letters from high officials in the pharmaceutical industry confirming that the petitioner contributed to the development of any new AIDS drugs. The development of protease inhibitors was major national news. The record does not include any newspaper articles identifying the petitioner as a contributor to these drugs or letters from the top AIDS researchers as identified in major newspaper articles confirming the petitioner’s contribution to the development of these drugs.¹

While the petitioner received his Ph.D. from [redacted] in 1995 and has allegedly been working as a postdoctoral researcher at the University of Iowa, the petitioner submitted only two letters of support, both from colleagues who worked with him while he was a Ph.D. student at [redacted]

[redacted] an associate professor at [redacted] provides general praise of the petitioner’s academic skills, defines him as a “capable researcher,” and asserts that the petitioner’s unidentified research contributions at the [redacted] have the potential to be substantial.” She concludes without explanation that the petitioner’s background in chemistry and biology is “unique.”

[redacted] a professor at the [redacted] who previously served as the petitioner’s doctoral advisor [redacted] writes:

¹ While a petitioner seeking a national interest waiver need not provide evidence of coverage in the media, in this case, the petitioner is claiming to have assisted with a development that received major media attention. To support such a claim, it can be expected that the petitioner would provide some evidence of media attention to him or his colleagues.

[The petitioner] tackled a problem that rapidly became much more complex than it first appeared, and through his perseverance he was able to complete the project. In the process, he overturned my own hypothesis concerning the course of these alkylation reactions, and exposed a deficiency in several computer models for the alkylation of 3-endo-benzylisobornyl propionates. [The petitioner] is a mature scientist whose skills as a graduate student ranked him among the best I have directed or observed in two decades of supervising graduate research students.

[The petitioner] is currently a post-doctoral fellow at the University of Iowa. There he has been working under the direction of one of the chemists at the forefront of the chemical fight against [redacted] on a project which shows considerable promise of identifying totally new classes of anti-HIV compounds with clinical potential. The nucleoside mimics that are being developed in the Iowa laboratory are exceptionally stable, and the results obtained to date suggest that they may attack the HIV retrovirus at several levels. When [redacted] his work at the University of Wisconsin [redacted] last year, he made it clear that this project is very much a work in progress, and that it is imperative that it be kept moving. After his seminar, we discussed [the petitioner], whom [redacted] then identified as a key individual in this effort. . . .

. . . [The petitioner's] work is resulting in the development of exciting new compounds for use in the fight against AIDS, and his expertise is critical to keeping that effort moving at its current pace.

As stated above, the petitioner did not submit a letter of support from [redacted]. More significantly, the petitioner did not submit any letters from independent researchers in the field regarding the petitioner's influence on their own work, experts in the field evaluating the petitioner's influence, or high ranking officials at relevant government agencies. Letters from the petitioner's collaborators and immediate colleagues, while important in providing details about the petitioner's role in various projects, cannot by themselves establish the petitioner's influence over the field as a whole.

The petitioner submitted evidence that his work was presented at the Twelfth International Conference on Antiviral Research in Jerusalem and that he had authored three published articles. 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.

In his initial brief, counsel asserted, "major renowned journals and publications on AIDS have referenced [the petitioner's] research." Counsel continues:

[REDACTED] a well-known AIDS physician and the medical director of the HIV clinic at [REDACTED] has called for a "cautious, patient" approach to HIV treatment in an article published February 15, 2000 in the Annals of Internal Medicine. [REDACTED] describe, for instance, the **enormous** benefits precipitated by modern antiretrovirals; he notes, importantly, that "Deaths in our HIV population decreased 85% in a 1-year period" when protease inhibitor therapy was utilized.

[REDACTED] and others are not alone in referencing the continued saliency of developing more effective antiviral drugs in combating AIDS. In the Journal of the American Medical Association, Volume 282, pp. 1668-1669, November 3, 1999, both [REDACTED] and [REDACTED] discusses the results of [REDACTED] on HIV-1 replication and concludes that, while more research needs to be done, [REDACTED] other newer antiviral drugs are becoming important tools in the war against AIDS.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); [REDACTED] 7 I&N Dec. 503, 506 (BIA 1980). The petitioner did not submit copies of the above articles. Moreover, counsel's comments imply that these articles simply discuss the benefits of antiretroviral therapy. The record contains no evidence that the petitioner played a major role in the development of any antiretrovirals responsible for the decline in AIDS deaths.

It remains, the record contains no evidence that the petitioner's articles have been widely cited by independent researchers, such as copies of the citing articles, copies of pages from a citation reference, or a printout from a citation database.

As the petitioner has not demonstrated the significance of his contributions to the field, counsel's argument that the lengthy labor certification process would delay the petitioner's vital research is not persuasive.

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.