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U.S. Department of Justice
Immigration and Naturalization Service

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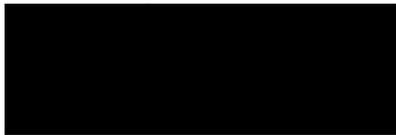
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 00 077 50892 Office: VERMONT SERVICE CENTER Date: **NOV 18 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. At the time of filing, the petitioner was a postdoctoral research associate at Virginia Commonwealth University's Medical College of Virginia. The petitioner subsequently accepted employment as a research fellow at the University of Texas Southwestern Medical Center in Dallas, Texas. 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 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, 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.

The petitioner has conducted various experiments in molecular biology, concerning cancer cells, chromosomal abnormalities, and other areas of medical interest. Along with copies of the petitioner’s articles and research presentations, the petitioner submits several witness letters. Counsel states that most of the writers of these letters “are **clearly independent of**” the petitioner (emphasis in original). The record contradicts counsel’s description of the letters. Of the seven witnesses, three are faculty members at Virginia Commonwealth University, where the petitioner worked at the time of filing; two more have collaborated with the petitioner; and the remaining two instructed the petitioner at Peking Union Medical College. We will take note of the witness letters, but we cannot consider the petitioner’s former professors and collaborators to be independent witnesses.

The witnesses describe various research projects and the petitioner’s role therein. Professor Shangzhi Huang, director of the National Genetics Center and of the Molecular Biology and Genetics Program at Peking Union Medical College, states that the petitioner’s “unusual degree of skill” in several related fields “was indispensable to the success of . . . projects” they undertook together. Prof. Huang states that the petitioner later “became an assistant professor of human genetics at the National Genetics Medical Center in Beijing, where she studied therapy of ovarian epithelial cancer.” Prof. Huang continues:

[The petitioner] was the first person ever reported to have successfully prepared a monoantibody OC859 (Fab)2 fragment conjugated with Adriamycin-albumin complex. She investigated its cytotoxic activity against ovarian epithelial cancer cells. [The petitioner’s] elucidation of the role of this compound in the progression

of ovarian cancer will prove invaluable in the development of new drugs to treat ovarian epithelial cancer. . . .

Since August of 1996 . . . she has obtained a complete molecular cytogenic characterization of some prostate cancer cell lines. Her novel discovery of the specific chromosomal aberrations involved in these cancer cell lines provides important clues as to the location of genes responsible for human prostate cancer progression and metastasis. Her discovery has a wide range of practical applications, including early diagnosis of prostate cancer and investigation of new drug treatment strategies.

Dr. Peng Wang, now a post-doctoral research fellow at the National Eye Institute, previously collaborated with the petitioner at Virginia Commonwealth University. Dr. Wang states:

[The petitioner's] results indicated that repair of free radical-mediated, double-strand breaks in confluence-arrest cells is effected by a conservative, homology-independent, end-joining pathway that does not involve single-strand intermediate and that misjoining of exchanged ends by this pathway can directly result in chromosome translocations. Her finding regarding this topic was a breakthrough and a major step forward in this area.

Dr. Honghua Li, associate professor at the Coriell Institute for Medical Research, states "we have been interacting closely for a collaborative research project" in which the petitioner's "remarkable new discovery may have a significant implication on understanding the frequent occurrence of chromosomal segment loss of one parental origin detected in a number of cancers."

A number of witnesses observe that the petitioner possesses rare training in certain laboratory procedures. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Matter of New York State Dept. of Transportation, *supra* at 221. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. Matter of New York State Dept. of Transportation, FN 7.

The director requested further evidence that the petitioner has met the third prong of the three-pronged test published in Matter of New York State Dept. of Transportation. The director specifically requested evidence that researchers other than the petitioner's own instructors and collaborators consider her work to be especially important in comparison to other research in the field. In response, counsel maintained that the petitioner had already submitted "independent opinions from officials of the National Institute of Health (NIH) and the World Health Organization (WHO)."

The claimed official of the WHO is Professor Shangzhi Huang, whose letter is on Peking Union Medical College letterhead, and who clearly described his work with the petitioner going back to 1991. Prof. Huang is director of the WHO “Collaborating Center for Community Control of Hereditary Diseases.” He is not an official of WHO.¹

The claimed official of the NIH is Dr. Peng Wang, who states “I have known [the petitioner] since . . . she joined the research group in the Department of Human Genetics at Virginia Commonwealth University. . . . For more than two years, [the petitioner] was a collaborator with our group on two major projects.” Dr. Wang is a post-doctoral research fellow at the National Eye Institute (a component of NIH). We are not persuaded that a post-doctoral fellow can accurately be described as an “official” of the NIH.

Clearly, neither of the two witnesses named above are independent of the petitioner, as counsel has repeatedly claimed. This refuted claim is counsel’s sole response to the director’s assertion that the record lacks independent witness statements. Counsel’s responses to other points raised by the director are primarily references to previous submissions. For instance, in response to the director’s observation that the petitioner does not seem to have won “major awards,” counsel states that the petitioner received “award[s] and recognition as an outstanding scientist in the study of genetics and oncology in 1995 and 1996.” The awards were presented by one of her professors and there is no evidence that such awards were presented outside of the facility where the petitioner conducted the research related to the award. Counsel also states that the petitioner received a “prestigious invitation” to join the American Association for Cancer Research (“AACR”) as an associate member. The petitioner submits a copy of a membership certificate but no evidence to show that an associate membership in the association is as prestigious as counsel contends.²

¹ According to the World Health Organization’s official web site, a “Collaborating Center” is not a part of the WHO at all. Rather, “[a] WHO collaborating centre is a national institution designated by the Director-General of the World Health Organization to form part of an international collaborative network carrying out activities in support of WHO’s mandate for international health work and its programme priorities.” http://whqlily.who.int/general_infos.asp, accessed October 29, 2002.

² The association’s official web site states, at www.aacr.org/3100e.asp,

Associate membership is open to graduate students, medical students and residents, and clinical and postdoctoral fellows who are enrolled in educational or training programs that could lead to careers in cancer research. Scientists in training who already have a substantial record of publications may wish to apply for Active membership, which confers full benefits of membership. Forms for Active membership are available on our Website and from the AACR Office.

AACR distinguishes between associate members, such as the petitioner, and active members:

Active membership is open to qualified scientists of any nation who have established a record of scholarly activity resulting in original, peer-reviewed publications relevant to cancer and biomedical research.

The web site indicates that associate members who “are no longer in training” may wish “to apply for transfer to active membership.” Nowhere does AACR’s own site indicate that any particular prestige or recognition attaches to associate membership. Because AACR has not offered active membership to the petitioner, we cannot conclude that AACR considers the petitioner to “have established a record of scholarly activity resulting in original, peer-reviewed publications relevant to cancer and biomedical research.”

Apart from the above membership certificate, the new materials submitted in response to the director's notice consist of a job offer letter from Harvard Medical School (which the petitioner presumably rejected) and a letter from Professor Jerry W. Shay of the University of Texas Southwestern Medical Center. Prof. Shay states:

[The petitioner's] research is focused on the study of telomeres, the structures that cap the ends of human chromosomes. Normal human cells grow older each time they divide because telomeres get shorter with each division. When the telomeres of a cell get too short, the cell will stop dividing. . . . Cancer is caused by unrestrained growth of cells in the body that is limited initially by shortened telomeres. The enzyme telomerase is activated when telomeres are short and this permits the continued growth of cancer cells. [The petitioner's] current studies involve in situ analysis of telomeres in aging and cancer. This information should lead to the identification of key genes that could lead to the testing [of] novel and important aging and cancer therapies.

We note that the petitioner's work in Dallas had not yet begun at the time she filed the petition. The petitioner's change of employment (and involvement in a new research project) after the petition's filing date cannot establish eligibility if the petitioner was not otherwise already eligible.

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 Izummi, 22 I&N 169 (Comm. 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.

Counsel states that Harvard's offer of a two-year renewable postdoctoral research position, studying "hormonal immune responses in breast cancer," shows that the petitioner's "expertise and skills clearly set her apart from others." The job offer shows that the petitioner's credentials are solid, but it does not show that the petitioner qualifies for a national interest waiver. The prestige of a prospective employer is not *prima facie* evidence of eligibility for a waiver; there is no relevant provision of law that exempts Harvard Medical School from the labor certification requirement. Furthermore, the job offered is a temporary postdoctoral position, which can be covered adequately by a nonimmigrant visa. The lack of permanent resident status, therefore, does not present an insurmountable obstacle to employment at Harvard even if the petitioner had actually chosen to work there.

Prestigious memberships are not a prerequisite to qualify for a national interest waiver. Discussion of AACR's membership requirements does, however, speak directly to the reliability of counsel's assertions on the petitioner's behalf. By signing the I-140 petition form, the petitioner has affirmed under penalty of perjury that her petition contains true information. The AACR membership information she provides continues a pattern of readily refuted claims.

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.

The appeal consists almost entirely of discussion of previously submitted letters. Counsel states "Petitioner has submitted eight letters . . . from well-known experts and established institutions from the United States such as the National Institute of Health (NIH) and the World Health Organization (WHO)." We have already discussed counsel's prior claims regarding NIH and WHO. There is no evidence that either of the witnesses named above claimed to write on behalf of NIH or WHO, or that they were authorized to do so. We cannot consider the letters in question to represent the official positions of NIH or WHO. Also, the only witness with any evident connection to WHO, Professor Shangzhi Huang, wrote from China and therefore not from "institutions in the United States." On appeal, counsel states that Prof. Huang "is currently the Director of the World Health Organization." Counsel submits no evidence to substantiate this claim.³ Counsel states that the petitioner has invented a widely-used anti-cancer drug, but offers no first-hand support for this claim, instead citing a letter from a researcher in Texas who does not explain how he has direct knowledge of this claimed fact. If a given drug is widely used in China, then ample documentation should exist to support that claim. Even then, the record does not indicate that the petitioner's innovation had actually been used as a drug as of the petition's filing date. Early letters spoke only of its promise for drug development.

The petitioner is clearly a talented researcher, whose skills are desirable at prestigious research facilities. At the same time, exceptional ability is not sufficient grounds for a national interest waiver, and the consistent pattern of exaggerations and plainly false claims offered in support of the petition necessarily raise overall questions of credibility that we cannot ignore.

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.

³ The director-general of the WHO is [REDACTED] Brundtland, who began a five-year term in 1998. www.who.int/dg/en/, accessed October 29, 2002. Prof. Huang's name does not appear on the list of WHO's executive directors, and a search of the site for that name on October 29, 2002 reveals only materials relating to the Collaborating Center named above. Prof. Huang is not, therefore, "currently the Director of the World Health Organization," and counsel's incorrect and misleading statement to the contrary is duly noted.

ORDER: The appeal is dismissed.