



B5

U.S. Department of Justice  
Immigration and Naturalization Service

identifying data deleted  
prevent clearly unwarranted  
invasion of personal privacy

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



File:

Office: Nebraska Service Center

Date: OCT 15 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 seeks employment as a research scientist in the Department of Obstetrics and Gynecology, University of Colorado Health Sciences Center ("UCHSC"). 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 Endocrinology from the Medical College of Georgia ("MCG"). 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 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.

The petitioner submits several witness letters in support of the petition. Dr. Kimberly Leslie, Associate Professor and Chief, Division of Basic Reproductive Science, Department of Obstetrics and Gynecology, UCHSC, states:

In 1999, we were most fortunate to recruit [the petitioner] to Colorado to join our team to continue his post-doctoral fellowship experience. [The petitioner's] project, which he developed independently, is to study how gene therapy using the progesterone receptor can slow the growth of endometrial cancers. [The petitioner] has surmised that progesterone, acting through the progesterone receptor, is the body's natural defense against unregulated cell growth leading to cancer in the uterus. Many endometrial cancers have evolved so that they no longer make progesterone receptors and can no longer respond to the growth-slowing effects of progesterone. Thus, re-introducing the normal gene for progesterone

receptors into the cancer cells will allow treatment of the cancer with progesterone, a safe and potentially effective therapy. [The petitioner] has already constructed the molecular tools needed to re-introduce progesterone receptors into cells. He has used these tools to make progesterone receptors in endometrial cancer cells in the laboratory, and he has most recently demonstrated that the cancer cells stop growing when the progesterone receptor gene is expressed and the cells are treated with progesterone. Indeed, in a recent experiment, [the petitioner] was able to completely inhibit the growth of the cancer cells in the laboratory by his methods. The next step is to test the therapy in an animal model. Eventually, of course, we believe that this strategy may be an important new tool to treat endometrial cancers in women. It may be safer than other gene therapy methods because we are introducing a normal gene and treating the patients with a natural and safe hormone (progesterone).

\* \* \*

As endometrial cancer is a common but an understudied disease, I believe that [the petitioner] is in a unique position to make a major contribution to the field. This is because he is a superb scientist with strong skills in molecular biology and because he has clinical training that allows a full understanding of the disease.

Dr. Caleb Awoniyi, Associate Professor and Director, Molecular Histopathology Core Laboratory, UCHSC, was "a part of the search committee that recruited [the petitioner] as a postdoctoral fellow." Dr. Awoniyi states:

Since his tenure at this institution, he has made tremendous progress on his research geared towards developing an antiproliferatory therapy for human endometrial cancer... [The petitioner's] approach to finding an antiproliferatory therapy is unique. Because the oncogenesis of endometrial cancer is thought to be related to overexposure to estrogen, [the petitioner's] approach is to increase progesterone production which is known to inhibit estrogen receptor gene expression and thereby enhancing degradation of estrogen receptors.

Dr. Thomas Ogle, Professor, Department of Physiology and Endocrinology, MCG, supervised the petitioner's Ph.D. research at MCG. Dr. Ogle states:

[The petitioner] made a number of novel and very provocative observations on progesterone receptor regulation and mediated cell signaling pathways leading to cell survival and apoptosis (a form of cell death), which now have been published as five major papers in the most cited international scientific journal in the area of reproduction (*Biology of Reproduction*) and another being reviewed for publication.

The petitioner submits three additional letters from his former professors at MCG. These letters describe the petitioner as a "well qualified scientist" and note that the petitioner's "publication rate as a student...and post doc...was very good."

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.

The petitioner provides internet citation lists for four of his published articles. Self-citation is a normal, expected practice. Self-citation cannot, however, demonstrate the response of independent researchers. Of the fifteen citations provided, ten citations were self-citations by the petitioner or his collaborators. The internet citation lists reveal that an article entitled "Stromal Cell Progesterone and Estrogen Receptors..." was cited two times by independent researchers, an article entitled "Progesterone and Estrogen Regulation of Rat Decidual Cell Expression..." was cited once by an independent researcher, an article entitled "Regulation of the Progesterone Receptor and Estrogen Receptor..." was cited twice by independent researchers, and an article entitled "Ventrally Emigrating Neural Tube Cells Differentiate into Heart Muscle" had no independent citations. The minimal number of independent citations simply does not rise to a level that would demonstrate significant influence in the biomedical research field.

The petitioner's initial six witnesses include his supervisor at UCHSC, a USCHC colleague, his Ph.D. supervisor from MCG, and three of his professors from MCG. Several of the witnesses offer general arguments as to the overall importance of gene therapy cancer research. Pursuant to Matter of New York State Dept. of Transportation, statements regarding the overall importance of a given project, rather than the merits of the petitioner as an individual, fail to demonstrate eligibility for a national interest waiver. Furthermore, the witnesses' assertions as to the petitioner's potential to make future contributions cannot suffice to demonstrate his eligibility for a national interest waiver. Dr. Mahesh's assertion that the petitioner "has the potential of making significant contributions" does not persuasively distinguish the petitioner from other competent biomedical researchers. Dr. Leslie notes that the petitioner is "in a unique position to make a major contribution to the field," but offers no information as to how the petitioner's research findings have already influenced the field. The above letters fail to demonstrate a past history of significant accomplishment on the part of the petitioner. The witnesses describe the petitioner's expertise and value to his current and former research projects, but do not demonstrate the petitioner's influence on the field beyond his research institutions. The petitioner has not shown that his work has attracted significant attention from independent researchers in the biomedical research field.

The director denied the petition, stating 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 acknowledged that the witnesses "speak highly of the petitioner," but indicated that the petitioner had not submitted evidence to demonstrate that his research work has had a significant national impact in the cancer research field.

On appeal, counsel argues that the director improperly denied the petition "without first affording the petitioner an opportunity to submit additional evidence or explanation." At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request.

We concur with counsel's assertion that the petitioner works in an area of intrinsic merit, cancer research, and that the proposed benefits of his 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 submits four additional letters in support of the appeal. In her second letter, Dr. Leslie states:

The principal focus of the work in my laboratory, in which [the petitioner] works, is the treatment of uterine cancer. This cancer is the most frequent invasive malignancy of the female reproductive tract and the fifth leading cause of death among American women. [The petitioner] is now working to develop new gene therapy techniques to treat this disease, and he is one of only few scientists worldwide with the unique expertise, training, and interest to do it. His work is novel. It is the topic of the recent paper presented at the American Gynecological and Obstetrical Society in response to a national competition... The manuscript is scheduled to be published in the *American Journal of Obstetrics and Gynecology*, the leading scientific journal in the field.

The remainder of Dr. Leslie's letter addresses a future research project involving a drug trial for the medicine ZD1839. Dr. Leslie states that the petitioner will be "the primary bench scientist involved in a new clinical trial the laboratory has been asked to undertake with the national Gynecological Oncology Group." Dr. Leslie adds that she "will be the Co-Chairman for the study."

The petitioner submits a letter from Dr. Richard Zaino of Penn State University who also serves as Co-Chairman of the Gynecology Oncology Group. Dr. Zaino notes that the petitioner's efforts "will be very important in the completion of the translational research portion of a soon to be activated Gynecological Oncology Group trial."

Dr. Russell Schilder, Member of the Gynecological Oncology Group, states that Dr. Leslie, the petitioner, and he "are collaborating on a trial using a brand new class of anti-cancer therapy which has the potential to have a major impact on the care of women with endometrial carcinoma."

The above witnesses offer assertions as to the future significance of the petitioner's involvement in the upcoming drug study. Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for the national interest waiver. Furthermore, the upcoming drug trial described by the above witnesses and the publication of the manuscript mentioned in Dr. Leslie's second letter are events that came into existence subsequent to the petition's filing. 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. A petitioner cannot file a petition under this classification based on the expectation of future eligibility.

The petitioner submits a letter from Dr. Ronald Gibbs, Secretary, American Gynecological and Obstetrical Society, and Chairman of the Department of Obstetrics and Gynecology, UCHSC, stating that the petitioner and his colleagues at UCHSC presented a paper that was selected as the Charles Hunter Prize Paper in 2000. Dr. Gibbs states: "Each year there is a national competition open to faculty at all American and Canadian medical schools for the Hunter Prize Paper. This paper must be on original research and is selected by a committee of eight members." While this prize recognizes the "potential impact" of the paper authored by Dr. Leslie, the petitioner and their collaborators, there is no evidence that the research findings have been heavily cited or garnered the attention of independent researchers throughout the field. We further note that according to Dr. Leslie's letter, the research paper had not yet been published as of the date of the petitioner's appeal. Therefore, assertions as to the paper's influence on the greater field are entirely speculative.

Counsel cites the testimonial letters as evidence of the petitioner's impact on his field. We note, however, that all of the petitioner's witnesses are individuals with direct ties to MCG, Dr. Leslie, or the petitioner's projects at UCHSC. 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. It remains, however, that very often, the petitioner's projects are also the projects of the witnesses, and no researcher is likely to view his or her own work as unimportant. The observation that all of the witnesses have close ties to the petitioner is not intended to cast aspersions on the integrity of the witnesses; the director specifically indicated that the letters accompanying the petition were from "professionals." Still, these individuals became aware of the petitioner's research efforts because of their collaborations with the petitioner or Dr. Leslie; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we could expect with research findings that are especially significant.

Counsel states that the petitioner's "research contributions have been internationally recognized through his publications in internationally circulated journals." Publication, by itself, is not a strong indication of impact because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner himself has cited sources in his

own articles. Outside citations (the more the better) provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. According to the citation lists provided, the most any one of the petitioner's four articles was independently cited was twice. Thus, the petitioner has offered little evidence showing that his work has garnered the attention of others in the field. Few or no citations of an alien's work suggests that that work has gone largely unnoticed by the larger research community and therefore it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work can have, if that research does not influence the direction of future research.

Clearly, the petitioner's former professors, collaborators and research supervisors have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While some of the witnesses discuss the potential applications of his findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not distinguish the petitioner from other competent researchers.

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 itself 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.