



B5

U.S. Department of Justice  
Immigration and Naturalization Service

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal



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

File: EAC 01 229 56057 Office: Vermont Service Center Date: OCT 15 2002

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:  
[Redacted]

**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. The petitioner seeks employment as a research associate at Harvard Medical School. 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 conducts cancer research at Harvard Medical School. Much of the petitioner’s initial submission consists of general background information about cancer, cancer research, and Harvard Medical School. This information establishes the intrinsic merit and national scope of the petitioner’s work, but it does not indicate or imply that it is in the national interest for this particular alien, instead of another qualified worker, to hold the particular research position at Harvard. One of the exhibits is an article from *Time* magazine. Counsel refers to this article as “concerning, in part, [the petitioner’s] research.” The article, however, does not mention the petitioner or the petitioner’s specific project, although there are occasional mentions of another Harvard researcher. Elsewhere, counsel more accurately states that the article discusses “the kind of research being carried out by” the petitioner. The fact that the petitioner’s work parallels the work discussed in the *Time* article does not mean that the article is about the petitioner’s research.

Counsel states that the petitioner should receive a waiver of the job offer requirement because “[t]he labor certification process will result in either hiring an ‘under-qualified’ research associate or none at all.” Counsel does not explain how the labor certification process could leave the position unfilled; the absence of minimally qualified U.S. workers is a favorable factor in approving a labor certification, rather than a mandate to leave a position unfilled.

Along with the background materials and copies of the petitioner’s published work, the petitioner submits several witness letters. The most detailed commentary is from Dr. Philip W. Hinds, associate professor at Harvard, who states:

[M]y laboratory is focusing on the genetic basis of cancer. . . .

The process by which cells divide – thus creating new cells – is regulated by a complex chemical process which prior research has shown consists of 4 phases. The first part of the process is called the G1 phase, and a subphase of critical importance is called the restriction point (R). The R point functions as a kind of a brake to regulate normal cell growth, particularly when the cell's DNA is damaged. If the cell is able to get beyond the R point biochemical growth factors are no longer needed for cell division and cancer can result. . . .

As you can understand, the mechanism of the R point is a matter of substantial concern and research interest. If we are able to stop the uncontrolled growth of cells which we call cancer at the R point, we will have successfully developed a new treatment modality. . . .

[The petitioner] is carrying out a critical function in this research. His role is to develop a systematic approach to identifying the genes which play a central role through a highly sophisticated and relatively new technique called DNA microarray or genome chips. . . . This allows [the petitioner] to literally monitor the expression of thousands of genes simultaneously rather than in the one gene per experiment tradition of genetic research.

[The petitioner] is one of the few scientists who [are] capable of carrying out this kind of cutting edge research, and his results have been spectacular. Thus far, he has identified more than 10 new genes which are affected in this process. The detailed molecular understanding of the process will allow us to understand how cancer cells are able to avoid the normal checks and balances which govern normal cell growth. . . .

[The petitioner's] outstanding technical expertise and research skills as demonstrated by his remarkable past achievements are significant – even critical – to our research in an area that is of national importance. . . . [The petitioner's] proven achievements and professional skills have made him an essential part of the Department's core research efforts in understanding the molecular underpinning of cancer.

Other witnesses discuss the above project, in less detail, and assert that the petitioner is “an outstanding research scientist” who plays “a critical role” in the project.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director acknowledged the originality of the petitioner's contributions, but asserted that originality is expected in the research community. The director stated “[t]he record simply offers no indication that [the petitioner's] contributions are

capabilities of the majority of [the petitioner's] colleagues." The director requested additional evidence regarding the petitioner's projects that would show the extent and importance of the petitioner's role in those projects. The director noted that "greater weight will be given to documentation submitted by experts and institutions that are clearly independent of the beneficiary." Most of the initial witnesses have worked with the petitioner or interacted extensively with him.

In response, the petitioner has submitted three new letters and copies of grant documents and the petitioner's published work. Two of the three witnesses had offered letters with the initial filing, the exception being Professor Domenico Accili of Columbia University. None of the letters are from sources that are clearly independent of the petitioner. Prof. Accili states that his shared area of research interest has led him "to interact on a professional basis with" the petitioner. Prof. Accili states that research associates typically "carry out mundane tasks, and are rarely if ever involved in the planning and interpretation, let alone publication and presentation of research results at scientific meetings."<sup>1</sup> Prof. Accili offers the vague assertion that the petitioner "is routinely the major contributor to his scientific publications, and has already made an impact on his specific field of research." Prof. Accili states that the petitioner "works on a class of proteins, known as tyrosine kinases, which are also central to the mechanisms of diabetes," but he does not specify what the petitioner has done that is of unusual significance in the field. Prof. Accili's assertion that the petitioner's work will become more influential in the future is, by nature, speculative.

Professor Michael G. Brattain of Roswell Park Cancer Institute had previously supervised the petitioner's work at the University of Texas Health Science Center. Prof. Brattain states that the petitioner "through his research and his publications has had a degree of influence in the field." Like Prof. Accili, Prof. Brattain maintains that the petitioner's findings have been especially significant but he does not elaborate upon this point.

Dr. Philip W. Hinds, in his second letter on the petitioner's behalf, discusses various projects underway at his laboratory and states that the petitioner "is carrying out the research without further co-researchers." Dr. Hinds asserts that his own role is "essentially supervisory" with little involvement in the actual research work. Dr. Hinds provides copies of grant documents but no documentation to identify, or rank the importance of, personnel working on the projects receiving grant funding. Some of the grant documentation dates back to 1997, before the petitioner had joined Dr. Hinds' laboratory, indicating that the petitioner's presence was obviously not the catalyst that made the projects possible.

---

<sup>1</sup> While we do not question the sincerity of Prof. Accili's assertions, he cites no statistical evidence to support his claim that "[i]t is highly unusual" for a postdoctoral researcher's work to appear in a peer-reviewed journal. This assertion clearly contradicts the position of the Association of American Universities. That organization of prestigious U.S. universities (including Columbia University and Harvard University) has concluded that publication of one's work is "expected," not only for postdoctoral appointees, but even for lower-level doctoral appointees. (Source: <http://www.aau.edu/reports/PostDocRpt.html>, accessed October 15, 2002.) We cannot, therefore, agree with the assertion that "publication and presentation of research results" represent a "highly unusual . . . distinction."

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the record lacks evidence of its national scope. The director stated that the petitioner has not established that the petitioner "is or was primarily responsible for the research findings" or "that the research is considered to be breakthrough in nature by those involved in similar scientific pursuits." The director noted that the grant documentation submitted previously does not identify the petitioner as "key personnel" in the projects described. The director found 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, documentation regarding his research projects, and background materials relating to labor certification.

We disagree with the director's finding regarding the national scope of the petitioner's work. Cancer is not a local problem, and the products of the petitioner's work could, in theory, be utilized at a national level, and therefore the proposed benefit is national in scope. Whether the petitioner's results actually have been, or are likely to be, implemented nationally is a separate issue.

Counsel argues that the petitioner has, in fact, complied with the director's request for a description of the nature of the petitioner's research duties, and that the director's assertion that the petitioner has "elected not to provide" such material is incorrect and "in a tone unbecoming a Government civil servant." Counsel observes that Dr. Hinds has stated that the petitioner was the only researcher working on several of the projects, and counsel asserts that this claim is corroborated by "the grant proposals which list only Dr. Hinds as the Principal Investigator." It is not clear how grant proposals that do not mention the petitioner can be viewed as corroboration of the importance of the petitioner's role. It remains that, in attempting to establish the relative significance of his projects, the petitioner has relied mainly on the assertions of supervisors rather than on independent witnesses who are aware of the work primarily through its importance rather than through existing ties with the petitioner.

Counsel observes, correctly, that Matter of New York State Dept. of Transportation does not specifically require "breakthrough" discoveries or "major advances." Nevertheless, the petitioner's claim of eligibility for a national interest waiver relies, in part, on letters that refer to the petitioner's findings as "spectacular" and "outstanding." It is, therefore, not unreasonable for the director to point to the apparent absence of objective evidence to corroborate and justify such superlatives. At issue is not Dr. Hinds' honest opinion of the petitioner's work, but the extent to which other researchers share that opinion. One could reasonably expect "spectacular" findings, beyond the abilities of most researchers, to come to the attention of (for instance) the National Institutes of Health or the American Cancer Society, indicating that on a national level the petitioner stands above other postdoctoral researchers conducting cancer-related research. Simply noting that the petitioner has published his results cannot suffice in this regard. Counsel's arguments carry negligible weight in this regard. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). With regard to the overall reliability of counsel's assertions, we note the earlier reference to the *Time* magazine article

“concerning, in part, [the petitioner’s] research” which is misleading at best because the article discussed research in the petitioner’s specialty but not the research conducted by the petitioner himself. The *Time* article shows mainstream media attention to genetic-level cancer research, but the record does not show that the petitioner’s work has attracted comparable attention, nor does it otherwise reflect that researchers outside of the petitioner’s circle of collaborators consider that work to be “spectacular.” Counsel’s exposition, on appeal, of the credentials of the petitioner’s witnesses is beside the point.

The burden is on the petitioner to establish that it is in the national interest to ensure that he, rather than another qualified worker, continues to occupy the research position at issue. Counsel maintains that the petitioner possesses skills which are fundamentally necessary to the success of the research, but which cannot be articulated on a labor certification. The general unavailability of these skills has not been established, particularly in light of evidence that some of the research projects in question were proposed while the petitioner was still a student at another institution, and therefore pursuit of those projects was clearly deemed feasible even before the principal investigator had apparently even heard of 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 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.