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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

[Redacted]

File: [Redacted] Office: Nebraska Service Center

Date: OCT 15 2004

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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

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 the University of Kansas ("UK"). 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 master's degree in Medicinal Chemistry from UK. 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 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.

We concur with the director that the petitioner works in an area of intrinsic merit, medicinal chemistry, 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.

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.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. Dr. Gunda Georg, Professor of Medicinal Chemistry at UK, is the petitioner's research supervisor. Dr. Georg states:

I am considered an international expert in Medicinal Chemistry, particularly with reference to my contributions to the development of Taxol, a drug widely used in the treatment of breast and ovarian cancer.

* * *

[The petitioner's] current work is focused on the design, synthesis and development of two anticancer agents: paclitaxel (Taxol) and the tyloindicines... The basic way paclitaxel works is by causing cancer cells to become so clogged with microtubules that the cancer cells cannot grow and divide. The tyloindicines have shown promise in the treatment of cancer; but the mechanism by which they act is yet unknown and synthetic methods are needed to obtain larger quantities for further study.

* * *

[The petitioner's] expertise is clearly unique and not easily found. In fact, he was selected and brought to our lab... because his area of concentration is extremely rare and is the very subject on which we are researching- namely, the analogs of paclitaxel.

* * *

Like most cancer drugs, use of paclitaxel has disclosed a number of undesired side effects. [The petitioner] has been using his unique expertise to solve these challenging issues through design and synthesis of second-generation Taxol analogs. He has in fact been absolutely critical in successfully isolating nearly 70 such analogs. His contribution to paclitaxel research is magnified by his design and synthesis of novel analogs of paclitaxel bearing transporters.

* * *

[The petitioner] is the first medicinal chemist in the world to design and synthesize novel analogs of paclitaxel bearing transporters. The delivery of drugs across normal tissue barriers is an important issue in drug development. Two pathways are involved in the transporting system: Passive transport and Active transport... The biological results of the analogs showed that [the petitioner's] analogs retained excellent cytotoxic activities against B16 melanoma and MCF 7 breast cancer cells. Evaluation of these compounds... assay very promising results.

* * *

[The petitioner] is also the co-inventor of a major discovery: the potential application of Taxol for the treatment of Alzheimer's Disease (AD). The basis for this discovery is that brain neurons are postmitotic (they do not divide). Thus, low doses of Taxol that could reach the brain are not likely to have toxic side effects and could help slow the progression of AD. This discovery has been recognized as being of major significance. A patent is currently being sought and the initial stages (invention disclosure) have already been conducted.

This discovery has generated widespread interest. A search of the internet has revealed more than 400 references to this invention. It is cited in many major public health media. It has even been cited in the April 7, 2000 issue of *Science*...

[The petitioner's] work on the use of Taxol and its analogs in the treatment of Alzheimer's disease is considered a seminal work in his field, with tremendous potential implications for the treatment of AD.

The petitioner submits additional letters from faculty at UK that echo the assertions of Dr. Georg. The petitioner also submits letters reflecting that his research has captured the attention of researchers beyond UK.

Dr. Ulrich Klar, Schering Institute of Medicinal Chemistry, Berlin, Germany, states:

My research covers... the treatment of hormone dependent as well as hormone independent tumors... I am very interested in compounds which- like Taxol- act on the microtubule system of cells. In this context I became aware of the outstanding achievements of [the petitioner].

[The petitioner's] projects are aimed to improve the potency and selectivity of Taxol as one of the most effective cancer drugs and its application for Alzheimer's disease. [The petitioner] co-authored several papers. The discovery of [Taxol's] neuroprotective effect on neurons is a state of the art work. This research opens a novel area of research for Alzheimer's disease.

Dr. Iwao Ojima, Chairman of the Department of Chemistry at the State University of New York at Stony Brook, states: "Due to my strong interest in cancer research, I am familiar with the work of [the petitioner], who is now working in Professor Gunda Georg's group, through published literature." Dr Ojima credits the petitioner with "synthesiz[ing] more than one hundred Taxol analogs. Dr. Ojima also states that the petitioner's "findings have implications for novel application in Alzheimer's disease." Dr Ojima further states that petitioner's "research ability and research accomplishments distinguish him from others and make him a unique scientist in the cancer research area."

Dr. Binghe Wang, Assistant Professor of Chemistry, North Carolina State University, describes the petitioner as an "expert in the design and synthesis of novel Taxol analogs related to cancer research." Dr. Wang states that the petitioner's findings have shown that Taxol has a "protective effect on primary neurons, indicating the potential beneficial effect of such compounds in treating and preventing Alzheimer's disease."

Dr. Ravi Varma, Chemist and Project Officer, National Cancer Institute, National Institutes of Health, states:

I know [the petitioner] through his synthetic work with Dr. Georg on the Tyloindicines, a

class of plant materials which have shown very promising anticancer activity in initial tests in our Institute... [The petitioner] is the only individual working on this project... [The petitioner] has already submitted for tests at our Institute a few compounds which are closely related to the Tyloindicines which he synthesized in the laboratory. [The petitioner's] project is thus progressing very well. This type of research is of very high relevance an importance to our nation in our quest to eradicate various types of cancer.

The record also contains an article released by the *Reuters* newswire service that states:

NEW YORK (Reuters) – Laboratory studies of the drug Taxol suggest it may someday help in the battle against Alzheimer's disease. Scientists at the University of Kansas in Lawrence say the drug slowed the damage of brain cells caused by amyloid protein fibers. Animal brain cells not treated with Taxol withered and died within 48 hours...

The petitioner also submits copies of four of his articles that were published in scholarly scientific journals. When judging the influence and impact that the petitioner's published 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. In this case, the petitioner has submitted citation histories for all four of his published articles. While some of the citations are self-citations by the petitioner or his collaborators, the majority of the citations demonstrate the favorable response of independent researchers. These citations show that other scientists have acknowledged the petitioner's influence and found his work to be significant.

The director denied the petition, indicating that the petitioner met the first two prongs of the above-described national interest test, but that the petitioner had not established his ability to serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

On appeal, counsel argues that the preponderance of the evidence demonstrates the petitioner's eligibility for the national interest waiver. Counsel also states that the director failed to consider evidence supplementing the record. Counsel indicates that on September 1, 2000, the petitioner completed all the requirements for his Ph.D. and that this information was forwarded to the Service. This evidence 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 beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

We concur with counsel's assertion that the director's decision was contrary to the weight of the evidence. The preponderance of the evidence of record shows that the petitioner's contributions have garnered attention throughout the biomedical research field. The independent witness letters, citation histories, and media coverage support counsel's contention that the petitioner has impacted

the field beyond his educational institution. The witnesses attesting to the value of the petitioner's work have not been limited to the petitioner's research collaborators at UK. Furthermore, the value of the petitioner's contribution is not tethered to one single short-term project; witnesses have described valuable contributions arising from the petitioner's work in past projects, indicating that the petitioner has established a prior track record of achievement.

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. That being said, the above testimony, and further testimony in the record, establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.