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U.S. Department of Justice
Immigration and Naturalization Service

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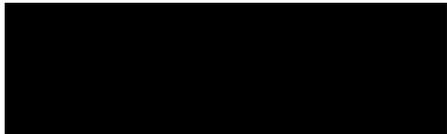


File: [Redacted] Office: Nebraska Service Center Date: 25 MAR 2002

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 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, 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 seeks employment as a materials chemist. At the time she filed the petition, the petitioner was a doctoral student at the University of Michigan (“UM”). 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 has 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 an M.S. degree in Polymer Chemistry from UM. 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 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.

Along with documentation pertaining to her field of research, the petitioner submits several witness letters. The most detailed letter is from Dr. Richard M. Laine, associate professor at UM, who states:

[The petitioner] has focused exclusively on developing new polymer composites for dental applications. [The petitioner] was given the leading role in this exciting and extremely important research project based upon . . . [her] cutting-edge research experience while working at the Institute of Chemistry in Beijing, China. . . . In China, [the petitioner] studied a novel approach to the surface modification of polymer composite materials. . . .

Dental practitioners currently use a number of different materials to make restorations. . . . [T]he most promising restorative material is polymeric composite materials which have become the leading material used in performing dental restorations. . . .

At the same time, the current generation of polymeric composite materials has some major shortcomings. . . . [T]hey break down, on average, in approximately three to five years. It is for this reason that approximately 70% of all restorations involve repairing or replacing restorations. . . .

[The petitioner] is conducting cutting-edge research on new polymeric composite materials called silsesquioxane-Liquid Crystalline (SQ-LC) composites. [The petitioner] has been working on this project for over four years and is playing the lead role in this research endeavor, which includes coordinating and directing the work of three other graduate and undergraduate students. . . .

[The petitioner's] research project is addressing the problems that currently plague polymeric composite dental materials. . . . The first problem with this type of polymer composites is that they can shrink up to 5% during curing. . . . Secondly . . . the weak physical bonding between the inorganic and organic phases still causes a number of problems . . . leading to the breakdown of the material. Thirdly, viscosity is a problem . . . which makes it very difficult to mold them into the best shape, and also prevents the material from completely solidifying. . . .

[The petitioner] has already accomplished a tremendous amount in this area. In fact, her accomplishments to date can only be described as extraordinary. . . . Recently, [the petitioner's] polymerizable SQ materials have been sent to a private dental materials company for extensive mechanical properties testing. The results that we have already received from this company have been extremely positive. Indeed, this company is discussing paying for a patent on the materials. . . .

[The petitioner's] work, in this regard, represents the first time that molecular composite materials have ever been developed for dental applications—hence the patent application. . . .

[The petitioner's] work has already received a great deal of attention and has generated much excitement in the materials, chemistry, and dental communities.

UM Professor Andrew Koran III, who has collaborated on several of the petitioner's projects, states that the petitioner's "accomplishments on this project [regarding improved dental composites] have been extremely impressive." Dr. Eric Kerchong Lin, a staff research engineer at the National Institute of Standards and Technology, states that he met the petitioner at a professional meeting and became very interested in the materials with which the petitioner was working. Dr. Lin states:

[T]he use of polymeric composite materials is increasingly desired by the dental industry. . . . In fact, polymeric composite materials are rapidly becoming the industry standard. Further research is therefore badly needed to improve upon the current generation of polymeric composite materials to improve their life span. . . .

[The petitioner] is leading research on a new class of polymeric composite materials called SQ-LC Composites. [The petitioner] has already been working on this project for more than four years, and plays a prominent role in its ongoing success.

Dr. Alan Sellinger, who studied for his doctorate alongside the petitioner at UM before becoming a postdoctoral chemist at Sandia National Laboratories, states that the petitioner "is not an ordinary

doctoral student,” and that the petitioner “has played a major role” in the development of new dental composite materials. Dr. Arlon J. Hunt, leader of the Microstructured Materials Group at Lawrence Berkeley National Laboratory, who met the petitioner during a 1996 visit to UM and has since collaborated with her, states that SQ-LC composites “have already shown tremendous promise under [the petitioner’s] work, drawing considerable interest from the scientific and dental research communities.” While several witnesses assert that the petitioner’s work is the subject of considerable interest, the record does not directly document the extent of such interest, or demonstrate that anyone other than the petitioner’s acquaintances, collaborators, and sponsors have shown special interest in the project. For instance, the petitioner has published some articles in her field, but the record does not show that independent researchers have repeatedly cited those articles in their own publications.

The petitioner submits a list of manuscripts which she claims to have reviewed for publication in the Journal of Applied Organometallic Chemistry. We note that the journal’s associate editor is the petitioner’s supervisor, Dr. Richard Laine, and therefore her frequent assignments as a reviewer do not demonstrate any kind of recognition outside of her own research group.

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 further arguments from counsel and six additional witness letters.

Counsel asserts that labor certification is not an option because the petitioner, as a doctoral student, cannot secure permanent employment. This argument carries little weight because it relies on the implied but unproven presumption that, if the petitioner is ever to obtain permanent resident status, she must do so immediately before her training and education have reached a point where she qualifies for permanent employment. The assertion that postdoctoral positions are inherently temporary begs the question of why a temporary nonimmigrant visa would not be sufficient for the petitioner’s intended work in such a position. The regulation at 8 C.F.R. 214.2(h)(16)(i) permits an alien to enter and work as an H-1B nonimmigrant while an application for labor certification is pending.

In his second letter on the petitioner’s behalf, Dr. Richard Laine states “[i]t is quite common for researchers doing . . . important work to move from one institution to another where their skills and services can be put to the best use.” While the labor certification process would prevent the petitioner’s changing employers for a time, this restriction would by no means be permanent; as a permanent resident, the petitioner could change employers at will.

Dr. Laine discusses the “waiting list” for immigrant visas, and his understanding that for citizens of the People’s Republic of China the wait is particularly long. While this may have been true when Dr. Laine wrote his letter, as of March 2002 all employment-based immigrant visa numbers were current for all nations, including China.

Prof. Andrew Koran also provides a new letter, in which he asserts that frequent changes of employers during the early stages of one’s career “allows for the greatest growth of the individual scientist, and it contributes to America’s overall scientific advancement.” According to his own

resume, Prof. Koran has spent his entire 30-year career on the faculty of the University of Michigan. He also obtained all of his degrees there. Prof. Koran refers to the petitioner's research as "promising" but he offers no indication as to the degree to which the dental profession has already adopted her work.

Most of the other letters are likewise new statements from previous witnesses, all making essentially the same basic assertions: the petitioner's work has intrinsic merit and national scope, and the petitioner's career would be better served by a waiver which would permit her to change jobs frequently.

Two letters are from new witnesses. Dr. Timothy J. Bunning, senior materials research engineer at the Air Force Research Laboratory, Wright-Patterson Air Force Base, states that he and the petitioner "have interacted extensively with her providing optical microscopy, thermal analysis, and structural characterization at a synchrotron source." Dr. Bunning repeats the assertion that the petitioner's "work has drawn tremendous interest from materials science communities," but like previous witnesses offers no specific information to show that this interest extends beyond the petitioner's own superiors and collaborators.

Dr. Jiazhong Luo, a materials engineer with Judd Wire, Inc., appears to be the most independent witness. Dr. Luo states:

I spent . . . four years (08/1994-07/1998) studying new polymer nanocomposites and their applications as biomedical (i.e., dental restoration and bone implant) and aerospace structure materials. With great enthusiasm in the past several years, I have got familiar with [the petitioner's] leading research and her excellent capabilities. . . .

Her work clearly has great potential to benefit millions of Americans throughout the country. This accomplishment alone sets her apart from other materials scientists with similar qualifications and is testimony to her remarkable ability to conduct ground breaking research.

Nearly a year after submitting the above information, the petitioner submitted background documentation regarding nanocomposite materials research. This documentation does not mention dentistry, although on the petition form itself, the petitioner had specified that she intended to serve the national interest by improving dental restorative polymers. The petitioner also submits a letter from Dr. Donald A. Tomalia, senior research scientist and scientific director of UM's Center for Biologic Nanotechnology. Dr. Tomalia states:

[The petitioner] has completed her Ph.D. degree and started postdoctoral research in my department. . . .

[The petitioner's] current project is a further development of her previous research on composite materials, however, this work has now been extended to the use of dendrimers. . . .

Dendrimers are a new form of matter which were discovered by my group in the early 1980s while working as a research scientist at The Dow Chemical Company. . . . This new class of polymers has already demonstrated its importance in such critical areas as materials science, medical applications . . . , pacification of chemical/biological terrorism weapons, as well as other classified defense applications.

Dr. Tomalia asserts that the petitioner continues “to supervise and direct a group of three graduate and undergraduate students in the development of SQ-liquid crystalline (LC) dental composite materials” while also working on other applications for the materials, such as in “the electronics, automobile and aircraft industries.” Dr. Tomalia asserts that the petitioner is “presently playing a key role in the advancement of this nanocomposite field.” Dr. Tomalia establishes his own credentials, such as his authorship of a 1995 article on dendrimers in Scientific American. Dr. Tomalia’s own work was significant enough to merit coverage in the Wall Street Journal.

There is no indication that the petitioner was working with dendrimers at the time she filed the petition; her postdoctoral work had not yet begun at that time. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

The director denied the petition, finding that the petitioner’s work has intrinsic merit and national scope, but that the petitioner’s own impact in the area “is speculative, at best.” The director stated that the petitioner has not shown that the labor certification process would have an adverse effect, for instance, on dental care. The director also noted that the visa petition proceeding is not the proper forum for general arguments about the perceived flaws of the labor certification process itself, because the proceeding is subject to existing laws including those which establish the labor certification requirement.

On appeal, the petitioner submits a brief from counsel which opens with a detailed interpretation of Matter of New York State Dept. of Transportation. Counsel then applies this interpretation to the matter at hand. Counsel argues “[t]he evidence submitted in this case more than adequately establishes the important and lasting contributions of the Petitioner to her field.” As examples, counsel cites Dr. Laine’s statement that the petitioner “is leading the only project that has ever researched using SQ-LC composite materials for dental applications,” and Dr. Hunt’s assertion that “[t]hese materials will have longer life span and will be easier to be molded, which will meet the need of our entire nation for more durable dental materials.” These assertions, as the director noted, are speculative, describing not benefits that have arisen from the petitioner’s work, but future benefits that are expected to arise at some later time. We note the absence, on appeal, of evidence to show that the dental profession has in fact adopted SQ-LC composite materials or has begun moving in that direction. When the petition was filed in July 1998, witnesses offered

the vague assertion that the petitioner's work had caused much attention and excitement, but there is no indication, in the appeal filed nearly two years later, that these expectations had borne fruit. The record does not even show that the materials developed by the petitioner have successfully been used in dental restoration.

Counsel repeats various arguments regarding the inapplicability of labor certification to temporary postdoctoral researchers. We have already addressed these arguments further above. The inapplicability of labor certification is certainly one consideration (out of many) when a given occupation is inherently not amenable to labor certification, but such a circumstance is greatly different from a situation where an alien cannot obtain permanent employment at present, because the alien's training is still incomplete, but where eventual permanent employment is the norm. To demonstrate that an alien cannot obtain a labor certification immediately is not the same as to demonstrate that the alien simply cannot obtain one. This is not, of course, to say that graduate students and postdoctoral researchers are inherently ineligible, as a class, for the waiver; such decisions must be made on a case-by-case basis. It remains, however, that such students and postdoctoral researchers (who can already work here legally with the appropriate nonimmigrant visas) bear the burden of showing that the United States will benefit substantially by accelerating their immigration process through the national interest waiver.

In this instance, the petitioner has shown that her mentors and collaborators are impressed with the potential future applications of her research. The petitioner has not, however, persuasively established that the rest of the field is, as claimed, more interested in her work than in the work of others in related areas of research.

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.