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U.S. Department of Justice
Immigration and Naturalization Service

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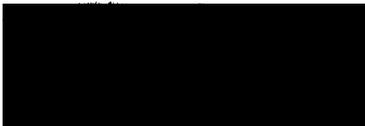
NOV - 6 2002

File: WAC 02 045 55273 Office: CALIFORNIA SERVICE CENTER Date:

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, California 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 prepared and submitted his own appeal, apparently without the involvement of counsel. The record, however, contains a Form G-28 Notice of Entry of Appearance from [REDACTED] and there is nothing in the record of proceeding to show that [REDACTED] was withdrawn as the petitioner's attorney or that another attorney has replaced him. Therefore, in the absence of contrary documentation, we consider [REDACTED] remain the attorney of record.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability and a member of the professions holding an advanced degree. At the time of filing, the petitioner was a postdoctoral fellow at Stanford University School of Medicine. The petitioner has since begun working as a postdoctoral scientist at Eli Lilly and Company, a large pharmaceutical company. 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.

(i) Subject to clause (ii), 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 petitioner also claims eligibility as an alien of exceptional ability. Because he qualifies as an advanced-degree professional, however, an additional finding of exceptional

ability would be of no further benefit to the petitioner. 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, 22 I&N 215 (Comm. 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 describes the petitioner’s work:

[The petitioner] has conducted focused research in the molecular mechanisms of lipid metabolism, which is related to the development and progression of diabetes and coronary heart disease. He has already begun to make research contributions on the functional roles of hormone-sensitive lipase (HSL) and on regulating its activity. . . .

Petitioner is uniquely qualified to further this work because of his expertise in biochemical research. . . .

His peers have noticed his knack for solving difficult and complex research problems under challenging circumstances as well as his one-of-a-kind approach to the process.

Counsel states that labor certification “does not lend itself to the instant case, where an alien is seeking admission as a self-petitioning biomedical researcher.” While an alien cannot self-petition in a labor certification case, counsel does not explain why a research facility cannot obtain a labor certification on the alien’s behalf, once the alien’s training has progressed to a point where the alien is considered ready for permanent employment (as opposed to a temporary postdoctoral appointment). Medical research is generally conducted in an institutional setting rather than by independent, self-employed researchers. Therefore, when considering whether the petitioner qualifies for a national interest waiver, we cannot give significant weight to the assertion that the petitioner prefers to petition for himself.

Along with various other pieces of evidence, including copies of the petitioner’s published articles and background documentation pertaining to his field of research, the petitioner submits several witness letters. Professor Frederic B. Kraemer of Stanford University states:

[The petitioner] served [as] a Postdoctoral Research Fellow in my laboratory at Stanford University. . . .

Compared to other researchers, [the petitioner] is uniquely qualified to further research into lipid metabolism and related diseases due to his unique knowledge, training, and ongoing achievements. . . .

[The petitioner] has made significant contributions by exploring the mechanisms regulating the activity of an enzyme known as hormone-sensitive lipase (HSL) . . . [which] is crucial for the normal control of fat metabolism. [The petitioner’s] initial studies have . . . opened up the possibility that subtle differences in metabolism among individuals might be explained by common and, heretofore, unappreciated differences in the sequence of these proteins. . . .

[The petitioner] has initiated a series of experiments examining the regulation of HSL in beta cells of the pancreas . . . which are responsible for secreting insulin. . . . [The petitioner] is establishing a connection between lipid metabolism, as regulated by HSL, and the normal control of insulin release. These studies . . . may provide potential therapeutic maneuvers to correct abnormal insulin secretion and release in patients with diabetes.

Professor David Y. Hui, who supervised the petitioner’s doctoral studies at the University of Cincinnati, states:

[The petitioner] played a pioneering role in unraveling the structure and function relationship of cholesterol esterase, an enzyme that is vitally important in dietary fat and cholesterol absorption. . . . His studies in identifying the mechanism by which bile salt activates this enzyme led to the hypothesis that genetic differences in the structure of cholesterol esterase may have a major impact on determining individual susceptibility to dietary fat-induced coronary artery disease. . . .

[The petitioner] also spearheaded our efforts to understand how oxidative modification of low density lipoproteins influence macrophage functions. His research indicated that cholesterol esterase synthesis by the macrophage, a key cell type that contributes to the atherogenic process, [is] an important regulatory step in the pathogenic process of atherosclerosis. [The petitioner's] research has provided an essential step in advancing studies into coronary artery disease. . . . [The petitioner's] work has served as the groundwork for our studies, which have strong potential to provide novel treatment strategies in reducing morbidity and mortality due to atherosclerosis.

Other witnesses have supervised or collaborated with the petitioner during the projects and studies described above, and they discuss the same projects in varying degrees of detail. These witnesses assert that the petitioner is exceptionally skilled and well-suited to his area of research. The only witness who claims no collaboration with the petitioner or affiliation with universities where the petitioner has worked or studied is Professor C.C. Wang of the University of California, San Francisco. Prof. Wang states "I have been familiar with [the petitioner's] research work, after he came to Stanford University. . . . We have had opportunities to discuss his research projects and findings." Prof. Wang describes the above projects and praises the petitioner's "abilities in yielding seminal results, which have been very well received by the scientific community. . . . His research has had an enormous positive impact on our understanding of the development of diabetes and possesses a great potential to lead to effective therapeutic strategies."

The initial submission contains little first-hand evidence of the petitioner's impact on the areas of research described above. The petitioner submits copies of one published article, one apparently unpublished manuscript, and one abstract of a conference presentation.

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 information about his new employer, Eli Lilly, as well as several new witness letters. Dr. Dominique Lombardo, research director and head of INSERM¹ Unit 559, Marseilles, France, states:

I have known of [the petitioner's] accomplishments because of our common research interests on bile salt-stimulated lipase (also called carboxyl ester lipase,

¹ The acronym stands for *Institut National de la Santé et de la Recherche Médicale*, or "National Institute of Health and Medical Research."

CEL). . . . I have been working on lipases myself for the past twenty years, so I am very familiar with [the petitioner's] work, although we have never collaborated with each other.

Based on [the petitioner's] research in the past, I am able to say that [the petitioner] is a highly accomplished scientist with extraordinary knowledge, expertise, and skills in enzyme biochemistry and molecular biology. [The petitioner's] most important contribution was his remarkable work on elucidating the mechanism of bile salt activation of the enzyme by using genetically engineered CEL. This work is very important towards our understanding of the mechanisms of genetic differences of enzyme structures in determining an individual's susceptibility to dietary fat-induced coronary heart disease. Even more importantly, the study demonstrated that enzyme structures and activities could be altered in favor of clearing toxic substances generated during lipid metabolism in blood vessels, which provides a new approach of drug or gene therapy for coronary heart disease.

Another witness with no apparent direct connection to the petitioner is Dr. Andrew S. Greenberg, director of the Program on Obesity and Metabolism at the Jean Mayer USDA Human Nutrition Research Center on Aging at Tufts University. Dr. Greenberg's comments are essentially similar to those of Dr. Lombardo. The petitioner also submits letters from individuals with closer ties to the petitioner.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. Much of the director's language relates to the petitioner's superfluous claim of exceptional ability, and some language seems to refer to the higher standard associated with aliens of extraordinary ability, referring for instance to "national recognition." The petitioner need not establish national or international recognition to qualify for a national interest waiver, so long as the petitioner has established some demonstrable degree of impact and influence outside of his own circle of collaborators, instructors, and employers.

On appeal, the petitioner submits evidence that others have cited his work. This evidence consists of three articles, two of them by Dominique Lombardo, the third by researchers in Sweden and New Zealand. The small number of citations does not readily establish eligibility, but it does demonstrate international interest in the petitioner's work, and it confirms Dr. Lombardo's assertions regarding the value Dr. Lombardo places on the petitioner's work.

The petitioner notes that he has submitted letters from independent witnesses, as well as closer witnesses with standing in the field. The petitioner observes that the director makes several erroneous assertions, stating for instance that the petitioner has worked in France, which have the effect of making the independent witnesses seem more closely tied to the petitioner than they actually are. Such errors appear to have prejudiced the director's decision.

On balance, we find that the petitioner is correct in claiming that the director's decision relies upon incorrect assertions and assumptions. We find also that the petitioner has established, through a variety of documentation rather than any one single piece or category of evidence, that researchers both within and outside of his circle of collaborators find particular value in his work.

In light of the petitioner's change of employment following the filing of the petition, we also note that eligibility does not rest on a single project at Stanford University, where the petitioner no longer works. Rather, it rests on the petitioner's overall record in a field in which the petitioner continues to work.

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 that the community recognizes 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.