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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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invasion of personal privacy**



File: EAC 99 274 52467 Office: Vermont Service Center

Date: **NOV 13 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 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 research statistician at North Shore University Hospital ("NSUH"). 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 Ph.D. in statistics from the University of Connecticut. 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, 22 I&N Dec. 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.

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 sought. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, biostatistics, and that the proposed benefits of her research would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner submitted several witness letters in support of the petition. Dr. Martin Lesser, Director and Associate Professor of the Division of Biostatistics at NSUH and New York University School of Medicine, states:

I have known [the petitioner] since June 1995, when she joined my department as a Research Statistician after receiving her Ph.D. degree in Mathematical Statistics from the University of Connecticut.

Some of the more notable [of the petitioner's] larger projects have been the following: She shares statistical responsibility with me for the General Clinical Research Center (GCRC) Program at the Weill Medical College of Cornell University. The GCRC Program is one of the National Institutes of Health's largest national programs whereby some 70-80 clinical research centers have been set up nationally for the purpose of studying human disease in a controlled setting. [The petitioner] works with both the adult and pediatric investigators at Cornell in designing their research studies and analyzing the data derived from those studies. Some of her more recent work has been in disease areas that are important public health problems in the United States, namely: diabetes, AIDS, cancer, cryptosporidiosis epidemics and congenital heart disease.

[The petitioner] is also a Statistician for the Chronic Myeloid Leukemia National Study Group (CMLNSG). This is a multi-center clinical trial involving many clinical centers throughout the United States, investigating the treatment of CML using a new combination therapy. As statistician for this group, she has been responsible for database management, producing regular status reports and carrying statistical analyses for the project.

[The petitioner] also assists investigators at NSUH, as well as Cornell and NYU, on the design and analysis of research projects that are being funded by the National Institutes of Health... [The petitioner] provides guidance to medical residents and fellows who undertake clinical investigations in their respective fields such as Oncology, Endocrinology, Allergy and Immunology, Obstetrics and Gynecology, Maternal Fetal Medicine, Child and Adolescent Medicine, Geriatrics, Cardiology, Emergency Medicine, and Pathology.

[The petitioner] also participates in the design and analysis of drug clinical trials that are sponsored by pharmaceutical companies. Her work directly impacts on decisions that are made by the United States Food and Drug Administration (FDA) with respect to approval of these drugs and assessment of safety to all those citizens who would use such medications.

In all of these projects, [the petitioner] plays a critical role in the ultimate success of these investigations through study design, sample size and power calculations, database management, statistical analysis and manuscript/abstract preparation. In consulting with research investigators, she formulates and implements the study design, statistical analysis and assists in the interpretation of the results.

Dr. Lesser's letter generally describes the petitioner's work rather than offering a valuation of its overall significance to the petitioner's field. We note that any objective qualifications that are necessary for the performance of a research statistician position can be articulated in an application for alien labor certification.

The petitioner submitted additional letters from researchers who utilized the petitioner's expertise and data analysis in conducting their various studies. Dr. Franak Batliwalla, a scientific researcher at NSUH, states: "[The petitioner's] expertise in statistics was invaluable for the analysis and

interpretation of my results of a recent study on Melanoma patients.”

Dr. Deborah Friedman, Professor and Director, Division of Pediatric Cardiology, Weill Medical College of Cornell University, states: “I have actually collaborated with [the petitioner] on a number of projects with some of the pediatric cardiology fellows under my mentorship... Her statistical analyses for all our projects were comprehensive, accurate, and well-explained.”

Dr. Soe Than, now Chief Scientist for Clinical Research, Advanced Bioscience Laboratories, Inc., was formerly employed as a researcher in the Department of Pediatrics at NSUH. Dr. Than states that the petitioner’s input in his research projects was “tremendously invaluable.”

Dr. Richard Kovner, Chief of Adult Neuropsychology, NSUH, states: “I found [the petitioner] to be exceptionally skilled, dedicated and easy to work with. She has the ability to translate difficult procedures in mathematical statistics so that they can be understood by scientists who are not statisticians. This type of translation ability facilitates the progress of scientific research.”

The above witness letters fail to set the petitioner apart from other competent biostatisticians. Pursuant to Matter of New York State Dept. of Transportation, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or experience which could be articulated on an application for a labor certification. The petitioner must clearly demonstrate a past history of significant accomplishment in the field of biostatistics.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, the petitioner submitted further letters, publications and background materials.

In his second letter, Dr. Lesser provides a listing of several research projects that the petitioner has worked on already or will be working on in the near future. Dr. Lesser’s letter, however, includes no information regarding how the petitioner has specifically influenced the biostatistics or biomedical research fields. Furthermore, information pertaining to the petitioner’s involvement in future research projects cannot suffice to demonstrate eligibility for a national interest waiver. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Dr. Peter Gregersen, Chief, Division of Biology and Human Genetics, NSUH, describes his research pertaining to rheumatoid arthritis and notes that such studies “require statistical analysis of research data as well as its appropriate translation into scientific parlance.” Dr. Gregersen further states: “[The petitioner] has provided us with invaluable statistical expertise in our studies. Her assistance with study designs, data organization, statistical analysis and scientific interpretation have contributed to many publications arising from research projects at my laboratory.”

Dr. Nicholas Chiorazzi, Chief, Division of Rheumatology and Allergy-Clinical Immunology, NSUH, states that the petitioner's "input and statistical skills" were invaluable to his medical studies. Dr. Rajendra Damle, a researcher at NSUH, credits the petitioner with performing "extensive statistical analyses" on data from a leukemia study. Dr. Damle further states that the petitioner helped her laboratory "reach statistically valid conclusions." Such assertions, however, would apply to any competent biostatistician and do not distinguish the petitioner from other similarly qualified individuals in her field.

None of the above witness letters indicate that the petitioner's contributions are especially important to her field, nor do the letters even devote much space to the petitioner's specific activities that were significantly influential. The message of the letters instead seems to be that because the petitioner possesses the training and education to do effective biomedical research statistical analysis and consultation, the petitioner serves the national interest.

Dr. Joseph Glaz, Professor of Statistics at the University of Connecticut (where the petitioner received her Ph.D.), notes that he and the petitioner have collaborated on several research projects. In contrast to prior witnesses, Dr. Glaz asserts that the petitioner's influence extends "throughout the world." He states:

[The petitioner's] thesis work entitled, "Simultaneous Confidence Intervals, Sample Size Determination and Testing Procedures for Multinomial Proportions" is one of the latest developments in the area of discrete multivariate distributions in Statistical Methodology. The publications extending from this work are of great importance and interest to both theoretical and applied statisticians throughout the world. Her article, entitled "Simultaneous Confidence Intervals and Sample-Size Determination for Multinomial Proportions" (1995)...has been widely read and referenced by many research statisticians throughout the world. To date, numerous requests of reprints and her sophisticated computer programs have been received.

The research projects funded by the National Institutes of Health and other national foundations are dependent upon [the petitioner's] skills for successful completion. The biomedical statistician is an essential partner in any research team. In plain English, [the petitioner's] role is to analyze laboratory results using sophisticated multivariate analysis methods that only the most expert and superior biomedical statistician can perform. The importance of this work to medical research programs is that without [the petitioner's] input the results would have no meaning since they would not be properly quantified and could not be interpreted.

Training and experience "using sophisticated multivariate analysis methods" could be articulated on an application for a labor certification. Furthermore, pursuant to published precedent, the overall importance of a given project or field of research is insufficient to demonstrate eligibility for the national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect.

Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that the petitioner's employment as a skilled biostatistician inherently serves the national interest, Dr. Glaz essentially contends that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect. Congress plainly intends the national interest waiver to be the exception rather than the rule.

We note that all of the petitioner's witnesses have direct ties to the petitioner. Letters from those close to the petitioner certainly have value, for it is those individuals who have the most direct knowledge of the petitioner's specific contributions to a given research project. Still, these individuals became aware of the petitioner's work because of their close contact with the petitioner; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we could expect with contributions that are especially significant.

The petitioner submitted evidence of her co-authorship of published articles, including the article mentioned above by Dr. Glaz, who was its co-author. 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work.

In this case, the petitioner has provided some evidence that the articles she co-authored have been minimally cited. While self-citation is a normal, expected practice, it cannot demonstrate the response of independent researchers. The citation indexes provided reveal that an article appearing in *Statistics in Medicine* entitled "Effect of Relative Risk and Cluster Configuration on the Power of the One-Dimensional Scan Statistic" (1993) was cited five times by independent researchers and an article appearing in the *Journal of the American Statistical Association* entitled "Simultaneous Confidence Intervals and Sample-Size Determination for Multinomial Proportions" (1995) was cited eight times, six times by independent researchers.

The petitioner submits evidence of four additional articles that have been cited.¹ It is important to note that the four additional articles being cited are results from studies pertaining to A.I.D.S.,

¹ The most that any of the four articles was independently cited was nine times. For example, "Proton P.R. Spectroscopy of the Basal Ganglia in Healthy Children and Children with A.I.D.S."

cardiology, urology, arthritis and rheumatism. The petitioner, however, is a statistician. While it is acknowledged that the petitioner played an important role in the presentation and interpretation of the results from the studies, it is not clear that the attention paid to the articles resulted from the article's contribution to the field of biostatistics. Unlike the articles discussed in the preceding paragraph, the four additional articles provided appeared in medical journals such as *Radiology*, *Circulation*, *Urology*, and *Arthritis and Rheumatism*. The petitioner does not claim expertise in these fields and the petitioner's witnesses confirm that she was not the principal researcher for these published medical studies.

The petitioner has failed to submit evidence showing that any of her articles have been heavily cited. Based on the limited number of independent citations provided, we find that the petitioner has not significantly distinguished her results from those of other competent research statisticians. It can be expected that if the petitioner's published research were truly significant, it would be more widely cited. The petitioner's participation in the authorship of several published articles prior to the filing of the petition may demonstrate that her efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's published works have garnered significant attention from independent experts throughout her field.

The director denied the petition, indicating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director stated: "While the petitioner's scientific interpretations have contributed to publications arising from research projects, the impact those articles have had on the field, and the petitioner in particular, has not sufficiently demonstrated that the petitioner's work in these areas elevates her above the majority of her colleagues in the field."

On appeal, counsel cites the testimonial letters as evidence of the petitioner's contributions and achievements as a leading biomedical statistician. We note, however, that the petitioner's witnesses consist entirely of individuals with direct ties to the petitioner. The witness letters do not show that the petitioner's individual work or collaborative findings have had significant repercussions among independent experts throughout the biostatistics field. Thus, the petitioner's published findings, such as developments in the area of discrete multivariate distributions in statistical methodology, appear to be incremental rather than fundamental. While the record amply documents that the petitioner has been an active statistician at NSUH and the University of Connecticut, it does not establish that the petitioner's findings have had a greater or more lasting impact than those of others in the field of biostatistics.

Clearly, the petitioner's colleagues and collaborators have a high opinion of the petitioner and her work. The petitioner's work, however, does not appear to have yet had a measurable influence in the larger field. Without sufficient evidence from disinterested statisticians indicating that the petitioner has been responsible for significant achievements in the field of biostatistics, we must

(1996) was cited eleven times with two of the citations being self-citations by the petitioner's collaborators.

find that the petitioner's assertion of prospective national benefit is speculative at best. In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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.

ORDER: The appeal is dismissed.