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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

APR 09 2003

File: WAC 02 033 52065 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

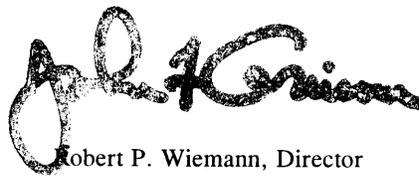
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office 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 chemical research scientist. 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 concluded 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.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General 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 obtained both a Master of Science in chemistry in March 1990 and a Ph.D. in chemistry in June 1995 from the University of California, San Diego. At the time the petition was filed on October 31, 2001, the petitioner was employed as a research scientist for R.W. Johnson Pharmaceutical Research Institute. The petitioner's occupation falls within the pertinent statutory definition as a member of the professions holding an advanced degree. Further discussion of whether the petitioner quantitatively meets the criteria for exceptional aliens as set forth in 8 C.F.R. § 204.5(k)(3)(ii) is moot, because the petitioner has established that he is an advanced degree professional. 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 pertinent 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 pertinent 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.

The director did not contest that the petitioner had established that he would be employed in an area of substantial intrinsic merit and that the proposed benefit of the petitioner's employment relating to the development of new therapeutic drugs would be national in scope. The remaining determination is whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner would merit the special benefit of a national interest waiver, over and above the visa classification he seeks. Eligibility for the waiver is based upon the alien's own qualifications rather than with the position sought. The argument that a given project or occupation is so important that any alien qualified to work in the area must also qualify for a national interest waiver is generally not accepted. By seeking the extra benefit of a waiver of the labor certification procedure, the petitioner also assumes an extra burden of proof. The petitioner must show that he has a past record of accomplishment with some degree of influence on the field as a whole. *Id.* at 219, n.6.

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.

Together with copies of published articles and degrees, the petitioner submits several witness letters. Ernest Wenkert, a professor of chemistry at the University of California, San Diego, indicates that he has known the petitioner since the petitioner was a graduate student. Dr. Wenkert summarizes the petitioner's academic background and asserts that the petitioner is one of the most original scientists he has known. Dr. Wenkert states:

After finishing his doctoral work, [the petitioner] was a postdoctoral fellow in the Departments of Chemistry at the Scripps Research Institute and UCSD, where he worked on the chemical syntheses of antifungal, antitumor natural products. These natural products (Swinholide A, and Maduropeptin) are scarce in nature and chemical syntheses have provided routes for the synthesis of these as well as their simpler analogs, which may be more potent. His pioneering work on these syntheses was published in three highly regarded journals: *The Journals of the American Chemical Society*, *Chemistry-A European Journal* and *Tetrahedron Letters*.

Dr. Richard H. Hutchings, a team leader at Pfizer Global Research and Development, collaborated with the petitioner at Johnson & Johnson and attests to his expertise in the area of organic synthesis. He adds that the petitioner's development of a number of compounds related to the treatment of allergies and asthma "show excellent efficacy against the target enzyme/receptor. . . . No other research chemist has been so successful in this area of immunology and the [the petitioner's] departure from the US would be a major setback in our efforts to treat allergy and asthma."

K.C. Nicolaou, a professor of chemistry at the University of California, San Diego and member of the National Academy of Sciences, states that he was the petitioner's supervisor while the petitioner was a postdoctoral fellow. Dr. Nicolaou commends the petitioner's work and asserts that the petitioner's work has significantly advanced the field. Dr. Nicolaou adds:

These projects were very novel and challenging, and [the petitioner] worked with diligence and creativity. His knowledge in synthetic organic chemistry is superior. He always devised alternative approaches when the projects were not moving forward. The solutions he created to the Swinholide A project helped lead to its total synthesis and that of its congeners. This work has been published in two papers in internationally acclaimed, peer-reviewed journals such as *The Journals of the American Chemical Society* and *Chemistry-A European Journal*. The petitioner also made invaluable contributions to the Maduropeptin project. For example, for the synthesis of its core moiety, he synthesized some chemically very sensitive advanced intermediates by utilizing Sonogashira type couplings.

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After his academic research work, [the petitioner] began working as a medicinal chemist at Johnson & Johnson in 1996. He has made seminal contributions for the treatment of benign prostatic hyperplasia (BPH), the most common clinical disorder observed among elderly men. . . . From this project he has written two manuscripts as primary co-author

and a patent has been granted. . . . [The petitioner] designed compounds which are very active against a protease enzyme and have potential for the treatment of chronic autoimmune diseases such as lupus, rheumatoid arthritis, and asthma. He is working on another project involving asthma and allergy. Three patents have been written recently for the US and world filing.

Dr. Keiichi Ajito, the chief researcher for Meiji Seika Kaisha, Ltd., indicates that he was a co-author with the petitioner for two scholarly research articles. This research involved the Swinholide A synthesis project described above by Dr. Nicolaou. Dr. Ajito states:

I wish to point out that [the petitioner] deserves credit for conducting the majority of the research for these articles, which have been published in the world's leading scientific journals, including the *Journal of the American Chemical Society* and *Chemistry-European Journal*.

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In my 20 years of research career, [the petitioner] has proven to be an extraordinary co-worker with whom I have had the privilege of associating. . . . [The petitioner] is very inquisitive about new chemistry, and wants to try new and efficient ways to carry out reactions. His in-depth knowledge in the subject matter had helped us to move forward in the project quite quickly. I should mention that the project was going on for almost 5 years and it was not moving forward. After we started the project, the project was completed in 15 months. This is extraordinary.

Dr. Andrew P. Patron, a senior research scientist of Senomyx, Inc., indicates that he was part of the research team with the petitioner at UCSD. Dr. Patron describes the petitioner as “not only a key player on our project; he was also a major motivational force within the lab” who often challenged the other researchers.

Dr. Kazunori Koide, an assistant professor of chemistry at the University of Pittsburgh, also collaborated with the petitioner when they worked in Dr. Nicolaou’s Swinholide A research project. Dr. Koide characterizes the petitioner as a ‘walking dictionary’ in chemistry and regards him as one of the top 5% organic chemists in the U.S.

As noted in the director's denial, the petitioner’s references discussed above come from his immediate circle of present and past colleagues and collaborators. Counsel criticizes the director for implying that the witnesses' accolades are not sincerely offered. While we acknowledge the importance of recommendations from those who are most familiar with the petitioner's work, the director specifically stated that the credibility of the petitioner's witnesses is not being questioned, but that the evidence should indicate that the petitioner's research has impacted the field beyond the petitioner's acquaintances. We do not interpret this as an accusation of improper bias. We note that testimonies by independent experts in the petitioner’s field are offered on appeal that more persuasively indicate

that the petitioner has had some degree of influence on his field as a whole. These letters are discussed below.

Peter Beak, a professor of chemistry at the University of Illinois in Urbana-Champaign, states that he is aware of the petitioner's work because he regularly follows the chemistry literature. Dr. Beak asserts that the petitioner's papers on the reactions of diazocompounds with furans are "exceptional." Dr. Beak adds:

[The petitioner's work on the total synthesis of Swinholide A, an anti-cancer, anti-tumor agent, is an outstanding achievement, and the work has been published in two international journals in chemistry. His work on the Maduropeptin, another anti-tumor, antibiotic natural product, was published in another prestigious journal.

* * *

Cathepsin S has been implicated in a number of immune system responses. This is a very distinctive project and for the first time, a number of reversible inhibitors of cathepsin S were obtained. The structurally unique compounds [the petitioner] has designed are very potent and selective against other cathepsins. Four patents have been submitted and two of these patents have been issued recently.

Dr. Tapan K. Bera, a staff scientist with the NIH National Cancer Institute, asserts that he knows of the petitioner's work because it overlaps his own research investigating the genes involved in prostate and breast cancer. Dr. Bera cites the petitioner's work on the synthesis of Swinholide A and Maduropeptin and the petitioner's design and preparation of potent compounds for use in the treatment of benign prostatic hyperplasia (BPH) in elderly men.

G. K. Surya Prakash, a professor of chemistry at the University of Southern California, Los Angeles, states that "as a synthetic organic chemist, I have followed [the petitioner's] work." Dr. Prakash reiterates the petitioner's accomplishments noted by other witnesses, which he characterizes as including "unprecedented and significant advances in the fundamental knowledge of the field."

The record reflects that the petitioner has made significant contributions to his field. In addition to advances mentioned by the witnesses, it is noted that when the petitioner served as a key member of the Nicolaou research team, he co-authored two articles that have been cited by independent sources twenty times. When considering these publications and the independent citations, the director noted that although other scientists may have found the petitioner's work useful, a scientist does not earn widespread acclaim by producing useful or valid results. The director concluded that the evidence did not demonstrate that the petitioner had influenced his field to a greater extent than those of other qualified researchers also contributing to the field.

We agree with the director that the publication of original articles is inherent to the field of research. Nevertheless, the frequent citation to the petitioner's articles by many different independent researchers strongly suggests that these articles have been influential. Although other letters by disinterested

scientists in the field would certainly have bolstered the petitioner's case, we conclude that all of the evidence considered together sufficiently establishes that the petitioner has influenced his field as a whole.

The director throughout the decision made references to the regulatory criteria required to establish eligibility as an alien of extraordinary ability under 8 C.F.R. § 204.5(h). While the director also discussed the petitioner's eligibility for a waiver of the labor certification requirement under *Matter of New York State Dept. of Transportation*, it appears his decision, in part, was mistakenly based on the distinct and more rigorous requirements to establish eligibility as an alien who is at the very top of his or her field of endeavor under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A).

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. In this case, however, the petitioner has established that the wider scientific community recognizes the significance of this petitioner's accomplishments rather than the importance of 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. 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, 8 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.