

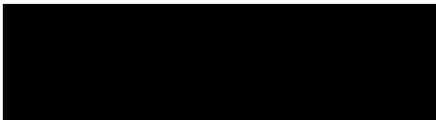


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: EAC 00 259 50818

Office: VERMONT SERVICE CENTER

Date:

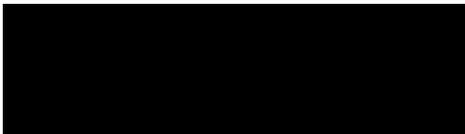
OCT 29 2002

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, 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. At the time of filing, the petitioner was a research associate at the University of Pittsburgh Cancer Institute ("UPCI"). 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.

Counsel states that the job offer requirement should be waived in this instance because the employer would otherwise be forced to hire an "under-qualified" research associate or none at all." Counsel indicates that UPCI would have to give consideration to every worker with "the 'minimal' requirement, *i.e.* an associate or baccalaureate degree." If, as counsel claims, the petitioner's position requires only an associate degree, then it is not a professional position because the pertinent definition of "profession" at 8 C.F.R. 204.5(k)(2) states that a professional position must require, at a minimum, a bachelor's degree. Conflicting definitions of "profession" or "professional" from other regulations or sources that do not expressly pertain to this immigrant classification are irrelevant in this respect. Thus, we cannot accept counsel's arguments without also arriving at the unavoidable conclusion that the petitioner is not a member of the professions.

We do not, however, accept counsel's assertion that an individual with a two-year associate degree meets the minimal qualifications for the petitioner's position. Counsel's argument in this vein relies on the assumption that the petitioner's position is that of a "Research Assistant (Scientific Helper/Laboratory Assistant)" as defined by the Department of Labor. In fact, the petitioner is not merely a laboratory assistant, conducting routine tasks under the close supervision of researchers rather than actually performing research. He is plainly a postdoctoral research associate, a higher position than a research assistant and one that, as the title shows, requires a doctoral degree. Counsel's inaccurate statements regarding the fundamental nature of the petitioner's work necessarily reflect on the reliability of counsel's other assertions. In any event, the assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3

(BIA 1983); Matter of Obaighena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The decision must rest, in the final analysis, on the evidence itself rather than on counsel's interpretation and commentary regarding that evidence.

Along with copies of the petitioner's published research and background documentation pertaining to the petitioner's field of research, the petitioner submits several witness letters explaining the nature of his work. University of Pittsburgh Professor Elieser Gorelik states:

I am the head of the overall research project in which [the petitioner] is carrying out his research. Our research deals primarily with the mechanisms of melanoma formation and finding the effective method of treatment of melanoma. . . . Melanoma is the most serious form of skin cancer. . . .

When [the petitioner] arrived in 1997, he had already spent 10 years carrying out research in molecular biology. More importantly, his research was highly significant and successful. . . . [The petitioner] has a great deal of experience in molecular biology, cloning and sequencing genes, genetic engineering, gene transfection as well as various aspects of the experimental virology and oncology. His expertise was crucial for success in our research.

██████████ describes technical details of the petitioner's work, such as his discovery of crucial aspects of the action of a retrovirus upon a gene which "might be responsible for the malignant transformation of normal cells." ██████████ states that the petitioner's work contributes to the laboratory's efforts to slow cancer growth by preventing the growth of new blood vessels, as well as attacking cancerous cells via the immune system.

██████████ assistant professor at Albert Einstein College of Medicine, states that the petitioner's "research will very much further our national interest because it relates to developing, validating and improving the efficacy of treatment methods for cancer." ██████████ asserts that the petitioner's "work involves a number of cutting-edge technologies" and she praises the petitioner's "rare intellect" and "experience in carrying out elaborate and highly-instrumented experiments." Although she does not mention it in her letter when listing the reasons that she is "fully familiar with the [petitioner's] research ██████████ was an assistant professor at the University of Pittsburgh from 1994 until moving to ██████████ at some point between 1998 and 2000. Indeed, accompanying ██████████ letter is an outdated *curriculum vitae* which states her current employer as the University of Pittsburgh.

██████████ of the Cleveland Clinic Foundation, also used to be a researcher at the University of Pittsburgh, but only until 1988, several years before the petitioner's arrival there in 1997. Dr. Shu states:

[The petitioner's] research is directed at exploring a methodology for increasing the effectiveness of angiostatin and endostatin, two antiangiogenic factors, in combating breast and other cancer. The preliminary research findings by Dr.

Gorelik's laboratory at Pittsburgh [are] very positive. The problematic aspect of the research, however, is the production and micro-molecular manipulation of angiostatin and endostatin. The techniques involved in this process require highly complex laboratory procedures and equipment and require as well a highly researched and exceptionally qualified researcher—[the petitioner]—to carry out this research.

██████████ a research scientist at the U.S. National Cancer Institute, states that the petitioner's work "is substantial and significant . . . and far exceeds that which could be expected from a minimally-qualified research associate." ██████████ asserts that the petitioner "has also made a number of important discoveries in this area, such as the pattern of DNA methylation on tissue inhibitors of metallo proteinase." ██████████ asserts that the petitioner will "continue playing a critical role in resolving the role that anti-angiogenesis treatment can play in cancer."

██████████ director and associate professor at ██████████ and Eugenics, where the petitioner worked from 1992 to 1997, states that the petitioner "is one of the best researchers I know of," and that the petitioner "performed [many] very important scientific experiments" at the institute, primarily devising diagnostic tests for various ailments.

The director requested further evidence that the petitioner had met the guidelines published in Matter of New York State Dept. of Transportation. In response, counsel asserted that the letters submitted with the initial filing of the petition should suffice to address the director's concerns. The petitioner submitted additional letters and copies of grant documents. The grant documents did not mention the petitioner, because the petitioner joined the projects while they were already in progress. The petitioner also discussed awards he received in China, but his statements regarding those awards do not constitute evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 and background materials concerning the labor certification process. Counsel argues that the director unfairly held the petitioner to an evidentiary standard that is more applicable to aliens of extraordinary ability (section 203(b)(1)(A) of the Act) than to the classification the petitioner seeks. Specifically, counsel states that only aliens of extraordinary ability must establish "a widely-accepted breakthrough or wide recognition as representing the top of the field." The director's reference to "the top of the field" does, in fact, derive from the extraordinary ability regulations at 8 C.F.R. 204.5(h)(2). Notwithstanding the director's poor choice of words, on balance the director's decision withstands appellate scrutiny. The director properly found that, while cancer research as a whole is important, participation in cancer research does not create a presumption of eligibility for the national interest waiver.

While sustained national acclaim at the top of one's field is not a prerequisite for the national interest waiver, Matter of New York State Dept. of Transportation, *supra*, nevertheless makes it clear that an alien must stand out from others in the field to an extent that is significant on a national scale. One need not be one of the very top or best known cancer researchers to have a national impact on cancer research, but this threshold is higher than simply demonstrating that one's employer would have difficulty locating a better-qualified worker for what the record describes as a two-year appointment as a postdoctoral research associate.

The materials that the petitioner has submitted establish that the petitioner plays a significant role in the research projects at UPCI, but they do not show that the petitioner has had an especially significant impact on cancer research nationally. Every research project has key personnel, but it does not follow that the key personnel of every project merit national interest waivers. The record does not demonstrate that the petitioner is responsible for particularly important research findings. Rather, the record focuses on how well suited the petitioner is to perform specific tasks in the context of projects already underway when he arrived. While many of these tasks constitute original research rather than routine laboratory procedures (as documented by the petitioner's author credits on published articles), the record lacks evidence (e.g., documentation of heavy independent citation) to show that the petitioner's work has had a demonstrable impact and influence outside of the University of Pittsburgh.

Counsel maintains that the petitioner has submitted letters from independent sources, but as we have observed above, one of the named independent sources was actually an instructor in the oncology (cancer) department of the University of Pittsburgh while the petitioner was researching cancer at UPCI. The fact that the petitioner has selected witnesses who have provided favorable letters on his behalf does not establish to what extent (if any) his findings have been implemented by other researchers, or have influenced the treatment of cancer at the clinical level.

Counsel contends that Matter of New York State Dept. of Transportation "is wrongly decided on a number of grounds." 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. Counsel's disagreement with that decision does not invalidate or overturn it. The director's reliance on relevant, published, standing precedent does not constitute error.

We note that Service records indicate that the petitioner is the beneficiary of an approved immigrant petition, filed on his behalf by his employer, in a different classification with no national interest requirement. Because we have not examined the record of proceeding pertaining to the approved petition, and because the two different immigrant classifications have significantly different eligibility requirements, we cannot comment on its content or compare that record with the record now before us. Subsequent to the approval of the new petition, the petitioner applied for adjustment of status in April 2002, and that application is still pending. We note, therefore, that the petitioner has already obtained the one thing that this office would be able to provide to him, i.e. the right to apply for adjustment of status. Approval of the petition at hand would not in any way

expedite the processing of an already-filed adjustment application, nor would it inherently improve the chances for the approval of that application.

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.