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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]

17 JUN 2002

File: [Redacted] Office: Texas Service Center

Date:

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 L. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

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. The petitioner seeks employment as a research associate at the University of Florida research associate at the University of Florida. 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 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.

The petitioner's work at the University of Florida involves the effort to develop gene therapy treatment for two progressive diseases that can cause blindness, specifically macular degeneration and retinitis pigmentosa.

The petitioner submits background documentation pertaining to her field of research. This material establishes the intrinsic merit and national scope of the petitioner's work, but because it does not specifically mention the petitioner, it cannot show that this petitioner's work is especially important in comparison with the work of others in the field.

The petitioner submits copies of a number of her published articles, of which the petitioner is the first-named author of several. One article appeared in the *Proceedings of the National Academy of Sciences* in 1993, the other in *Genetics* in 1996. The petitioner also submits evidence that the two articles have been cited a total of 33 times (12 and 21 times, respectively). The petitioner's articles both pertain to the mitochondrial genetics of bacteria in the genus *Neurospora*.

In support of her claim, the petitioner submits several witness letters. Professor William W. Hauswirth, who supervises the petitioner's work at the University of Florida, states:

[The petitioner] is playing a significant role in two major projects. The first relates to retinal gene delivery by adeno-associated viruses, and has as its ultimate goal developing a gene therapy for macular degeneration. The second research

project relates to ribozyme therapy for autosomal dominant retinitis pigmentosa, and also has as its goal developing a gene therapy for that condition. . . .

Effective gene therapy depends on safe, efficient and stable gene transfer systems which can target the specific affected cell types. . . .

Since joining my program in October 1996, [the petitioner] has contributed substantially to our research in this area. She successfully constructed an rAAV gene delivery system to deliver experimental and therapeutic genes to mammalian retina-specific cells such as the rod photoreceptor, cone photoreceptor and neurons in the retina. [The petitioner] also developed an *in vivo* approach to functionally analyze the promoter/regulator sequence required to regulate cell-type specific and developmental-stage specific gene expression. Since the cell-type specific promoter determines which cell type will be specifically targeted by the desired genes, [the petitioner's] analytical approach is critical to the overall success of the project. Further, [the petitioner] defined the requisite promoter elements for the human red/green visual pigment gene. Most important, [the petitioner] discovered that LCR acts as a cone-specific enhancer rather than the cone specificity determinant. This discovery is a very significant contribution to the understanding of the molecular mechanism of gene expression and also has important practical implications in designing strategies for cone specific gene delivery for gene therapy on retinal diseases that primarily affect cone photoreceptors.

[redacted] chief scientific officer of the Foundation Fighting Blindness, states that the petitioner's "contributions to her current research [are] both significant and substantial to the field of eye research." [redacted] associate professor at the Wilmer Ophthalmological Institute at the [redacted] states that the petitioner "is a critical member of her research team," and that the petitioner's "most significant contribution is her progress in developing an *in vivo* system to analyze the functionality of regulatory elements of cone photoreceptor specific genes and explaining the function of the Locus Control Region in determining the cone cell type specificity." [redacted] associate professor at the University of Illinois at Chicago, asserts that the petitioner's "published discovery that the Locus Control Region enhances rather than determines cone specificity is [a] very important contribution to our knowledge of the molecular mechanism of gene expression regulation."

[redacted] who had supervised the petitioner's doctoral studies at the [redacted]

[The petitioner] made several important contributions to my research program. First, she carried out the complete characterization of a *Neurospora* mitochondrial plasmid which she discovered to encode a unique DNA polymerase. In addition, she constructed several differentially subtracted cDNA libraries from cytochrome *c* oxidase deficient mutants of *Neurospora*. She also generated a physical map in

a region of the genome containing a gene required for cytochrome *c* oxidase function. . . . Finally, she cloned and analyzed the *Neurospora* alternative oxidase structural gene and its upstream regulatory regions.

Apart from the witnesses who have worked directly with the petitioner, many of the witnesses indicate that they derive their knowledge of the petitioner's work from what [redacted] told them.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted new documentation and witness letters to support the assertion that, in counsel's words, the petitioner's "achievements on her current project are very significant when compared to the achievements of other researchers doing similar research."

Counsel asserts "the minimum qualification for the research associate position is an associate or a baccalaureate degree. Thus, the appropriate standard in this case should be that [the petitioner] must serve the national interest to a substantially greater degree in the field of genetic research than would an available U.S. worker having an associate or a baccalaureate degree in her field." The petitioner seeks classification as a member of the professions holding an advanced degree, a qualification which already places her above most less-educated workers in her field. To assert that the advanced degree itself is grounds for a waiver is a serious misreading of the statute, which plainly indicates that advanced degree professionals are, as a rule, subject to the labor certification requirement.

Furthermore, if it is counsel's contention that an individual holding an associate degree can be hired in the petitioner's position, then the position is not professional as the relevant regulations define that term. The regulation at 8 C.F.R. 204.5(k)(2) defines a "profession" as "one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." Because an associate degree is at a lower level than a baccalaureate degree (requiring, generally, only two years rather than four years of study), no occupation can be considered "professional" if an individual with only an associate's degree can work in that occupation. Thus, counsel's argument carries no weight at all unless counsel stipulates that the petitioner is not a member of the professions (and therefore ineligible for the classification sought). We do not accept such a stipulation, however, because the petitioner's position appears to be postdoctoral in nature. The petitioner has provided no evidence to indicate that the University of Florida would hire anyone without a doctorate to work in her position. Counsel's citation of the Department of Labor's definition of a "scientific helper" does not appear to be germane, despite the indication that "research assistant" is an "alternate title."

Counsel's remaining arguments derive directly from witness letters, and it would be redundant to consider these arguments in two contexts. Apart from copies of previously submitted letters, the petitioner's response to the director's notice includes several new letters [redacted] associate professor at the University of California, Berkeley, labels the petitioner "an outstanding

researcher," whose "therapeutic approach also has broad implications for other newly identified genes that relate to retinal degenerations." [REDACTED] repeatedly uses the word "extraordinary" when describing the petitioner's findings and methods, and states that the petitioner "has made four very significant genetic research discoveries in retinal degeneration. This is a tremendous achievement." [REDACTED] of the [REDACTED] discusses technical aspects of the petitioner's work and states that the petitioner's results are "very important." Other letters pertain to the petitioner's agricultural research in China, prior to her graduate studies in Canada and her present work in the United States.

The petitioner submits information indicating that new citations continue to appear in reference to her two widely cited articles, discussed above.

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 noted that several of the witnesses evidently had no knowledge of the petitioner's work until the petitioner contacted them for advisory opinions.

On appeal, counsel observes that the Service, in Matter of New York State Dept. of Transportation, "misinterpreted the statutory requirements for a national interest waiver." By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress<sup>1</sup> nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

Counsel is on stronger footing when asserting that the petitioner has submitted persuasive letters from credible, independent witnesses. While some of these witnesses appear to have learned of the petitioner's work only through being asked to review her credentials, this is not universally the case. Also, as noted above, the petitioner has established that other researchers have frequently cited at least two of her articles. While these articles do not pertain to her specific project at the University of Florida, they are still in the overall field of genetics and thus relevant to her ongoing work. These citations show that other scientists have acknowledged the petitioner's influence and found her work to be significant. As such, these citations have the effect of independent endorsements of the petitioner's work, and the quantity of those citations appears sufficiently high to suggest particular interest in the petitioner's work. The record

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<sup>1</sup>Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

overall successfully establishes a track record of prior achievement that justifies expectations of future national benefit.

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 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.