



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: [Redacted] Office: Nebraska Service Center Date: 16 SEP 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, Nebraska 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 post-doctoral researcher at Ohio State University ("OSU"). 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 petition was filed on June 14, 2000. 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, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

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 sought. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, and that the proposed benefits of her 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.

Along with evidence of her published research and academic credentials, the petitioner submits several witness letters [redacted] Assistant Professor of Entomology, Nematology, and Environmental Science at OSU and Director of the Entomopathogenic Nematology Laboratory, states:

Entomopathogenic (or insect-parasitic) nematodes are used for biological control of insect pests as an alternative to chemical insecticides. The nematodes are being developed

commercially and are currently used to control pests impacting citrus, cranberries, strawberries, mushrooms, turfgrass, and greenhouses. They are replacing the use of toxic chemicals and are thus contributing to the preservation of our environment and to the safety of humans, pets, and wildlife... Although these nematodes are commercially available and successfully used for large-scale application in field pest control, the inability to keep the shelf-life of entomopathogenic nematode for a long period is a major limiting factor in their use as soil biopesticides. The maximum shelf-life for nematodes is about six months, far short of the two-year industry standard for conventional insecticides. Therefore, enhancement of nematode shelf-life is a critical issue in realizing their full biological control potential. After joining my laboratory, [the petitioner] initiated studies to unravel the mechanisms of aging in insect-parasitic nematodes in order to develop novel approaches to enhance their shelf-stability.

In a short time, [the petitioner] discovered that there is a large genetic variability in field collected strains of insect-parasitic nematodes. She also demonstrated that the nematode longevity is correlated with their ability to tolerate major environmental stresses including heat, freezing, and desiccation. From the practical point of view, her discovery provides critical guidance when deciding which strains should be chosen to control pests more efficiently. The strains she found to be more tolerant of environmental stresses and which lived longer are better candidates as biological insecticides. [The petitioner] presented these results in the 74th annual meeting of the American Society of Parasitologists, and the 38th annual meeting of the Society of Nematologists at Monterey in July 1999... Currently, she is cloning the first gene from insect parasitic nematodes that extends longevity and imparts stress tolerance. She has already found the high similarity of these longevity-related gene in insect-parasitic nematodes and *Caenorhabditis elegans*, which is a well-known molecular biology study model for eukaryotes... The extended shelf-life of nematodes that results from the extension in longevity will make a huge difference in the use pattern of insect-parasitic nematodes. They will be more readily available to farmers and homeowners, and will become readily accepted as alternatives to toxic chemical pesticides in agriculture.

Additional witnesses from OSU, such as [REDACTED] focus on the undoubted importance of research devoted to improving the shelf-life of insect-attacking nematodes. Pursuant to published precedent, the overall importance of a given project or area of research is insufficient to demonstrate eligibility for the national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987).

[REDACTED] Professor of Entomology, OSU, states: “[The petitioner] is clearly one of the most productive researchers in her laboratory. By any of our usual measures, for example publications and presentations, she is both generating new information and getting it out to other scientists.” Similar to [REDACTED] many of the petitioner’s witnesses have referred to her published articles and presentations at scientific conferences. The record, however, contains no evidence that the presentation or publication of one’s work is a rarity in petitioner’s field, nor does the

record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's work in their research.

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." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." When judging the influence and impact that the petitioner's 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, demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner provides no evidence that her articles have been heavily cited.

Emeritus Professor of Saga University in Japan, states that the petitioner began pursuit of her master's degree in his laboratory in 1993. He describes the petitioner's Ph.D. research and credits the petitioner with discovering that a "high nictation rate predicts high penetration efficiency into a host insect." He also credits the petitioner with advancing general knowledge regarding nematode foraging behavior and low host invasion rates.

The petitioner's initial five witnesses include her current research supervisor at OSU, three colleagues from OSU, and her former research supervisor from Saga University. All five of the witnesses have direct ties to the petitioner. In order to qualify for the classification sought, the petitioner must demonstrate that she has had some measure of influence on the agricultural research field as a whole. Letters from those close to the petitioner certainly have value, for it is those individuals who have the most direct knowledge of the petitioner's specific contributions to a given research project. Still, these individuals became aware of the petitioner's research work because of their close contact with the petitioner; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we could expect with research findings that are especially significant. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of the petitioner's published articles, is more persuasive than the subjective statements from individuals selected by the petitioner.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the petitioner's co-authorship of scholarly articles, but indicated that "publication and presentation of research work are inherent to the position of a researcher." The director further noted that the witness letters, while credible, did not establish

that the petitioner's work "was known and considered unique outside her immediate circle of colleagues."

On appeal, the petitioner submits a second letter from [REDACTED] states that the petitioner plays an important role in research funded by the United States Department of Agriculture. [REDACTED] describes two competitive grants that he applied for with the assistance of the petitioner. He indicates that the petitioner co-authored the proposals and provided preliminary data analyses. According to [REDACTED] one of the projects was awarded funding in June 2000 and the other is still pending. [REDACTED] discusses the petitioner's current research efforts in his laboratory and a future proposal under preparation that will feature the petitioner as a "principal investigator." Several of the events discussed in [REDACTED] second letter 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 aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. While [REDACTED] letter shows that the petitioner's research efforts continue, it provides no specific evidence of any significant achievements or contributions in the nematology or agricultural research fields. To establish eligibility under this visa classification, the petitioner must clearly demonstrate a past history of significant accomplishment with some degree of influence on the field as a whole.

In a statement accompanying the appeal, counsel argues that the petitioner's record of publication and presentation demonstrates "significant and substantial contributions to the field." The petitioner, however, has not provided a citation history of her published works. Without evidence reflecting independent citation of her articles, we find that the petitioner has not significantly distinguished her results from those of other researchers in the field. It can be expected that if the petitioner's published research were truly significant, it would be widely cited. The petitioner's participation in the authorship of five published articles prior to the filing of the petition may demonstrate that her efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's published works have garnered significant attention from other researchers throughout the scientific community.

Counsel cites the numerous testimonial letters as evidence of the petitioner's impact on her field. We note that the petitioner's witnesses consist entirely of individuals with direct ties to the petitioner. The witness letters reflect that the petitioner's contributions have arisen from work on ongoing research projects lead by [REDACTED]. The petitioner has not been shown as being the initiator of research projects that yielded significant findings. As a researcher in the laboratories of [REDACTED] and [REDACTED] the petitioner's duties involved conducting research that was already underway well before the petitioner had arrived. The petitioner has not shown that her individual work or collaborative findings within their laboratories have had significant repercussions throughout the field. Thus, the petitioner's contributions to agricultural research, such as demonstrating the large genetic variability in field collected strains of insect-parasitic nematodes and that nematode longevity is correlated with their ability to tolerate major

environmental stresses, appear to be incremental rather than fundamental. While the record amply documents that the petitioner has been an active researcher at both OSU and her former university in Japan, it does not establish that the petitioner's research has had a greater or more lasting impact than that of other researchers in the agricultural research field.

Without evidence that the petitioner has been responsible for significant achievements in the field of agricultural research, we must find that the petitioner's assertion of prospective national benefit is speculative at best. Clearly, the petitioner's colleagues have a high opinion of the petitioner and her work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While some of the witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in her field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent researchers. In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches itself to the visa classification sought by 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.

ORDER: The appeal is dismissed.