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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



File:



Office: Nebraska Service Center

Date:

16 SEP 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, Nebraska Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen and to reconsider. The motion will be rejected as untimely, the matter will be reopened on a Service motion, and the petition will remain denied.

The petitioner seeks to classify the beneficiary 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, a developer of drug delivery systems, seeks to employ the beneficiary as a laboratory specialist. 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 beneficiary 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. The director also found that the petitioner had not properly applied for the national interest waiver in accordance with the Service regulation at 8 C.F.R. 204.5(k)(4)(ii).

The Service regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part:

The director may exempt the requirement of a job offer, and thus of a labor certification... if such exemption would be in the national interest. To apply for the exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.

The petition, filed on July 23, 1998, did not include Form ETA-750B. On September 28, 1998, in accordance with the Service regulation at 8 C.F.R. 103.2(b)(8), the director issued a request for evidence, stating:

For the alien to qualify for an exemption from the requirement of a job offer, and thus of a labor certification, you must submit Form ETA-750B, "Statement of Qualifications of Alien," in duplicate and evidence to support your claim that such an exemption would be in the national interest.

On October 28, 1998, the petitioner responded to the director's request pertaining to the supporting evidence, but failed to provide Form ETA-750B. The record reflects that the director properly informed the petitioner regarding its omission of Form ETA-750B. At the time of the director's decision, the record did not contain this critical document, and therefore, by regulation, the beneficiary could not be considered for a waiver of the job offer requirement.

On June 21, 1999, the director denied the petition, indicating 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. Additionally, the director stated: "The petitioner failed to submit Form ETA-750B, 'Statement of Qualifications of Alien.'"

On July 21, 1999, the petitioner filed an appeal of the director's decision. The Administrative Appeals Office, ("AAO"), acting on behalf of the Associate Commissioner, concurred, in part, with the director's finding and dismissed the petitioner's appeal on April 10, 2000. The decision noted: "Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7."

In May of 2000, the petitioner attempted to file a motion, but it was not accompanied by the proper remittance.

On June 20, 2000, the petitioner filed (with the proper remittance) a motion to reopen the AAO's decision dismissing the appeal.

The Service regulation at 8 C.F.R 103.5, states, in pertinent part:

Reopening or reconsideration.

(a) Motions to reopen or reconsider in other than special agricultural worker and legalization cases--

(1) When filed by affected party--

(i) General. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, 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 was beyond the control of the applicant or petitioner.

The motion was not properly filed within the required thirty-day period and nothing has been submitted to demonstrate that the delay was reasonable or beyond the control of the petitioner. Therefore, the petitioner's motion must be rejected as untimely.

The initial appellate decision rendered by the AAO, dated April 10, 2000, was devoted solely to the absence of Form ETA-750B. On Service motion, we will first consider whether the director improperly denied the petition based on the absence of the Form ETA-750B. This decision will then examine the merits of the petitioner's national interest waiver claim.

The Service regulation at 8 C.F.R. 204.5(k)(4)(ii) requires the petitioner to submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The petitioner, however, did not provide this crucial document at the time of filing. The director then specifically informed the petitioner, in writing, that the Form ETA-750B must be provided. The petitioner failed to comply with the director's request and, therefore, the director denied the petition. Based on the above discussion and chronology of events, we find that the director acted in accordance with Service regulations in denying the petition.

In the notice of denial, the director again informed the petitioner regarding the absence of Form ETA-750B. Although the petitioner had received two written notifications from the director indicating that Form ETA-750 was missing from the record, the petitioner still failed to provide the form in support of the appeal received on July 21, 1999.

Now, in support of its untimely motion, the petitioner, for the first time, provides duplicate copies of the Form ETA-750B. However, in cases where a petitioner is put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). In this case, the petitioner failed to comply with the director's written request for evidence. The Form ETA-750B provided in support of the untimely motion will not be considered in this proceeding, the previous decision of the AAO will be affirmed, and the petition will remain denied.

As noted above, the initial appellate decision rendered by the AAO did not address the other grounds for denial cited in the director's decision. For purpose of thoroughness, we will also consider the other issues raised in the director's denial and the evidence provided by the petitioner in support of the appeal.

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 beneficiary holds a Master of Science degree in Material Science and Engineering from the University of Utah. The director acknowledged that the beneficiary 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 beneficiary's contributions in the field are of such unusual significance that the beneficiary 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. The petitioner must demonstrate the beneficiary's past history of achievement having some degree of influence on the field as a whole. Id. at note 6.

In a letter accompanying the initial filing, James Herrin, Executive Director of Corporate Development, MacroMed, describes the beneficiary's work:

[The beneficiary] has been responsible for development of a very important technology at [REDACTED]. This technology, which allows for controlled-release of orally administered drugs, is patented and proprietary [REDACTED]. The ability to control drug release allows for more effective and safer pharmaceutical products, as well as improving patient compliance, saving millions of dollars in healthcare costs. This program is progressing very well, thanks to [the beneficiary] and is extremely important to [REDACTED] future success.

* * *

[The beneficiary] has been the primary person responsible for this project since [REDACTED] brought development in-house from the University of Utah.

Dr. You Han Bae, Associate Professor, University of Utah, states:

The concept for this new product is based on a U.S. patent issued to the University of Utah. I am one of the inventors named on the patent.

* * *

After filing the patent, two postdoctoral research fellows at the university worked on the project to improve and expand the initial concept and to change constituting materials for this system... The work from the postdoctoral fellows has significantly improved the system. However, the greatest improvement was made by the effort of [the beneficiary] when he was employed by the university. His contribution and skill has made the system commercially feasible. A company located in Salt Lake City, [REDACTED] evaluated the potential of commercialization of the concept and licensed the patent. Because [the beneficiary] was the most experienced in this work and the only person who can continue to further the project for commercialization, he was hired by [REDACTED].

The petitioner submits additional witness letters confirming that the beneficiary is in the process of developing a commercially viable drug delivery system. It is important to note that "two postdoctoral research fellows" from the University of Utah are credited with the patent for the drug delivery system, not the beneficiary. Furthermore, the letters offered by the petitioner provide no specific details regarding the beneficiary's past track record of proven accomplishment in the biomedical engineering field. The witnesses discuss the beneficiary's ongoing project to make a patented drug delivery system commercially feasible, but do not demonstrate the beneficiary's impact on the field beyond his work at [REDACTED]. The petitioner's initial witnesses include two officials from [REDACTED] professor from the University of Wisconsin who sits on [REDACTED] board of directors, and four of the beneficiary's colleagues from the University of Utah. The witness letters provided fail to demonstrate that the petitioner's prior efforts have significantly influenced the area of drug delivery research or the larger biomedical engineering field.

Along with the witness letters, the petitioner provides evidence of his co-authorship of three published articles. While the beneficiary's participation in the authorship of these articles may demonstrate that his research efforts yielded some useful and valid results, the impact and implications of the beneficiary's findings must be weighed. 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 of the beneficiary's work, 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 beneficiary's findings. Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the beneficiary's work. The petitioner has failed to provide a citation history of the beneficiary's published work demonstrating that it has garnered significant attention from throughout the biomedical engineering field.

In response to the director's request for evidence, the petitioner submits a letter from Dr. Gaylen Zentner, Vice President of Research and Development for [REDACTED]. Dr. Gaylen states: "Although [the beneficiary] has not published yet in this area due to confidentiality and competitive concerns at [REDACTED] his work will become widely known as commercial development progresses and will have substantial influence among his peers and in industry and academics." This statement supports the director's conclusion that the beneficiary has not yet impacted the biomedical research field. Additional statements from Dr. Gaylen offer only speculation regarding the beneficiary's future achievements. 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. A petitioner cannot file a petition under this classification based on the expectation of the beneficiary's future eligibility.

According to the majority of witness letters provided, the beneficiary's eligibility under this classification is based on future contributions resulting from his participation in the development of a drug delivery system that has not yet been marketed. The question necessarily arises as to how the beneficiary's research, which, due to proprietary concerns is not shared beyond [REDACTED] advances knowledge throughout the biomedical research field or benefits the national interest of the United States. The beneficiary's research for [REDACTED] appears mainly of interest to that company and does not appear to have captured the attention of independent researchers throughout the field. Conducting ongoing research that is licensed and confidential does not relieve the petitioner of the burden of demonstrating how the beneficiary's past record of

accomplishment has already impacted the drug delivery research field. Pursuant to published precedent, the beneficiary must establish a past history of demonstrable achievement with some degree of influence on the field as whole.

The director denied the petition, concluding that the petitioner had not shown that the benefits of the beneficiary's services were national in scope. The director also found 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 submission of testimonials from those close to the beneficiary, but indicated that the letters did not establish the beneficiary's work was "known and considered unique outside his immediate circle of colleagues."

On appeal, the petitioner submits letters from Alex Kim and Jim Herrin of [REDACTED] Inc. Their letters describe [REDACTED] business development activities and how they ultimately serve the national interest. While the Service recognizes the undoubted importance of drug delivery research and development, eligibility for the national interest waiver must rest with the beneficiary'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. 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). By asserting the beneficiary's involvement in the U.S. healthcare industry inherently serves the national interest, the witnesses essentially contend that the job offer requirement should never be enforced for the beneficiary's field, and thus this section of the statute would have no meaningful effect. Congress plainly intends the national interest waiver to be the exception rather than the rule.

Dr. Robert Langer, Professor of Chemical and Biomedical Engineering, Massachusetts Institute of Technology, an undisputed expert in the area of drug delivery systems, credits the beneficiary with making a unique and significant advance in the field of oral controlled-release drug delivery originating from "licensed patent number 5,226,9022." The beneficiary, however, is not listed as one of the three inventors of this patent that was filed on July 30, 1991. It could easily be argued that Alex Kim, Business Development Director at [REDACTED] is the driving force behind the project given that he is a named inventor of the patent. Dr. Langer also refers to a pending patent for which the beneficiary authored a research paper entitled "A Polymer Blend Having Swelling and Deswelling Properties." The petitioner, however, provides no evidence of the paper or proof of its existence prior to the filing of the petition. See Matter of Katigbak, *supra*, 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.

The petitioner also submits a letter from Orrin G. Hatch, United States Senator for Utah, stating that the fact that the beneficiary is not highly published "does not in any way devalue [the

beneficiary] or the technology he has provided to [REDACTED]. We concur with the Senator's assertion that the petitioner's work is important to [REDACTED]. The petitioner, however, must demonstrate that the beneficiary's contribution extends beyond [REDACTED] to the biomedical research field as a whole. Senator Hatch concludes his letter by noting that the technology developed by the beneficiary has a "high probability of product commercialization."

Many key witnesses have couched their remarks not in terms of what the beneficiary has done, but what he and his company are likely to achieve at some unspecified future point. For example, Dr. Langer states: "Once fully developed, these technologies will make an important contribution to the controlled drug delivery and healthcare in the U.S." Dr. Bae also asserts his confidence in the future significance of the beneficiary's work, stating: "[The petitioner's] proven ability will significantly contribute to this and other product developments in the future." The majority of the witness letters address the beneficiary's future results rather than a past record of demonstrable achievement. Without evidence that the petitioner has been responsible for significant achievements in the field of drug delivery development, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations of Dr. Bae, Dr. Langer, and officials from [REDACTED] may yet come to fruition, at this time the waiver application appears premature.

Clearly, the petitioner's witnesses have a high opinion of the beneficiary and his work. The beneficiary's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The beneficiary's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the beneficiary's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent biomedical researchers. In sum, the available evidence does not persuasively establish that the beneficiary'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 Associate Commissioner's decision of April 10, 2000 is affirmed. The petition is denied.