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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

[Redacted]

File: [Redacted] Office: Nebraska Service Center

Date: NOV 18 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)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[Redacted]

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 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. The Associate Commissioner for Examinations summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The decision of the Associate Commissioner will be withdrawn, and the petition will be approved.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 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.

On motion, counsel provides evidence that she did timely supplement the appeal. As such, our summary dismissal of that appeal was in error and will be withdrawn. The appeal will be adjudicated on its merits.

On appeal, counsel challenges the director's reliance on Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998). By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c). To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error. As such, we will consider below counsel's arguments that the director improperly applied the standards set forth in that decision and whether the petitioner's new evidence overcomes the director's concerns.

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.

¹Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

(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 Human Ecology from the University of Tennessee, Knoxville. 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, supra, has set forth several factors that 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 works in an area of intrinsic merit, diabetes and obesity research, and that the proposed benefits of his work, improved treatment of these diseases, 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.

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 219, note 6.

The petitioner submitted several letters from his immediate supervisors, professors, and colleagues. Dr. Colin R. Jefcoate, in whose laboratory the petitioner worked at the University of Wisconsin-Madison, writes that the petitioner's research has focused on a protein that plays an essential role in cholesterol translocation, StAR. Dr. Jefcoate indicates that the petitioner has cloned and 'performed sequence determination and characterization of this gene.' Dr. Jefcoate continues:

[The petitioner's] work on StAR has been critical to new developments in the study and treatment of congenital lipoid adrenal hyperplasia (lipoid CAH), a potentially lethal condition that results in the complete inability of an infant to synthesize steroid hormones, which, however, can be treated by early treatment of glucocorticoids. Based on the cloning and characterization of this StAR protein in the laboratory, studies on patients themselves have shown that they have mutations in this gene which demonstrate an inability to promote steroidogenesis, or production of essential steroid hormones. These findings enhance the clinical importance and value of [the petitioner's] underlying work.

Finally, Dr. Jefcoate notes that the petitioner's work has been supported by research grants from the National Institutes of Health and that the petitioner has 'unique credentials' for cross-disciplinary research. 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 that justifies a waiver of the job offer requirement. In addition, as stated in Matter of New York State Dept. of Transportation, supra, it cannot suffice to state that the alien possesses useful skills, or a "unique background."

Dr. James Ntambi, in whose laboratory the petitioner also worked at the University of Wisconsin-Madison, provides general praise of the petitioner and asserts that he is familiar with computer software in his field and has written his own software as well. While he asserts that the petitioner has unique credentials, he does not explain how the petitioner has already influenced his field as a whole.

In response to a request for additional documentation, the petitioner submitted a new letter from Dr. Ntambi. In his second letter, Dr. Ntambi asserts that the petitioner was listed as a 'key person on the research team' on grant applications. He continues:

Moreover, [the petitioner] is deeply involved in research on a very hot pharmaceutical compound called 'troglitazone' or TZD. This drug, approved by the FDA in March 1997 for use in treating Type II diabetes, is in the final stages of approval as it undergoes further clinical trials. This compound is expected to be extremely important in the prevention and treatment of diabetes. However, TZD, which affects fatty acid production in the cells, has encountered complications and paradoxes that must be resolved before it can safely be used.

...

TZD has held much promise as a treatment for diabetes. However, one concern surrounding its clinical use is that it causes an increase in the number of fat cells and thus a weight gain in animals that could actually be detrimental to diabetes patients if the same effect occurred in humans. Thus, more work needs to be done before the drug TZD is fully approved by the FDA for human use.

...

The major breakthrough that [the petitioner] has made so far is to find that TZD decreases the expression of the SCD gene and the enzyme activity in fat cells. He has also found that treatment with TZD decreases the size of the fat cells and also blocks fat accumulation in the cells so as to enhance the overall sensitivity of target tissues in response to insulin, despite the fact that it also increases the number of fat cells. His findings and explanations bring us closer to understanding the mechanisms by which TZD benefits patients suffering from obesity or diabetes.

[The petitioner] is one of the few researchers in the country investigating this phenomenon. His work is critical to the proper use of this highly touted drug. His past work makes him singularly qualified to help determine the paradoxical behavior of TZD.

Dr. Ntambi notes that the petitioner's new research has been submitted for publication and will be the subject of a scientific presentation. Dr. Ntambi concludes:

[The petitioner] is well positioned to make important discoveries about a profoundly costly and serious disease.

Dr. Ntambi's belief that the petitioner is likely to contribute to his field in the future is insufficient. The petitioner must already have a track record of contributions.

Dr. Michael Zemel, a professor at the University of Tennessee who oversaw the petitioner's research while a student at that institution, discusses the petitioner's research into 'how insulin stimulates intracellular free calcium recovery and the expression of the CA^{2+} ATPase gene in smooth muscle cells.' Dr. Zemel indicates that this research led to two publications and several

presentations at 'prestigious national scientific meetings.' Dr. Jay Whelan, a member of the petitioner's dissertation committee at the University of Tennessee, provides similar information.

As noted by the director, the above letters are all from the petitioner's immediate circle of colleagues and cannot demonstrate that the petitioner's work is considered significant outside that circle.

On appeal, the petitioner submits new letters from some of the references discussed above challenging the director's assertion that the petitioner was not a 'prime motivator' in his research group. While the director's assertion on this matter was tenuous, the petitioner has now amply overcome this concern.

The petitioner also submits letters from new references. While Dr. William Wilkison previously collaborated with Dr. Zemel and Dr. Richard Atkinson collaborated with the petitioner at the University of Wisconsin, the remaining references became acquainted with the petitioner through his publications and lectures. Dr. Susanne Mandrup of Odense University in Denmark asserts that the petitioner has 'exciting insights into adipocyte biology and the regulation of adipocyte differentiation.' She concludes, 'the work he has already performed has contributed significantly to this area of research.' Dr. Daniel Lane, a professor of the School of Medicine of Johns Hopkins and member of the National Academy of Sciences, asserts that the petitioner's work 'represents a significant contribution to the study of fat cell differentiation.'

The petitioner also submitted evidence of several 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 influence on the field; we must consider the research community's reaction to those articles. Prior to filing the appeal, the petitioner did not submit any evidence of citations.

On appeal, however, the petitioner does submit evidence that his work has been cited. The petitioner submitted citation database information reflecting that his 1993 article in *Hypertension* was cited 32 times, 29 times by independent researchers; his 1997 article in *Steroids* was cited six times, five times by independent researchers; his 1998 article in *Journal of Biological Chemistry* was cited four times by independent researchers; and his 1995 article in *Biochemical Journal* was cited three times, twice by independent researchers. Thus, the petitioner's articles have attracted attention.

While the director raised legitimate concerns given the evidence before him, the petitioner has now provided evidence that his work is considered significant beyond his immediate circle of colleagues. Some of the petitioner's recognition appears to have come after the date of filing.

Nevertheless, as stated above, the petitioner's 1993 article was widely cited. As such, the record as a whole now supports the conclusion that, at the time of filing, the petitioner had influenced his field as a whole. Thus, the petitioner has overcome the director's concerns.

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 decision of January 8, 2001 is withdrawn, and the petition is approved.