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U.S. Department of Justice  
Immigration and Naturalization Service

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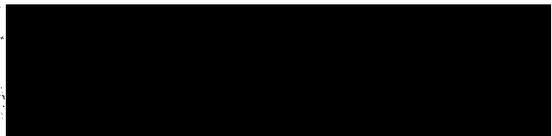
File: [Redacted] Office: Nebraska Service Center

Date: 19 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:



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.

At the time of filing, the petitioner held a Master's degree in analytical chemistry from Brigham Young 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's area of work, medical research, has intrinsic merit and that the proposed benefits of his work, better drug testing and environmental monitoring, would be national in scope. With regard to the final prong, the director concluded that the petitioner had not demonstrated that his work had already resulted in "national benefits." On appeal, counsel argues that Matter of New York State Dept. of Transportation only requires that the petitioner's past record justify a projection of future benefit to the national interest. Counsel argues that the petitioner has influenced his field as a whole and will continue to contribute to his field.

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 he 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.

Dr. Milton L. Lee, the petitioner's research advisor at Brigham Young University, writes:

[The petitioner] is one of the few who have developed expertise in capillary isotachopheresis, which is a new technique that has tremendous potential for application in biomedical and pharmaceutical research. His paper [recently published] introduced a new method of categorizing ribonucleotides which are being studied in human blood plasma as early chemical indicators of cancer growth. . . .

In continuing his work, [the petitioner] developed a new technique called counterflow isotachopheresis-capillary zone electrophoresis which extended the use of isotachopheresis as a preconcentration technique for capillary electrophoresis. This work expanded the usefulness of isotachopheresis to many more molecules of biomedical interest. . . . [The petitioner] is currently constructing a comprehensive isotachopheresis-capillary electrophoresis system that could revolutionize biomedical analysis if it is successful.

[redacted] a member of the petitioner's thesis committee, writes:

[The petitioner] has used [isotachopheresis-capillary zone electrophoresis] as well as a new rapid methodology he developed for capillary electrophoresis for separation of ribonucleotides in cancer cells, sensitive determination of antimuscarinic drugs, and determination of angiotensins (involved in high blood pressure) levels in human serum.

[redacted] also asserts that the petitioner's work is relevant to environmental protection, noting that the U.S. Environmental Protection Agency funds the petitioner's current research.

[redacted] professors at Brigham Young University, and [redacted] a former research associate [redacted] laboratory, reiterate much of the above information, emphasizing that the petitioner's skills are unique.

[redacted] an associate professor at Harvard Medical School indicates that he has collaborated with the petitioner's laboratory "to develop methods that would allow for the analysis of complicated hormonal systems in biological specimens [redacted] continues:

Specifically, [the petitioner] has been instrumental in the development of novel technologies or in developing novel uses of emerging technologies to specific needs. I) In his homeland of China his research resulted in the development of ion trap mass spectrometry for the sensitive determination of more than 500 organic pollutants, allowing for an important tool that is currently used for environmental monitoring in China. II) More recently his research has been extended to the development of a new application of capillary electrophoresis to the separation of ribonucleotides derived from cancer cells. He achieved a method 100 times more sensitive and requiring 30% the time required by the best alternative methods for studying the genetic mechanism that underlie cancer. His advancements have

provided an important analytical tool for the discovery of new anti cancer drugs. III) Recently, he has developed an important method for coupling isotachopheresis to capillary zone electrophoresis and has applied this to the sensitive determination of anti-muscarinic drugs. This approach was successfully applied with substantial reductions in time (40 min versus 150 min) and requires far simpler instrumentation to carry out. Moreover, the method provided an understanding of this specific set of drugs and their metabolism but obviously could be applied to almost any drug and/or drug metabolite. IV) Finally there is the work that we have carried out collaboratively. [The petitioner] has refined the previous approach. In this case [the petitioner] has developed a new application of isotachopheresis-capillary electrophoresis for the measurement of angiotensins in human specimens. Existing techniques cannot distinguish one angiotensin from other angiotensins present. Current approaches require anywhere from 6 hours to 2 days to assay one angiotensin though current methods all suffer from significant non-specificity. This problem has been overcome by [the petitioner's] method. The angiotensins are prime candidates in the development of hypertension and a host of other medical problems. This technique can be coupled to mass spectrometry, allowing for rapid, sensitive and completely specific measurement of these clinically important hormones.

The above letters are from the petitioner's advisors, colleagues, and collaborators. While such letters are useful in providing details about the petitioner's role in his various research projects, they cannot by themselves demonstrate that he has influenced the field as a whole.

On appeal, the petitioner submits another letter from his current collaborator [REDACTED]. The petitioner also, however, submits three letters from experts who have not directly worked with the petitioner. [REDACTED] Associate Director of Analytical Research and Development at the Novartis Institute for Biomedical Research who worked [REDACTED] laboratory before the petitioner was a student there, writes:

[The petitioner's] experience in studying the separation of pharmaceutically related compounds by various techniques provides him with valuable knowledge that we in the pharmaceutical industry need. He has also demonstrated his versatility through the development of new separation techniques, namely countercurrent isotachopheresis-capillary zone electrophoresis. Speaking from personal experience, as the pharmaceutical industry becomes more sophisticated in identifying ever more selective and potent compounds, we will need new separation strategies, such as this, in order to better understand drug candidates.

[REDACTED] however, does not indicate that he or others in the pharmaceutical industry have begun to incorporate or even test the petitioner's separation techniques.

[REDACTED] at the Center for Integrated Discovery Technology which provides funding for [REDACTED] laboratory, writes:

[The petitioner's work with capillary isotachopheresis, capillary zone electrophoresis, and coupling isotachopheresis with capillary zone electrophoresis] is recognized world-wide for advancing the technology itself and providing innovation solutions to difficult problems. His work represents a significant contribution to the analysis of pharmaceuticals and biochemical in both research and clinical applications. I am confident that his work will find its way into commercial products in the future. [The petitioner's] current work on the analysis of single cells is also on the frontier of medical research. This is a young and developing science. Having the instrumental tools to probe the chemistry of single cells is crucial to understanding biochemical pathways and cellular functions.

[The petitioner] is contributing to technologies that are still in the development stage. He will be an important contributor in the years to come as these technologies mature and find widespread commercial application. Biotechnology, pharmaceutical development, biochemistry, and cellular biology have already benefited from [the petitioner's] work.

Most significantly, [redacted] Deputy Director of the Toxicology Branch, Division of Laboratory Sciences at the National Center for Environmental Health, Centers for Disease Control, praises the petitioner [redacted] states:

A summary of the accomplishments of [the petitioner] is very impressive. The methods he has developed and techniques invested are state-of-the-art and at the "cutting edge" of analytical chemistry. These methods and inventions are now making and will make in the future an important impact on Public Health. He has recently invented new instrumentation for high sample throughput Capillary Electrophoresis for the analysis single cells. He has invented instrumentation for comprehensive multidimensional Isotachopheresis-Capillary Zone Electrophoresis and applied it to the sensitive detection of drugs and angiotensins in human serum. He developed CE separation methods for amino acids, carbohydrates, nucleotides, and proteins using novel hydrophilic polymethylmethacrylate hollow fibers. He has recently developed a new method of categorizing ribonucleotides which are being studied in human plasma as potential early chemical indicators of cancer growth.

[redacted] opinion, however, does not appear to be the official opinion of the Centers for Disease Control. Moreover, he does not indicate that he had prior knowledge of the petitioner's work or that the petitioner's work has influenced the laboratory where he works. Rather, he appears to have reviewed the petitioner's resume in response to a request for a letter of support.

[redacted] does not specify how the petitioner has influenced his field. For example, he does not indicate that his own laboratory or other independent laboratories have adopted the petitioner's techniques or that the techniques are in clinical trials.

The petitioner has authored seven published articles. 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.

The petitioner submitted a 15 page review of capillary electrophoresis which cites one of the petitioner's articles. The review included 530 citations and the petitioner's work was not singled out among the cited projects as particularly significant to the area of capillary electrophoresis which is, according to the article, "a popular topic for review." Rather, the author cited the petitioner's article at the end of the sole paragraph under the sub-heading "Capillary Geometry, Material, and Experimental Arrangements. (a) Capillary Material," for the following statement, "other materials that were investigated during the review period include hollow polymethacrylate fibers."

On appeal, the petitioner submits a printout from a citation database reflecting that independent researchers have cited one of his articles seven times and another article twice. All of the articles were published after the date of filing and cannot establish the petitioner's eligibility at that time. See generally Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel argues:

However, we believe that the national interest inherent in the labor certification process is realized only through nationwide implementation and administration of the process itself and that the national interest is very much diluted and minimal in an isolated individual labor certification application. On the basis of this premise, we believe that the United States has more interest in this present petition than in any given individual labor certification application involving a job opportunity requiring an advanced degree in the field. The truth of this conclusion will be obvious when we consider the fact that the beneficiary's research efforts are being funded by federal agencies and considered to have initiated new and important technologies in the field. Consequently, this individual petition has a very clear and immediate national focus, while the protection of US workers and the problems of labor shortage in a given individual labor certification application are primarily issues at the local level.

Counsel's attempt to reduce the labor certification issue to a local one is not persuasive. Matter

of New York State Dept. of Transportation states that "the labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest." Matter of New York State Dept. of Transportation continues, "an alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process." Thus, the interest in the labor certification process is more than a local issue.

Overall, the record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. 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. The record does not demonstrate that at the time filing, the petitioner had already influenced his field as a whole. At best, the petition was filed prematurely.

Finally, counsel argues that the labor certification process is not applicable to the petitioner because the application could not take into account the petitioner's scientific insight, the ability to innovate and pioneer new technologies, the combination of duties, experience acquired by the alien with the same employer and special requirements outside the employer's business necessity. Many of these factors would apply to every researcher position. We do not find that every researcher is exempt from the labor certification process. Nor do we find that an employer can avoid the labor certification process by training an alien in its unique technology and then asserting that the alien is "unique" or irreplaceable. Regardless, the inapplicability of the labor certification process is simply one factor for consideration. For the reasons discussed above, the petitioner has not demonstrated that he has influenced his field as a whole or that he will benefit his field to a greater extent than an available U.S. worker with the same minimum qualifications.

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.