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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 15 2002

IN RE: Petitioner: [redacted]
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)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

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, Texas 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 assistant at Mississippi State University ("MSU"). 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 submits several witness letters. The most detailed letter is from the petitioner's supervisor, Dr. Bert C. Lynn, Jr., assistant professor at MSU, who states:

> The laboratory [where the petitioner] is currently conducting her research has been actively involved in protein crystal growth experiments in the micro gravity environment aboard NASA's shuttles. These experiments may lead to the development of new drugs for the treatment and cure of diseases such as cancer, diabetes, alcoholism, AIDS, and Alzheimer's disease. . . .
>
> [The petitioner's] contribution to the crystal protein growth is not only significant but also fundamental to our present studies. This is the only laboratory in the world using light scattering techniques to obtain optimized protein crystallization conditions. In order to provide reliable parameters and high quality protein crystals in a very short time, it is necessary to start with highly purified proteins. [The petitioner] developed confirmation methods for determining the purity of proteins and established separation methods. . . . Previous methods of protein separation and purification are time-consuming, expensive, and provide low yields of the product. [The petitioner] established new separation methods that are fast, utilize inexpensive solvents, and provide high quality protein to be used for crystal growth. . . .

> Prior to this research project, [the petitioner] . . . developed a multiresidue method for the determination of 20 fungicides in fruits and vegetables using GC/MS/MS techniques.

Other researchers, all of whom have supervised or collaborated with the petitioner, offer general statements about the importance of the petitioner's tasks at MSU and descriptions of the petitioner's work as an analytical chemist prior to her studies at MSU. Several of the witnesses discuss the potential usefulness of the petitioner's work in relation to drug development, but they do not provide specific examples of advances in the field that the petitioner has already brought about (rather than having the skills potentially to bring about at some future time).

The remainder of the initial evidence consists primarily of background information about cancer, Alzheimer's disease, microgravity research, and other areas touched by the petitioner's research specialty.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted arguments from counsel accompanied by supporting exhibits.

Counsel asserts that labor certification is "extremely time consuming," and that the petitioner's employer "cannot as a practical matter take the time to test the labor market and leave the position unfilled." Many of the documents submitted with the petitioner's response pertain to the labor certification process and make no mention of the petitioner or her work. Whatever complaints counsel may have about the labor certification process in general, or flaws in its execution, it remains that Congress created a job offer requirement which we cannot simply ignore. Furthermore, the regulation at 8 C.F.R. 214.2(h)(16)(i) allows an alien to enter and work as an H-1B nonimmigrant while an application for labor certification is pending. While a variety of factors may have a bearing on each individual case, an application for labor certification would not automatically require a given position to be left vacant while the application is processed.

Apart from general documents regarding labor certification, most of the documents submitted in response to the notice are general materials about the petitioner's field of endeavor or copies of previously submitted materials. The response includes two new letters that specifically address the petitioner and her work. Dr. Gaylen L. Jones, manager of Field Studies at ABC Laboratories, Columbia, Missouri, states:

> [T]he study and refinement of drug delivery systems have become a new branch of pharmacology. It is obvious, of course, that the purer the drug, the more effective that drug will be. . . . [T]he more sophisticated our ability to deliver these drugs to patients, the more effective the patient's drug therapy will be.
>
> The growth of crystal proteins used in drug therapy is very much affected by gravity. For this reason, NASA and other government agencies have sponsored

> research to determine if protein crystals can be more regularly created in the weightlessness of space. Indeed, they can.
>
> [The petitioner] is a critical link in the research supporting this effort. It is only with the purest proteins that the perfect crystals can be grown. It was her job in the research project to apply a number of extremely challenging and quite creative techniques to extract the purest possible protein from which to grow the crystals in space. . . . [The petitioner] carried out her part of this research brilliantly based upon my understanding of the results.

Manat Maolinbay, senior research associate at the University of Michigan, offers a letter that is very similar to the earlier letter from Dr. Bert Lynn; some passages are totally identical to excerpts from Dr. Lynn's letter. The letter simply repeats prior claims, rather than adding any new information to the record. The two witnesses do not indicate the source of their knowledge about the petitioner; they merely state that they have been asked to provide letters.

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 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.

We disagree with the director's finding regarding the national scope of the petitioner's work. Scientific research and inquiry into technical methods of crystal refinement are not geographically limited, and the products of the petitioner's work could, in theory, be utilized at a national level. There is also the consideration that the petitioner's crystals were slated for use in a national-level NASA space project.

On appeal, counsel rhetorically asks "was the adjudicator correct in determining that . . . [the petitioner's] F-1 visa will allow her to continue her research in the United States forever?" The director, however, made no such finding. The director acknowledged that "denial of the waiver may affect the petitioner's continued employment," while noting that her present short-term project is covered by her F-1 nonimmigrant student visa. Indeed, counsel acknowledges the director's finding that denial of the waiver will affect the petitioner's continued employment. Clearly, there has been no finding that the petitioner's F-1 visa allows permanent employment.

Counsel asserts that Matter of New York State Dept. of Transportation "defeats the clear legislative intent of the statute." By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. Indeed, counsel acknowledges the binding nature of the precedent decision. The director's reliance on standing precedent cannot, by any reasonable standard, be held to constitute an error of law.

The bulk of counsel's brief consists of passages from witness letters discussed above. Counsel states that these letters demonstrate the special importance of the petitioner's work, and the

irreplaceable nature of the petitioner's contribution to the crystal protein growth project at MSU. These letters, however, fail to demonstrate that the petitioner's accomplishments are so unique as to warrant the special benefit of a national interest waiver. The record contains nothing from NASA or any major pharmaceutical research institution to show that the petitioner's work has had a significant impact or is seen as important (rather than as one routine part of a much larger experiment) by ranking figures outside of the petitioner's immediate circle of collaborators and superiors. Speculations about the potential for future impact cannot suffice in this regard without evidence that the petitioner has had a similar impact in her past endeavors. In this instance, the petitioner has provided descriptions of her past work but no persuasive evidence that such work has consistently been of particular importance when compared to the efforts of other analytical chemists.

Arguments about the urgency of researching various deadly diseases are somewhat diminished because there is no indication that the petitioner plays any direct role in developing such drugs. The petitioner has merely listed types of research which could conceivably benefit (but apparently have yet to do so) from her methods. With regard to the claimed importance of the petitioner's continued importance to the project, her student visa covers her continued work in the short term; in the long term, there is no clear indication that hiring officials at MSU have expressed any intention to retain the petitioner's services on a permanent basis (rather than on a temporary basis, for example as a postdoctoral research associate). Given that the petitioner had previously studied fungicide residues at the same laboratory where she later began studying protein crystal growth, the nature of the petitioner's work appears to involve moving from one short-term project to the next, in which case it is far from clear that permanent immigration benefits should result from one of those short-term projects.

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.