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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



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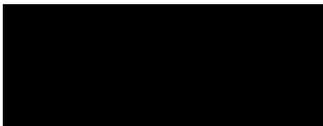
Date: OCT 07 2002

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, Nebraska 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 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 plant physiology from the Shanghai Institute of Plant Physiology. 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.

On the form I-290B, counsel asserted that the standard set forth in Matter of New York State Dept. of Transportation is contrary to congressional intent. Counsel does not explain the basis for this argument in his attached brief. We note simply that Matter of New York State Dept. of Transportation does not represent a fundamental change in the underlying law, but rather an interpretation of already-existing regulations. 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.

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, photosynthesis research, and that the proposed benefits of his work, improved photosynthesis in crops, crop resistance to herbicides, and the eventual development of artificial photosynthesis, 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.

¹ Congress 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.

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 note 6.

Toivo Kallas, a professor at the University of Wisconsin, OshKosh, with whom the petitioner has collaborated, writes:

[The petitioner] has recently succeeded in splicing the Rieske gene from the green alga *Chlamydomonas* into plasmid vectors (bacterial extra-chromosomal genetic elements) that allow "overproduction" in bacteria of both the full-length and a shortened, water-soluble Rieske protein. The full-length Rieske protein is being used in a collaborative study (with Dr. C. deVitry, IBPC, Paris France) aimed at in vitro (in the test-tube) reconstitution of catalytic activity to a Rieske-depleted cytochrome *b6f* complex. The soluble Rieske fragment will be used in a collaborative study with Dr. W.A. Cramer (Purdue University) to measure electron transfer rates in a soluble system from the Rieske iron-sulfur center to the cytochrome *f* subunit of the cytochrome *b6f* complex. These approaches will allow subsequent studies with mutant Rieske proteins which will provide insights into features of this protein required for subunit interactions, electron transfer, and the physico-chemical properties of the unique Rieske 2Fe-2S, iron-sulfur cluster. [The petitioner] is currently engaged in this important and exciting work. He is using advanced genetic engineering techniques to create specific (site-directed) mutations in his *Chlamydomonas* Rieske plasmids to allow the overproduction of Rieske proteins modified at specific sites. [The petitioner] is exceptionally well-qualified to perform this work because of his previous experience in the laboratories of Drs. Ohad and Hirschberg at the Hebrew University (Jerusalem) where he constructed site-directed mutants of photosystem II in a cyanobacterium.

Professor Kallas continues that the petitioner's work on overproduction of an algal Rieske iron-sulfur protein were reported at the Gordon Research Conference on Photosynthesis and would be presented again at the 25th Midwest Photosynthesis Conference. Professor Kallas also indicates that the petitioner's work on the overproduction of mutant cyanobacterial Rieske proteins will be submitted to *Biochemistry*. Professor Kallas collaborated on all of these projects. In addition, Professor Kallas states that the petitioner "made significant contributions" to the International Project on Photosynthetic Productivity. This project, funded by UNESCO, concerned the mitigation of CO₂ enrichment (the "green house effect") through agriculture and an analysis of CO₂ enrichment as a potential resource for increasing agriculture. Joe Zilinsky, Co-chair of the Department of Biology and Microbiology at the University of Wisconsin, writes that he has read Professor Kallas' letter and concurs with the statements in that letter.

Dr. Shunfu Hu, an assistant professor in the Department of Geography at the University of Wisconsin, discusses the importance of the petitioner's area of research, the petitioner's academic credentials, and asserts that the petitioner is "internationally recognized." Dr. Hu reaches the latter conclusion because, "as indicated in his CV, [the petitioner] has been invited for presentations in the [sic] international conferences." It is not clear that Dr. Hu works in the petitioner's field or has personal knowledge of the petitioner's alleged accomplishments other than reviewing the petitioner's curriculum vitae.

The petitioner also submitted two 1998 letters from professors at the Hebrew University of Jerusalem where he completed a two-year postdoctoral appointment. Professor Ohad writes:

In the frame of his work, [the petitioner] has mastered the techniques of DNA isolation, sequencing, cloning and transformation of cyanobacterial cells and creation of site directed mutations. [The petitioner] was successful in constructing several mutants of *Synechocystis sp.* 6803 cyanobacteria. In addition, he has also achieved expertise in the technique of thermoluminescence measurements permitting the monitoring of light induced primary charge separation and recombination of charges in photosystem II as well as the measurements of fluorescence kinetics and spectrophotometry. [The petitioner's] knowledge of these techniques, both at the operation as well as the theoretical level and the use of the molecular genetics techniques have permitted him to complete his project that consisted of creation and analysis [sic] of mutants putatively [sic] involved in the process of the PSII semiquinone QB protonation, an important step in the process of oxygen evolution and reduction of the plastoquinone pool of the photosynthetic membranes.

Professor Joseph Hirschberg provides similar information, adding:

[The petitioner] has focused his research on the structure and function of the D1 polypeptide of photosystem 2 (PS2). He has created novel mutations in the gene *psbA* which resulted in amino acid substitution in D1 near the QB binding site. These mutations affected electron transfer in PS2. [The petitioner's] achievements in this work yielded significant results which, at this time, are being written up for publication as an original scientific article.

[The petitioner] participated in the regular weekly seminars in the Life Science Institute and the weekly 'journal club' meeting where newly published papers in the field of plant physiology and plant molecular biology have been discussed. In this framework [the petitioner] was an active participant and presented new articles. He also participated in the IX International Congress on Plant Tissue and Cell Culture, held in Jerusalem, June 14-19, 1998.

In response to the director's request for additional documentation, the petitioner submitted

additional letters from professors at the University of Wisconsin. Professor James Paulson asserts that long range benefits of the petitioner's research include cleaner energy sources through the development of artificial photosynthesis and improving health through the use of fewer, more directed herbicides. While these benefits may be the intended long-term benefits of the petitioner's research, there is no evidence that the petitioner has made any significant contributions towards developing artificial photosynthesis or new herbicides that have attracted the attention of the field in general. For example, the record does not suggest that any artificial photosynthesis engines or new herbicides are being patented, tested or even that they are in development with a foreseeable testing date. Professor Linfeng Xie provides similar information to that considered above.

The above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole.

The petitioner also submitted letters from members of his field who, while not currently with any of the petitioner's previous or current employers, appear to have either collaborated with him or professor Kallas.

William Antholine, a professor at the Medical College of Wisconsin and Professor Kallas' collaborator, reiterates much of the information quoted above. As evidence of the importance of the petitioner's area of research, Professor Antholine asserts that Dr. Deisenhofer won a Nobel Prize for solving the "crystal structure of the photosynthetic reaction center in purple bacteria." Professor Antholine then discusses the achievements of the petitioner's past and present advisors. Finally, Professor Antholine discusses the petitioner's accomplishments.

As far as I know, [the petitioner] is the first one who has developed the system for 'bacteria overproduction-in vitro reconstitution-affinity purification' of soluble *Chlamydomonas* Rieske protein. This system serves as a target for site-directed mutagenesis. It is also an excellent model for overproduction of other X-ray crystallography-qualified membrane proteins. Using this construct, [the petitioner] successfully made some mutants, which are important for investigating the structure and function of Rieske protein. [The petitioner] created a construct (pTRX/GFP/CRN37d) of GFP-Rieske fusion protein, which glows in bright green color under UV light. This fusion protein is ideal for detecting quantity and quality of overproduced Rieske proteins. In the Hebrew University, [the petitioner's] novel mutants considerably furthered understanding of QB-binding pocket of PSII-D1 protein.

[The petitioner's] Ph.D.[.] study elucidated the photoinhibition mechanisms under natural conditions in the absence of additional stresses other than high light. In Prof[essor] Shen's lab, [the petitioner] also gained experience [i]n applying photosynthesis biotechnology for helping the economy. By employing double concentration of CO₂ in a green house, he increased cucumber productivity for

[sic] 80%.

Professor Antholine does not appear to have first hand knowledge of the 80% increase in cucumber yield and this claim is not supported in the record. The petitioner's Chinese articles co-authored with Professor Shen that are in the record involve cotton and wheat. The petitioner's Chinese award was issued in recognition for his work with cotton. The record contains no letters from Professor Shen. Finally, the record contains no evidence that this discovery has impacted the cucumber or other agricultural industry.

Catherine de Vitry, a scientist at the Institute de Biologie Physico-Chimique in Paris, France and one of the petitioner's co-authors on his recent article, reiterates much of the above.

The most disinterested reference is Professor William Cramer of Purdue University, although at the time of filing, Dr. Kallas indicated that the petitioner would be collaborating with Professor Cramer. Professor Cramer indicates that he met the petitioner at a photosynthesis conference in Indiana in 1998 and subsequently invited the petitioner and Professor Kallas to his own laboratory at Purdue "to determine the circular dichroism spectrum of his engineered soluble Rieske protein." Professor Cramer continues:

The genetically engineered Rieske protein, together with the success of its *in vitro* reconstitution with the iron-sulfur cluster, and the purification in high yield, is a significant contribution [the petitioner] has made to his field.

This achievement is important because the Rieske protein of the cytochrome *b₆f* complex, which is a key enzyme complex that catalyzes the photosynthetic electron transport and energy transduction, is intimately involved in the rate-limiting step of photosynthesis. [The petitioner] has used biotechnology approaches to make this membrane protein available for crystallization and possible crystal structure and functional analysis. His soluble Rieske protein has been used in my lab for stopped-flow experiments to detect its interaction with the neighboring subunit cytochrome *f*, and has produced interesting results. In addition, site-directed mutagenesis of this protein and subsequent characterization will provide insights into some of its crucial features. [The petitioner] has successfully created several mutants, and their analysis is under way.

Professor Cramer concludes that the petitioner's research has "the potential to contribute to the national interests of the United States." While Professor Cramer indicates that his laboratory has been influenced by the petitioner's work insofar as it is using one of his proteins, this one letter from a researcher also in the Great Lakes area is insufficient evidence of influence on the field as a whole. Science is a collaborative effort, with researchers building on the results of other published research. That another research group is building on the petitioner's research in collaboration with him is not evidence that he has influenced the field to a greater degree than researchers with similar credentials. As implied by the director, the petitioner's influence appears limited to his immediate collaborators and a single nearby researcher. On appeal,

counsel relies on the broad statements of ability expressed in the reference letters. Without evidence of non-collaborators relying on the petitioner's results through other disinterested reference letters or evidence that the petitioner's work is widely cited, we cannot conclude that the petitioner has demonstrated that his work is influential in his field.

The petitioner also submitted the grants from the U.S. Department of Agriculture (USDA) and the University of Wisconsin for Professor Kallas' research on Rieske FE-S Proteins. Professor Kallas is listed as the only principal investigator. The petitioner included general information about USDA grants. 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 which justifies a waiver of the job offer requirement.

In addition, the petitioner submitted certification from the Chinese Society of Plant Physiology confirming his 1996 prize for Excellent Scientific and Technological Articles of Youth Researchers in the Chinese Congress on Plant Physiology for his work "Relation of Photorespiration and Photoinhibition of Photosynthesis in Cotton Leaves." The petitioner also received a scholarship at Shanghai Institute of Plant Physiology in 1994 and was selected as an organizer of the III Chinese Youth Conference on Plant Physiology in 1994. The petitioner was a member of the Chinese Society of Plant Physiology from June 1993 to April 1996 and is currently a member of the American Chemical Society (ACS). The director noted that ACS membership requirements are not notably exclusive. In response to the director's request for additional documentation, the petitioner submitted evidence that he was also a member of Sigma Xi, the Scientific Research Society. The Society has 80,000² members selected based on their research *potential* or achievements. The petitioner also submitted proof of his membership in the American Association for the Advancement of Science (AAAS), but no evidence that AAAS has exclusive membership requirements. Regardless, these documents relate to the criteria for exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, or even the requisite three, criteria for exceptional ability is sufficient to waive the labor certification requirement in the national interest.

The petitioner also submits evidence of his published articles and abstracts. 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

² The fact that 180 of the 80,000 members are Nobel Prize winners does not reflect on the exclusive nature of membership in general.

consider the research community's reaction to those articles.

The record reveals that the petitioner has cited his own articles and that D.Q. Xu, one of the petitioner's co-authors, cited the article on which they collaborated. While self-citation is a normal and expected practice, it is not evidence of the petitioner's influence on the field as a whole.

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.

ORDER: The appeal is dismissed.