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U.S. Department of Justice  
Immigration and Naturalization Service

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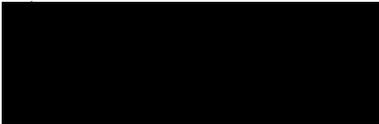
Date: OCT 15 2002

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, California 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 researcher in food science and nutrition. At the time of filing, the petitioner was a postdoctoral researcher at the University of California ("UC"), Berkeley. The petitioner subsequently moved to a postdoctoral position at UC Davis. 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.

With her petition, the petitioner submits a letter from Professor Fernando E. Viteri, who was the petitioner's first postdoctoral supervisor at UC Berkeley. Prof. Viteri states:

I have no doubts that [the petitioner] is eminently qualified and able in her professional field, to which she adds unique academic backgrounds and personal characteristics that place her among the best professionals in the field of Nutrition. I can confidently state this given her bicultural background (Hispanic and North-American) and her excellent professional [education]. . . .

In summary, I consider [the petitioner] a superiorly qualified professional in the field of food and nutrition, and do not hesitate to recommend her among the top ranking young nutritional scientist[s] in this Country.

The above letter is complimentary toward the petitioner, but it does not demonstrate that others in the field share Prof. Viteri's assessment of the petitioner's skills.

Other submissions include documentation of the petitioner's academic training and copies of abstracts and articles that the petitioner co-authored, mostly while still a graduate student. These materials show that the petitioner has been an active and productive researcher, but they do not demonstrate that the petitioner has served the national interest to a greater extent than other researchers in the specialty.

The director requested further evidence that the petitioner merits an exemption of the job offer requirement in the national interest. In response, the petitioner has submitted three new letters. Prof.

Fernando Viteri, in his second letter on the petitioner's behalf, states that the petitioner is "UNIQUELY QUALIFIED to undertake a series of nutritional studies that will benefit the United States population at a national level." Prof. Viteri describes these studies, but does not indicate whether the studies are already underway. As to the reasons why other researchers are not qualified to undertake those studies, Prof. Viteri notes that the petitioner "is fully bicultural" and "has a rather unique expertise in using very new technology in determining free-radical damage."

Professor Kenneth H. Brown of the University of California, Davis, states that "there are very few other individuals with the unique set of skills and experience that allow [the petitioner] to carry out this research." Prof. Brown cites the petitioner's "understanding of iron and zinc metabolism, use of isotopic tracer techniques . . . and the necessary cross-cultural experience and sensitivity to conduct this research in ethnic sub-groups of the population at high risk of malnutrition." Professor Janet C. King, director of the U.S. Department of Agriculture's Western Human Nutrition Research Center at UC Davis, states:

[The petitioner] has been a post-doctoral fellow in my laboratory since October, 1999. In this capacity, [the petitioner] will be conducting a clinical trial of the effect of supplemental iron on maternal health during pregnancy and infant nutrition. . . .

I believe that she is certain to become one of the leaders in iron nutriture during pregnancy and lactation.

None of the witnesses have identified any existing contributions by the petitioner that they identify as being especially significant compared to other research in the field. Prof. King limits her remarks to discussion of a project that apparently had not yet begun as of the date of her letter. She does not explain why this clinical trial requires the involvement of this particular petitioner, nor have any witnesses explained why the petitioner's cultural background would have any impact on the empirical findings of such a study. The witnesses do not indicate that the petitioner is responsible for significant innovations in her field (as opposed to carrying out projects conceived by others or mastering technology developed by others).

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. On appeal, the petitioner submits a brief from counsel, letters from herself and Prof. King, and copies of research materials and previously submitted documents.

The petitioner states:

My important research findings have been presented at the highest scientific events in nutrition at the national and international level.

I have conducted the first series of human studies in the United States of America and the entire world evaluating the absorption of minerals from genetically modified grains with low levels of phytates. . . . The results from these studies have been used as a scientific basis for the promotion of this novel approach to improve

the iron and zinc status of the US population. Additionally, my research has supported the leadership of the USA in the promotion of food production and intake of genetically manipulated grains as a new food security strategy at international levels. . . .

In summary, my exceptional knowledge, background, abilities and skills for addressing research in food science and nutrition makes me a unique professional who can especially aid the Hispanic population . . . to a greater degree than a similarly qualified US worker in the mineral research area in the US.

The petitioner offers no evidence to show that her research is viewed by anyone outside of the University of California as being especially important or significant. A description of the research does not establish its importance, nor does the originality of that research unless one assumes that most nutritional research is repetitive of studies already conducted.

Prof. King asserts that the petitioner possesses qualifications that are unique among the ten researchers at the Western Human Nutrition Research Center, such as "a Ph.D. in nutrition" and her "fully bicultural and bilingual" background. Like the petitioner, Prof. King observes that the petitioner has published and presented her research findings in journals and at conferences. Prof. King concludes that the petitioner "is the leader in the field of the evaluation of the effect of iron supplementation on zinc metabolism during pregnancy and lactation." Leaving aside the issue of whether a subspecialty so narrowly focused constitutes a "field" in its own right, it remains that the record does not show that anyone outside of the University of California shares this assessment of the petitioner's work. While we do not dispute the sincerity of Prof. King's assertions, we cannot conclude that the petitioner is a major figure in her specialty based solely or primarily on an endorsement from her supervisor and collaborator. The record is devoid of evidence that the petitioner's work has attracted more attention, or had a greater practical impact, than the work of other nutrition researchers, or that the petitioner's work is otherwise so distinguished from others that the petitioner merits the special benefit of a national interest waiver.

Counsel asserts that the petitioner has established "recognition from her colleagues," and cites the letters in the record. Of the three individuals who wrote those letters, two have directly supervised the petitioner's work and the third is a professor at the university where the petitioner began working after she filed the petition. These letters, therefore, do not show that others in the field are even aware of the petitioner's work, let alone significantly influenced by it. The petitioner has published articles (which is routinely expected of postdoctoral researchers, rather than a rare accomplishment<sup>1</sup>) but there is no evidence (such as citation indexes) to show that those publications have had a greater impact than any of the countless other articles published in the field.

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<sup>1</sup> 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" (emphasis added). If publication is "expected" of postdoctoral researchers, it is difficult to maintain that publication is *prima facie* evidence of the significance of a researcher's work.

Counsel's assertion that "[t]he outcome of [the petitioner's] research will provide a basis for the policy for iron supplementation not only nationally but internationally" is inherently speculative. The record lacks evidence that any policy-making entity at the national or international level has considered or intends to consider the petitioner's work as "a basis for . . . policy."

Counsel states that the University of California, as a matter of policy, will not apply for labor certifications for alien researchers. This assertion is uncorroborated by any official documentation from the university. Furthermore, if employers could evade the labor certification process simply by refusing to apply for them, then the statutory labor certification process created by Congress is so easily avoided as to be meaningless. Also, the record contains no indication that, but for the labor certification requirement, the University of California would permanently employ the beneficiary (postdoctoral appointments are generally temporary in nature). The petitioner has not shown why a permanent immigration benefit would be necessary to facilitate temporary employment in a postdoctoral training position.

Because the statute does not universally exempt nutrition scientists from the job offer requirements, arguments about the importance of the petitioner's field do not establish eligibility for a waiver. Indeed, the statute specifically states that the job offer requirement applies to aliens of exceptional ability in the sciences. The petitioner is clearly a well-trained and dedicated researcher, whose particular skills distinguish her from other researchers at Prof. King's laboratory. The record, however, lacks evidence to show that this research has been unusually influential outside of the University of California, or is otherwise so much more valuable than other nutritional research that the petitioner merits a waiver of the job offer requirement that, by law, normally attaches to the visa classification sought.

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.