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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: WAC 97 191 51059 Office: CALIFORNIA SERVICE CENTER Date: SEP 24 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

Bert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was initially approved by the Director, California Service Center. On the basis of new information received and on further review of the record, the director determined that the beneficiary petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and revoked the approval of the petition on February 14, 2002. The matter 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 initially indicated that she seeks employment as a biochemist at Pacific Rim Catalytic Resources. 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 does not qualify for classification as an alien of exceptional ability, or for an exemption from the requirement of a job offer.

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.

In the notice of revocation, the director stated "[i]t is agreed that the self-petitioner has earned an advanced degree, therefore, the petition will be limited to the issue of exceptional ability." The director then discusses, at length, the petitioner's ineligibility for classification as an alien of exceptional ability. As an advanced degree professional, however, the petitioner remains eligible to apply for the national interest waiver. The director offers no satisfactory explanation as to the relevance of the lengthy discussion of exceptional ability. This discussion appears to be irrelevant in the face of the director's repeated acknowledgments that the petitioner qualifies as an advanced degree professional.

Counsel cites an April 7, 1999 memorandum from the Acting Deputy Executive Associate Commissioner of the Office of Field Operations, indicating "[a]ll national interest waivers approved prior to NYSDOT<sup>1</sup> should be honored in [adjustment] or immigrant visa proceedings provided that

<sup>1</sup> Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), a precedent decision intended to standardize requirements for national interest waivers. It was issued a year after the approval of the instant petition.

beneficiaries continue to seek employment or are employed in the professional activity which provided the basis of the approval." Counsel maintains that this memorandum bars, under any circumstances, the revocation of any national interest waiver petition approved prior to August 20, 1998. Counsel's interpretation is overly restrictive, removing as it does any discretion on the director's part to revoke the approval of waivers that should never have been approved in the first place, even in the absence of Matter of New York State Dept. of Transportation.

Also, it is important to note that the cited memorandum states that the prior approvals are to be undisturbed only if the "beneficiaries continue to seek employment or are employed in the professional activity which provided the basis for the approval." In the matter at hand, the director observed that the petitioner did not work in the relevant field (biochemistry) from late 1996 to 1998, working during that period in restaurants, law offices, and import-export companies. This information, never contested or addressed by counsel, indicates that the petitioner had stopped working "in the professional activity which provided the basis for the approval." Thus, the director's decision to re-evaluate the petition does not violate the April 7, 1999 memorandum.

Nevertheless, the record also indicates that the petitioner has returned to the field of biochemistry. A letter dated April 6, 2000 (long before revocation proceedings were initiated in December 2001) indicates that the petitioner works at SyStemix, Inc., a division of Novartis, where her duties involve the development of materials intended for "gene therapy for AIDS patients." Thus, while the petitioner's temporary departure from the field of biochemistry raised legitimate questions, that issue had apparently been resolved well before the director issued the notice of intent to revoke in December 2001. The record contains no evidence to show that the petitioner had again left the field of biochemistry after April 2000 (although, should such evidence surface, revocation would once again be worthy of consideration, consistent with the April 7, 1999 memorandum).

We note that, although the strongest cited ground for revocation appears to be the petitioner's work at restaurants and other non-research facilities, that ground was effectively "buried" in an irrelevant discussion of whether the petitioner had accumulated ten years of full-time experience in her field.

The grounds given the greatest emphasis in the notice of revocation concern the significance of the petitioner's research. Some of these arguments appear to derive from Matter of New York State Dept. of Transportation, even though the decision does not specifically cite that precedent decision. Other arguments seem to be more applicable to claims of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. That classification has a higher threshold of eligibility than the classification and waiver that the petitioner seeks in this proceeding.

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 revoking the approval the petition will be withdrawn.

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