

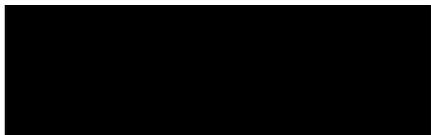


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U.S. Department of Justice  
Immigration and Naturalization Service

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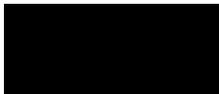
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



19 JUN 2002

File: EAC 99 134 50859 Office: Vermont Service Center Date:

IN RE: Petitioner:  
Beneficiary:



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, Vermont 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. At the time of filing, the petitioner was a doctoral student at the State University of New York ("SUNY") at Buffalo. 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 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 describes his work:

My research is focused on an important aspect of cancer treatment, gene therapy. Normally, the genetic system in a cell consists of 3 elements: DNA, RNA and protein. DNA contains the genetic information of genes, which is transcribed into RNA. As a messenger, the RNA carries the genetic information from the nucleus to cytoplasm and directs the synthesis of proteins. Proteins are the basis of any metabolism, including cell proliferation and differentiation. Antisense nucleic acids are single-strand DNAs or RNAs that are complementary to the sequence of their target genes. After binding to the specific sequence, it will block the expression of the respective gene.

Antisense oligonucleotides appear to be an attractive tool not only for investigations of normal and pathogenic gene functions, but also as potential therapeutic agents in a spectrum of pathologic processes ranging from viral infections to neoplastic disorders. However, the application of antisense strategy is limited by the poor permeability and instability of oligonucleotides.

The petitioner then proceeds with a technical explanation of his efforts to overcome the limitations he describes. The petitioner asserts that "[t]he success of the antisense poly-DNP-RNA provides a promising candidate for the cure of human cancer."

Along with copies of his published articles, the petitioner submits several witness letters. [REDACTED] the petitioner's dissertation advisor at SUNY Buffalo, states:

Our current work is focused on the design, synthesis and testing of bioavailable nucleotide derivatives for the effective treatment of breast cancer. A paper . . . with [the petitioner] as the first author . . . shows that these specifically designed compounds can selectively kill breast cancer cells without damaging the non-tumorigenic breast cells. They can also stop the growth of transplanted human breast cancer cells in SCID mice without toxic symptoms. [The petitioner] joined my research group at SUNY/Buffalo in 1995 . . . and is principally responsible for the design, synthesis and testing of these remarkable new anticancer compounds. . . . We need him here after his graduation as a leader and essential member of the anticancer project and to continue the research he has undertaken.

Other SUNY Buffalo faculty members assert that the petitioner's contributions have been significant. Outside of that university [REDACTED] senior research scientist at Roswell Park Cancer Institutes, states "I believe [the petitioner's] research is an important step in developing effective new means of curing cancer. [REDACTED] director of the Department of Biochemistry at Idun Pharmaceuticals, Inc., deems the petitioner's work an "exciting breakthrough" that "might potentially contribute to our next generation drug designs in the anti-Cancer and anti-HIV areas." [REDACTED] explains how genetic mutations represent a serious impediment to HIV drug therapies because "just a single point mutation of HIB viral genes is sufficient to countervail the drug effect in virtually every case so far." He adds that, "[f]or cancer patients, it is even more complicated" because, in addition to drug resistance, researchers must design drugs that attack cancer cells but not the genetically very similar normal cells. Dr. Wu states:

[The petitioner] has designed an innovational approach that may overcome the aforementioned obstacles. The most impressive result from [the petitioner's] works is that he was able to target the abnormal gene transcripts in an extremely selective manner, and specifically trigger the transformed cells to undergo apoptosis [i.e., programmed cell death] whereas [the treatment would] leave the normal cells untouched. This is a remarkable breakthrough in the cancer research. The most imperative element attribut[abl]e to this success was that [the petitioner] was able to deliver a highly specific antisense molecule across [the] cell membrane to inactivate the selected gene in cancer cells. Delivering a macromolecule into cells has been the major challenge in the biotech industry. . . . This technology may also be applied to design the next generation of drugs to combat AIDS.

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 four

additional witness letters, as well as documentation to show that the journal that published the petitioner's article ranks 53<sup>rd</sup> out of 104 ranked journals in terms of impact factor.

Two of the new witness letters are from SUNY Buffalo faculty members. The petitioner's initial submission has already established his reputation at that university. The third witness is also in [REDACTED] chief of Cytopathology at Kenmore Mercy Hospital, states:

[The petitioner] has made several important discoveries that significantly improved the efficiency of antisense gene therapy against cancer cells. One of his breakthrough findings is that the antisense poly-DNP-RNA compound can inhibit cancer cell growth at a very low concentration. He further demonstrated that the antisense compound can kill cancer cells specifically without side effects. [The petitioner] is the first one who showed that the antisense poly-DNP-RNA compound is able to kill the cancer cell specifically. In addition, he also revealed that this antisense compound could enter the living cell without any delivery vehicle. These discoveries basically resolved a problem blocking the practical application of antisense agents in gene therapy and pave the road for clinical trials. . . .

At this time, [REDACTED] lab is the only lab in this country that can perform such experiments, and I know that [the petitioner] is the central investigator in this project and this project would be greatly hindered if [the petitioner] is absent from participating. . . .

[The petitioner] has achieved tremendous success in the cancer research field, and his breakthrough findings dramatically advanced our understanding of tumorigenesis. It is unquestionable that [the petitioner's] continuing participation in his ongoing research is essential.

[REDACTED] affiliate professor at the University of Washington Medical School, states that the petitioner's "elegant work revealed the effectiveness of antisense Poly-DNP-RNAs against cancer and opened up the possibility of developing an entirely new type of drug to fight cancer."

The director denied the petition, stating that the evidence of record "does not establish [that the petitioner's] level of education and experience could not be delineated on labor certification forms or that the projects would have to be suspended without [the petitioner's] presence and contributions."

On appeal, the petitioner submits documentation showing that he has completed his doctorate, and that SUNY Buffalo has appointed him to the position of research assistant professor for a three-year term ending in 2003. This information supports the prior claim that SUNY Buffalo desires to continue to employ the petitioner.

The petitioner submits two further letters. Professor Jui H. Wang states:

In view of his achievements, the faculty of [SUNY Buffalo's] Chemistry Department has unanimously voted to promote [the petitioner] to Research Assistant Professor of Chemistry. . . .

[I]n spite of the successful treatment of targeted cells by poly-DNP-RNAs, we had until recently no direct evidence to show that these compounds can penetrate cell membrane and reach their targets inside. . . . [The petitioner] designed a new procedure . . . [that] showed that poly-DNP-RNA molecules had indeed permeated into the cells. . . .

[The petitioner] is the person who used antisense poly-DNP-RNAs for the first time to treat cancer. His discovery that antisense poly-DNP-RNA can trigger apoptosis in targeted cancer cells without damaging non-tumorigenic cells has since been confirmed by others. This discovery by him is of great potential importance, because it opens up a feasible way to treat cancer patients even after metastasis has already taken place.

[REDACTED] University states:

I first learned about [the petitioner's] research on anti-sense RNA through his publications. His first paper . . . reported the success of a truly original approach in the field. This paper shows that these specifically designed compounds can selectively kill breast cancer cells without damaging the non-tumorigenic breast cells. A second paper . . . showed that these compounds can also inhibit the growth of transplanted human breast cancer cells in SCID mice without toxic symptoms, prevent metastasis and drastically reduce mortality. Recently [the petitioner] showed that similar poly-DNP-RNAs can be synthesized to selectively kill human prostate cancer cells and human leukemia cells in a concentration-dependent and sequence specific way.

[REDACTED] makes it clear that he first learned of the petitioner's work through the petitioner's publications, rather than through any personal or professional connection with the petitioner or with Prof. Wang. Other witnesses, as well, appear to be largely independent of the petitioner, their contact with him being limited to discussions at professional conferences. It is not surprising for the faculty members of a given research institution to view projects at that institution as being important; few researchers would devote their effort and resources to projects that they themselves consider to be unimportant. Independent witness testimony, however, shows that the high opinions of the petitioner's work extend outside the walls of SUNY Buffalo, and researchers at several prestigious research institutions have endorsed the petitioner's work as a major step forward in the continuing fight against cancer. While this research is still at a relatively early stage, experts have seen more in the petitioner's work than simply a vague promise or incremental advance in the overall body of knowledge.

Moreover, several of the independent researchers have stressed the petitioner's significant role in the research projects underway at SUNY Buffalo. It does not appear to be the case that research in [REDACTED] laboratory was progressing inevitably toward specific findings, which happened to occur while the petitioner was there, or that the petitioner was little more than a laboratory technician performing routine tasks while his collaborators made discoveries. Rather, the petitioner himself appears to have been responsible for significant advances and findings that have demonstrably captured the attention of experts outside of his circle of mentors and collaborators.

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.