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Immigration and Naturalization Service

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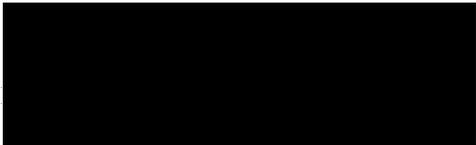
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D. C. 20536



File: WAC-98-075-50324 Office: California Service Center Date: 19 JUN 2002
IN RE: Petitioner: [Redacted] 19 JUN 2002
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:



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, California 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 an alien of exceptional ability or 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.

In the letter accompanying the petition, counsel requests that the petitioner be "classified as an alien of exceptional ability or that she be accorded a National Interest Exemption." Aliens with exceptional ability, however, normally require a labor certification unless, as with advanced degree professionals, the petitioner demonstrates that the labor certification should be waived in the national interest. The record establishes that the petitioner holds a Master's degree in Pharmacy from the University of New Mexico. 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. Thus, the issue of whether the petitioner is an alien of exceptional ability is moot. 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.

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 director concluded that the petitioner had not established that her potential benefit to the United States substantially exceeds that of any person who has completed the education and training required to engage in the profession in the United States. On appeal, the petitioner submits an unsigned statement asserting that the petitioner’s combined experience in clinical medicine, cellular immunology and molecular biology is unique. The statement continues:

During her years as a medical doctor, she accumulated experience in clinical cancer treatment. She gained knowledge in how to diagnos[e], control, and treat cancer clinically. She studied cancer morphology. She studied cancer regulation, especially via [the] immune system. One of her papers, *Effects of Parenteral Nutrition of the Immunological Function of Gastric Cancer Patients*, has been published at [sic] *General Clinical Surgery*. Another paper, *T Lymphocytes Function in Asthma and Chronic Bronchitis Patients* has been published at [sic] *Immunology (Shanghai)*.

[The petitioner] studied immune regulation on cancer at [the] cellular level. Through the study of glutathione, [the petitioner] presented a more clear picture to understanding how oxidants [sic] stimulate and interfere [with an] immune cells’ signaling path to induce cancer. She also studied single gene mutation regulating cell channel activity thus [sic] regulates cell signal transaction in inducing and blocking cancer.

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 or area of research 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 she 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.

The petitioner submitted three reference letters, two from staff at the Shanghai Medical University, and one from the Director of the Shanghai Institution of Clinical Medicine. Yuan Hongchang, Dean of the Graduate School, Shanghai Medical University, asserts that the petitioner is "confident, knowledgeable," and a "promised [sic] surgeon." [REDACTED] continues that the petitioner excelled in academics and athletics and that he would have liked to mentor the petitioner in clinical medicine but she chose to pursue research instead. [REDACTED] Director of the Department of Surgery at Hua Dong Hospital, Shanghai Medical University, asserts that the petitioner is hardworking and responsible. He continues that he recommended her for the "outstanding intern" award in the Department of Surgery. He concludes that the petitioner will be an excellent surgeon if she chooses a career in surgery and that he believes she will be successful in any other area she chooses. Finally, [REDACTED] Director of the Shanghai Institute of Clinical Medicine provides that the petitioner is an "outstanding and natural born medical scientist" and that "her research style is creative and independence [sic]." [REDACTED] notes that the petitioner worked in a lab that won a National Science Achievements Award in 1989. He concludes that the petitioner has a wide range of interests and knowledge and that she will succeed in her future research.

None of the letters provide anything more than general praise of the petitioner. They do not identify any specific contribution she has made to her field or explain how she has influenced her field. Moreover, the above letters are all from the petitioner's collaborators and immediate colleagues. While such letters can be important in providing details about the petitioner's role in various projects, they cannot by themselves establish that the petitioner has influenced her field beyond her immediate colleagues.

The record also includes a letter from [REDACTED] of Research and Development at Litmus Concepts, Inc., the petitioner's employer at the time of filing. [REDACTED] asserts that the petitioner was hired to work on a recently patented diagnostic test for Bacterial Vaginosis. It is not clear that the petitioner participated in the research that resulted in the patent. Even if she did, it can be argued that the petitioner's field, like most science, is research-driven. As such, it is not clear that everyone who holds a patent for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. [REDACTED] continues:

To fill [the petitioner's] position, we placed ads in the San Jose Mercury under the heading "Biotechnology[.]" We received approximately 50 responses, and

interviewed 5 to 10 of these candidates. [The petitioner] was chosen because she uniquely filled several of our needs:

1. She has a Masters Degree in immunoscience. We are building an immunodiagnostics group at present, now consisting of four R&D people. We will be expanding this group when new facilities are completed.
2. She has experience in chemistry and biochemistry, allowing her to step right in and become involved in immediate R&D work. Compared to the other candidates, Jane's background was stronger and more relevant to our benchwork needs.
3. She has training and practical experience in medicine and diagnostics. This is important to us, and will become even more so in the future.
4. She has connections to the medical field in China. Since we are planning on marketing our products to the Far East, this is obviously important. Besides the current products, we feel that [the petitioner] will also serve as a valuable consultant for future product opportunities.

It cannot suffice to state that the alien possesses useful skills or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

The record contains a certificate verifying that the petitioner won the "Outstanding Internship Award" from the Department of Surgery, Shanghai Medical University in 1991. An internship is inherently a training position. As such, the petitioner only outperformed other trainees. Moreover, the petitioner does not seek to practice surgery in the United States. Regardless, even if we considered this award significant, recognition from one's peers is only one factor in establishing eligibility as an alien of exceptional ability, a classification normally requiring a labor certification. We cannot conclude that evidence relating to one criterion for a classification which normally requires a labor certification is evidence that the labor certification should be waived in the national interest.

The petitioner also received "first prize" from [REDACTED] for "her significant contribution in developing G5030 Enzyme ELISA Analytical Instrument." As stated above, the petitioner's field, like most science, is research-driven. The record does not establish that the petitioner's work on this project represented a groundbreaking advance in medicine, or has far-reaching implications.

The petitioner also submitted evidence that she has authored two articles and one abstract. 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 sustained acclaim; we must consider the research community's reaction to those articles. The record reflects that one of the petitioner's articles was cited by one of her co-authors. While self-citation is a normal and expected practice, one self-citation is not evidence that the petitioner has influenced her field beyond her immediate colleagues.

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.