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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 99 149 50578 Office: Vermont Service Center

Date: 28 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 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 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 research scientist at Walter Reed Army Institute of Research (“WRAIR”). 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 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.

Counsel summarizes the petitioner’s research interest:

[The petitioner] has made significant progress in understanding the neurological mechanisms of botulism infections, including when it occurs as the result of exposure to bacterial agents commonly employed in biological warfare. The U.S. Army is highly interested in this work because of its great potential for yielding better treatment methods and preventative vaccines against biological weapons exposure.

The petitioner submits various background materials concerning botulinum toxin, which can cause fatal food poisoning (botulism) yet has accepted uses in medical treatments of facial muscles (cosmetic and otherwise). The petitioner also submits copies of his own published work. The publications derive from the period when the petitioner was studying dentistry in Japan. The petitioner’s published articles do not appear to relate to botulism or biological warfare. Rather, the articles pertain to the growth of bones and gums, as well as a “clinical evaluation of a potassium nitrate dentifrice for the treatment of dentinal hypersensitivity.” None of the published articles appear to fall outside the field of dentistry.

The petitioner submits witness letters concerning his current work. Colonel Jonathan D. Berman, M.D., chief of the Department of Biology, Division of Experimental Therapeutics at WRAIR, states that the petitioner “has been working on our botulinum toxin project since January 1998 at

my laboratory. . . . He has already found interesting results which may lead to a new therapeutic way for the botulinum toxism” (sic). Col. Berman discusses the petitioner’s research in technical terms, describing the petitioner’s studies of PC12 neural cells, and the effect of botulinum toxin in interrupting normal chemical processes in those cells. Col. Berman states that “very few researchers have been able to master the sensitive conditions and protocols that are required in order to obtain verifiable results,” and adds that “the Department of Defense is not permitted to directly petition for alien workers.”

Dr. Prabhati Ray, also of WRAIR, states that the petitioner “has taken several sophisticated techniques based on molecular biology and already found interesting results which may lead to a new therapeutic way for the botulinum toxicity.” Dr. Ray indicates that the petitioner’s “unique findings” suggest “a possible candidate for the treatment against the toxin.” Dr. Toru Miki, principal investigator at the Laboratory of Cellular and Molecular Biology at the National Cancer Institute (where the petitioner worked from 1996 to 1998), states that the petitioner “has . . . demonstrated his ability to establish new systems independently.”

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director specifically noted that the petitioner appears to have conducted research in several disparate areas, and the director instructed the petitioner to submit evidence that the petitioner has made significant discoveries regarding botulinum toxin. In response, the petitioner has submitted new witness letters, and a statement in which counsel indicates that the U.S. Department of Defense “has now formally certified . . . at the highest possible level” that the petitioner’s “work is critically important” to that agency.

The highest Department of Defense official represented in the record is Jay Dutcher, acting director of Congressional Actions and Internal Reports. We note that Mr. Dutcher’s letter does not mention the national interest waiver; the letter was written as part of a “request for a waiver of the two-year foreign residency provision of Section 212(e) of the Immigration and Nationality Act.” Still, the letter is relevant because it discusses the Department’s position regarding the petitioner’s work, and its interest in the petitioner’s continued employment. Mr. Dutcher states:

[The petitioner] is currently performing research crucial to an Army program to develop new therapeutics for botulinum neurotoxins (BoTx) produced by certain strains of Clostridium Botulinum. . . . He has distinguished himself as the exceptional scientist of the research team because he has contributed a series of research findings crucial to the therapeutic development efforts. His contributions have changed the entire direction and concept of the program. . . . It is strongly felt that the loss of his future contributions would be detrimental to the successful completion of this research project and future projects of high interest to the Department of Defense and the United States.

In his second letter, Col. Berman reiterates that “the U.S. Army . . . is prohibited by law, regulation and policy from directly petitioning or otherwise sponsoring for permanent resident status any nonresident alien. . . . Therefore, the labor certification process is not an option that is available to

us.” We note that Col. Berman does not cite the specific statute or regulation. Col. Berman also states that, while the petitioner’s earlier work is “seemingly unrelated” to his current activities, the basic processes and structures are “strikingly similar” and thus the petitioner’s prior work “provided him with research skills and proficiency that is indeed used and directly related to the work required for the structure of botulism.”

The petitioner himself further clarifies the nature of his current work:

Our data clearly show that botulinum toxin accelerate[s] the degradation of some proteins in the neuronal cells by the ubiquitine/proteasome system that is a special protein degradation machinery in various cells. If this mechanism is further clarified, then the knowledge will help solve the problems with major neurological disorders such as Alzheimer[‘s] disease, Parkinson’s disease, and Huntington’s chorea.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner’s work but stating that there is no evidence that the petitioner’s findings “have [had a] significant influence on others in the field.” On appeal, counsel asserts that the director “has incorrectly and inappropriately used only one of the many criteria set forth in the Matter of NYSDOT,” and denied the petition despite “the preponderance of the evidence that clearly demonstrates eligibility for the request being made.” Counsel asserts that “requiring . . . a labor certification . . . imposes a substantial hardship on the employer that can not be met.”

The petitioner submits copies of his latest scholarly writings, and a third letter from Col. Berman, who states:

[The petitioner’s] work for this Department directly and significantly contributes to our program for the identification and development of safe and effective protective measures for U.S. military use by our troops who may become exposed to toxic strains of Botulism that should be anticipated by us from acts of biological warfare or terrorism. [The petitioner] has been very productive, as evidenced by 2 important manuscripts that are in preparation.

Counsel, on appeal, does not directly dispute the director’s conclusion that the petitioner’s work has had little outside impact; rather, counsel asserts that the director overemphasized the need to show such impact. Counsel observes that “credible and reputable sources” have attested to the importance of the petitioner’s work. Upon careful consideration, we concur with counsel’s assertion that Matter of New York State Dept. of Transportation contemplates a variety of factors that affect eligibility for the national interest waiver. While evidence of outside impact would greatly strengthen the petition, the absence of such evidence is not, by itself, inherently disqualifying. We must consider the specific merits of each case. In this particular instance, the petitioner is performing defense-related research. It is not at all surprising for interest in this research to be concentrated heavily within the U.S. Department of Defense. Also, the petitioner has

shown that the Department's interest extends to high levels at the Pentagon, rather than being limited to the petitioner's close colleagues at WRAIR.

Events that have transpired since the filing of the appeal have proven that biological terrorism is a genuine threat, rather than a remote abstract or a hypothetical possibility. Research in this area is unquestionably in the national interest. This is not to say, of course, that participation in such research ought to be a guarantee of a waiver, but in this instance the waiver request does not rest merely on the overall importance of the area of research. A ranking Pentagon official has indicated that the petitioner's efforts have had a major impact on the research project underway at WRAIR, and that the petitioner's decades of productive research have afforded him rare and valuable expertise. The petitioner has used this expertise to the advantage of not only himself, but of the U.S. Army. Upon consideration of many factors in this proceeding, we concur with counsel that these factors preponderantly favor approval of the waiver and, therefore, the accompanying petition.

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 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.