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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



File: [Redacted] Office: Nebraska Service Center Date: 11 MAR 2002

IN RE: Petitioner: [Redacted]
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 which 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 which 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 which 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.

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 Medical Genetics from the Hunan Medical 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, cancer research, and that the proposed benefits of her work, increased understanding of esophageal cancer, would be national in scope. The director then concluded that the petitioner had not established that she would benefit the national interest to a greater extent than an available U.S. worker with the same qualifications would.

On appeal, counsel argues that the director used the incorrect standard. Counsel notes that Matter of New York State Dept. of Transportation requires a petitioner to establish only that she will serve the national interest to a greater degree than an available U.S. worker with the same minimum requirements. At the bottom of page four, the director stated the correct standard, using the word "minimum." In her final conclusion, the director did omit the word "minimum." We do not find this omission to be reversible error, especially as the director initially stated the correct standard. Counsel also argues that, while the director was bound by Matter of New York State Dept. of Transportation, that decision is flawed and based on an incorrect view of the labor certification process. To date, neither Congress¹ nor any other competent authority has overturned the

¹Congress 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.

precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it.

The remaining issue is whether the petitioner has established a track record of accomplishments that projects that she will contribute to the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Counsel argued initially that the labor certification process is too restrictive and lengthy for research institutions and that the petitioner is overqualified for the position according to the Department of Labor requirements for a research assistant.

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. According to counsel's argument, the labor certification process should be waived for all research assistants or at least those who have extra qualifications beyond those allowed by the Department of Labor. Congress is capable of providing a blanket waiver for certain occupations, and has not done so for research assistants.

Next, counsel argued that the petitioner has demonstrated prior achievements. The petitioner submitted several reference letters as evidence of her achievements. [redacted] Director of the Thoracic Surgery Tumor Biology Laboratory at the University of Michigan School of Medicine, discusses the deadly nature of esophageal adenocarcinoma and the importance of his laboratory's efforts (funded by the National Cancer Institute) at identifying genes which play a role in this type of cancer. [redacted] asserts that the petitioner is solely responsible for the two dimensional electrophoresis separation procedure at his laboratory. [redacted] continues:

The restriction landmark genome scanning analysis carried out by [the petitioner] is extremely sensitive and is able to identify small regions of genomic DNA which has either increased in copy number as compared to the patient's normal tissue or, conversely, decreased as a result of the tumor. It also allows the identification of DNA produced by the two-dimensional gel approach, as well as permitting the DNA to be extracted and cloned. In addition, this technique allows for the identification of DNA fragments which are important in these cancers, but which cannot be identified by any other approach. Using this approach in a limited series of tumors, [the petitioner] has been essential to our identification of a number of amplified genomic fragments present in esophageal adenocarcinomas including a potentially important gene amplification event common in these tumors which would indicate a vast potential for uncovering cancer-related genes. Her work far surpasses the average researcher.

[redacted] Chief Resident in General Surgery at the University of Michigan Hospital, provides similar information. [redacted] Head of the Thoracic Oncology Section of the National Cancer Institute discusses the importance of the work going on in [redacted] laboratory, especially the two-dimensional analysis procedure. [redacted] states:

This sophisticated technique has been substantially developed by [redacted] group at the University of Michigan, and, as detailed in [redacted] letter, is being solely carried out by [the petitioner].

This language suggests [redacted] is relying on [redacted] letter as to the role the petitioner is playing at his laboratory. Regardless [redacted] indicates that the touted technique was developed [redacted] laboratory as a whole, possibly prior to the petitioner's arrival, and that she is merely responsible for performing experiments using this previously developed technique.

On appeal, the petitioner submits a new letter from [redacted] stating without explanation that the petitioner will serve the national interest to a greater extent than an available U.S. worker with the minimum qualifications for a research assistant. [redacted] Reed, an associate professor at the University of Kansas Medical Center, provides general praise of [redacted] work, asserting that the petitioner plays an "essential part" in his laboratory. [redacted] concludes that the petitioner's research activities as a member of [redacted] group contribute to the understanding of esophageal adenocarcinomas.

Xiulan Zhu, Deputy Director of the Hunan Eugenics and Genetics Institute in Changsha, China, writes:

From 1996 until June 1997, [the petitioner] made outstanding contributions to our research on the detection and analysis of a number of genetic diseases common in Chinese people, including G-6-PD deficiency, hemophilia, Fragile-x Syndrome, Down's Syndrome, and Mediterranean [sic] Anemia. We discovered three sudden new point mutation changes in G-6-PD deficiency. Our research provided a better understanding of the relationship between Fragile-x Syndrome and certain repeating sequences.

[redacted] Deputy Director of the National Key Laboratory of Medical Genetics at Human Medical University provides general praise of the petitioner's work while obtaining her Master's degree.

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. In addition, most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent which justifies a waiver of the job offer requirement. 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. *Id.* at note 6.

None of the above letters suggest that the petitioner has influenced her field as a whole. For example, there are no letters from independent researchers attesting to the petitioner's influence on their own projects. As stated above, the record does not establish that the petitioner herself developed the two-dimensional technique used in [REDACTED] laboratory or that the technique has been adopted in other laboratories. Most notably, the record does not contain a single published article authored or co-authored by the petitioner. The most typical manner in which a researcher influences her field is through publication in respected scientific journals. Even the publication of an article, inherent to the field of research, is not typically sufficient evidence of influence, a petitioner must generally also demonstrate that the article or articles are well cited. In the absence of any published articles, the petitioner must provide some explanation of how she has influenced her field without publishing or presenting her research findings.

The petitioner has not established that she has accomplished anything more than serving as a laboratory technician or that her "critical" role in her laboratory is due to anything other than having been trained in a unique technique by her employer. The petitioner has not established that her role in the laboratory is innovative and influential. An employer cannot avoid the labor certification process by arguing that an alien employee is "irreplaceable" due solely to the technical training which the employer himself has provided. The record does not satisfactorily resolve why an available U.S. worker with the minimum qualifications for a research assistant would not be able to learn the two-dimensional procedure utilized by the petitioner.

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.