



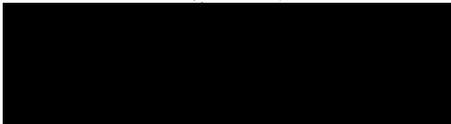
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U.S. Department of Justice

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: EAC-98-179-50669 Office: Vermont Service Center

Date: 19 MAR 2002

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:

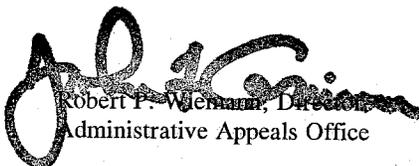
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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. Weisman, 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 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 Ear Nose and Throat Surgery from [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.

The petitioner seeks to work in an area of intrinsic merit, medical research, and the proposed benefits of her work, improved rehabilitation for patients undergoing neck surgery, would be national in scope. It remains, then to determine whether or not the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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. 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. Matter of New York State Dept. of Transportation, *supra*, note 6.

Initially, the petitioner submitted several letters from her immediate circle of colleagues. [REDACTED] Director of Research at the [REDACTED] where the petitioner works, discusses the petitioner's work with the muscles of the larynx. He states:

The structure of the muscle is so complex that it has eluded scientists for centuries, as a result, all the present theories of speech production are no more than hypothesis. Until today there is no universal consensus on this muscle's origin and insertion, which is the cornerstone for the study of the muscle.

[The petitioner's] work has solved this riddle for the origin and insertion of vocalis muscle. She has proved that this muscle is not a single muscle but has many different subcompartments. The paper, "The human vocalis contains superior and inferior subcompartments" was presented in the national conference and received "The Young Faculty Research Award" by the American Laryngology Association. In addition to all this she has made many important observations on this muscle which are yet to be reported, and a number of papers are being written. She has shown mastery of many techniques, and is writing additional manuscripts to present her new findings.

My feeling is that her continued presence in the United States would benefit the medical research here in that she would be the only one linking the complex anatomy of these laryngeal muscles to their function, diseases, and rehabilitation.

██████████ also asserts that his research group is working to develop an artificial larynx. ██████████ another researcher at ██████████

[The petitioner] has been successful in tracing the muscle fibers of the vocalis muscle and showing their insertion for the first time in the field of laryngology and hence provided insights of the production of speech [sic] and development of different pathological processes and the voice rehabilitation and treatment. Her findings have significantly advanced our understanding in laryngology and has [sic] resulted in publications in major medical Journals as well as presentations at major national meetings.

The record contains only one publication co-authored by the petitioner, and that article was published after the date of filing. ██████████ the petitioner's collaborator at ██████████ writes:

This project involved the electromyography of vocalis muscle to find out the difference in activity of the different subcompartments of the vocalis muscle. [The petitioner] designed the electrodes with her ingenious methods and these needle electrodes needed [a] lot of persistence and patience and she designed different types of them. As these electrodes were placed in the larynx of patients they had to be perfect and I was very pleased as these unique electrodes worked excellently. She also attended the sessions for electromyography for diagnosis of laryngeal pathologies with me and injection of Botulinm toxin for spasmodic dysphonia (condition which causes spastic paralysis of vocal folds leading to loss of speech) which is one . . . of the commonest condition in United States speech disorders.

██████████ professors at ██████████ reiterate much of the above information, noting that the National Institute of Health funds the petitioner's research. It can be argued, however, that 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.

██████████ an associate professor at the Lady Hardinge Medical College, discusses the petitioner's work at that institution.

Along with surgery, she also did research on auditory evoked potentials and she was the only one in the department who performed this difficult test and did analysis. She also wrote her thesis which will help scientists and physicians all over the world and of course the biggest beneficiaries will be the patients as their disorders will be accurately diagnosed and treated.

The Vice Principal of Lady Hardinge Medical Center and ██████████ professor there, verify the petitioner's experience at that institution and provide general praise of her abilities. The record does not reflect that the petitioner's work in India garnered any attention beyond her immediate colleagues.

In response to the director's request for additional documentation, the petitioner submitted new letters from ██████████. These letters mostly reiterate the information quoted above. While letters from collaborators are useful in providing details about the petitioner's work, they cannot by themselves demonstrate that she has influenced the field as a whole. Furthermore, the petitioner's job title at ██████████ from January 1996 through the time of filing was "research trainee." While we do not question the credibility of the petitioner's references, some explanation must be given as to how a research trainee is vital to their research project.

The petitioner also submitted two letters from doctors who appear to be practicing medicine in the New York area, although they provide no information about themselves in their letters. The record does not reflect that these doctors are well-known U.S. experts or that their opinions represent the official opinions of an established institution or government agency.

██████████ a surgeon, asserts that he has reviewed the petitioner's "publications" (the record contains evidence of only one publication) and provides general praise of the petitioner. He further asserts that her work has been recognized worldwide. This assertion is not supported by letters from researchers or medical practitioners outside of the New York area. ██████████ the assistant director for Emergency Services at Jamaica Hospital, asserts that the petitioner's promising project will assist with the creation of a synthetic voice.

The letters from ██████████ do not reflect that the petitioner's work on the larynx has influenced other researchers or practitioners in her field beyond the New York area. For

example, there is no evidence that other researchers are using her results in their own projects or that new treatments are in clinical trials based on her results. Despite the director's specific request, the petitioner has not submitted evidence from well-known U.S. experts, established institutions, or appropriate U.S. governmental agencies who are clearly independent of the petitioner.

The petitioner submitted the award from the American Laryngological Association, which was issued to [REDACTED] not the petitioner. The petitioner also submitted her thesis, which does not appear to have been published. Subsequently, the petitioner submitted her article co-authored with [REDACTED] published after the date of filing in *Annals of Otolaryngology, Rhinology and Laryngology*.

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 influential contributions; we must consider the research community's reaction to those articles. As of the date of filing, the petitioner's article had not even been published, much less widely cited by independent researchers.

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.