

B5

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

APR 16 2003

File: WAC 02 024 50049 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:

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.


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 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 postdoctoral biomedical researcher. At the time she filed the petition, the petitioner was a postdoctoral researcher for the School of Medicine at the University of California, San Francisco (UCSF). 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 a Ph.D. and a M.D. from Shanghai Medical University in 1998. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus 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.

On appeal, counsel argues that the director considered the evidence under the standard for a higher classification than that sought by the petitioner. We agree with counsel that the director's decision contains several erroneous references to the criteria for aliens of extraordinary ability under section 203(b)(1)(A). In order to obtain a waiver of the labor certification requirement in the national interest, one need not be one of the small percentage at the top of one's field. While the director subsequently goes on to discuss the evidence under the correct standard and even

states that national acclaim is not required for the classification sought, the initial discussion is erroneous, and those portions of the director's decision are withdrawn. Because the decision also correctly analyzes the evidence under the statutory requirement of section 203(b)(2) and the precedent decision, *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), the decision will be upheld.

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 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, supra, 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.

We concur with the director that the petitioner works in an area of intrinsic merit, biomedical research, and that the proposed benefits of her work, improved understanding of cardiovascular disease, are national in scope. It remains to determine whether the petitioner has established that she will serve the national interest to a substantially greater degree than would an available U.S. worker with the same minimum qualifications.

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 it 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 she seeks. 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. *Matter of New York State Dept. of Transportation*, at 219, n.6.

The petitioner submits several reference letters in support of her petition. [REDACTED] the petitioner's research advisor at UCSF, explains that his laboratory specializes in research connected with cardiac and skeletal muscle. He credits the petitioner with establishing for "the first time a quantitative DNA binding site affinity spectrum for poly ADP-ribose polymerase a key component of the switch." He emphasizes that the petitioner's work has potential not only for scientific understanding, but also for clinical applications, and characterizes the petitioner as the most knowledgeable person in the world regarding DNA-protein interactions relating to this switch.

Dr. [REDACTED] an associate professor of medicine at Tufts University and the petitioner's former colleague at Shanghai Medical University, describes the petitioner as a dedicated and exceptionally knowledgeable individual whose papers and awards show that she is an excellent medical professional.

Dr. [REDACTED] also describes the petitioner's work with Dr. [REDACTED] and states that her current research involving another transcription factor PARP "will provide promising therapeutic means for treating cardiovascular diseases."

Dr. [REDACTED] of Fudan University and the Shanghai Institute of Cardiovascular Diseases, ranks the petitioner as one of the best graduate students he has supervised. Dr. [REDACTED] states:

Moreover, [the petitioner] evaluated the effects of the rennin-angiotensin-aldosterone system (RAAS) blockage at different sites on LVH regression. She found that ACEI and Angiotensin II AT1 antagonist are better than aldosterone in regression of the interstitial fibrosis in hypertensive LVH in SHR and they also had collagen metabolism at transcription level. These novel findings led her to the first prize in advances of science and technology in 1998 in China.

Dr. [REDACTED] a professor of anatomy and cellular and molecular pharmacology at UCSF, also praises the petitioner's abilities. In his first letter, Professor [REDACTED] explains that he met the petitioner when he joined Professor Ordahl in a joint study of the structure and function of the cellular protein PARP. Dr. [REDACTED] states:

[The petitioner] was working in Ordahl's laboratory on the molecular mechanism that governs cell-specific gene regulation of cardiac troponin T (cTnT) gene, in which PARP was found critical for its cell-specific expression. She quantitatively determined the binding site preferences for PARP, and found two nucleotides sequence mistakes in PARP cDNA in Genbank. Besides, I heard that she was also investigating the protein-

protein interaction between PARP and TEF-1 (another transcription factor) and have [sic] made promising progress.

* * *

It was my consistent impression that [the petitioner] was a well trained, versatile and highly capable individual who took on significant and difficult scientific problems.

Dr. [REDACTED] second letter describes subsequent research that he and the petitioner conducted which resulted in the "first experimental evidence of a discriminatory biochemical mechanism, separating 'DNA damage' induced PARP I auto-modification from the specific double strand DNA-required activation of trans-ADP ribosylation which may occur under physiological condition." Dr. [REDACTED] adds that he and the petitioner have submitted a paper about the project to the journal *Science*, and that the petitioner made "an irreplaceable" contribution to the research. There is no evidence that this paper has been accepted for publication, and its submission to *Science* for review does not establish a significant accomplishment to date. Further, the paper was submitted subsequent to the petition's filing date. A petitioner may not establish eligibility for the visa classification by relying on an achievement attained after the filing date of the petition. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Dr. [REDACTED] a visiting professor at Professor [REDACTED] laboratory, similarly commends the petitioner's research skills. Dr. [REDACTED] states:

[T]he PARP protein is involved in extremely important cell biological processes such as replication, repair, recombination and surveillance of the integrity of the genome, but its exact biological role hasn't been really established yet.

* * *

[T]he petitioner's novel finding marks a substantial contribution in the rapidly growing field of PARP research by focusing on the regulation of transcription. She designed elegant experiments to characterize the PARP-DNA interactions. . . . [T]he petitioner created plasmid DNA samples which will finally solve one of the major questions of PARP biochemistry: Are structures able to activate the PARP enzyme? Understanding the biological role of PARP proteins will bring significant health care benefits to this country because it has been shown that the inhibition of PARP enzymic activity in cases of stroke, ischemia-reperfusion, infarct and LPS-induced inflammation provides significant improvements in the outcome of the aforementioned conditions.

Dr. [REDACTED] an associate professor of anesthesia at UCSF, describes the petitioner as a "highly gifted" scientist. Dr. [REDACTED] summarizes the petitioner's background, praises her previous articles in the treatment of left ventricular hypertrophy (LVH), and concludes that "her ability to combine basic research and clinical medicine set her apart from her peers to such an extent that she is unequivocally one of the top researchers in this field." Dr. [REDACTED] also states that "researchers and scientists across the country, like myself, could have drawn upon [the petitioner's] discoveries." Dr.

█ asserts that his own tissue engineering projects have benefited from the petitioner's work, but does not provide any details. His general observation that researchers could draw upon the petitioner's discoveries does not support the argument that her work has already been influential.

All of the above cited letters are from the petitioner's supervisors, mentors, collaborators or colleagues from her past and present research institutions. Letters from those with direct ties to the petitioner certainly have value, because such persons have direct knowledge of the petitioner's contributions to a specific research project; however, their statements do not show, first-hand, that the petitioner's work has attracted attention on its own merits from the wider scientific community, as might be expected with research findings that are especially significant. Independent evidence that would have existed whether or not this petition was filed, would be more persuasive than the subjective statements from individuals selected by the petitioner.

The petitioner submits an additional letter from █ a senior clinical pharmacologist at the Food and Drug Administration. Dr. █ describes the petitioner as "an outstanding biomedical researcher" who has been conducting cardiovascular clinical and basic research for over 11 years. Dr. █ continues:

[The petitioner] found that the two critical proteins, poly ADP ribosyl polymerase (PARP) and the transcriptional enhancing factor (TEF-1), are crucial in the processing of left ventricular hypertrophy (LVH) and hypertrophic cardiomyopathy (HCM). [The petitioner's] findings about the effects of different DNA (specific or nonspecific) on the auto- or trans-modify function of PARP actually rewrote the notion that PARP was only able to recognize non-specific DNA free ends, auto-modify itself and mediate the DNA repairing. Her results also showed for the first time that PARP also could serve as a special transcriptional factor, recognizing specific DNA sequence and trans-ADP-ribosylated its partner proteins, which [the petitioner] recently summarized in a paper and submitted to the most prestigious academic journal *Science*.

Dr. █ does not indicate how she is familiar with the petitioner's work. While it is clear that she has a high regard for the petitioner's research expertise, Dr. █ description of the petitioner's accomplishments does not establish that the petitioner has already influenced her field to any significant degree, but rather suggests that the petitioner's most significant research achievements have just recently been documented and submitted to a prestigious journal. As indicated above, the submission or publication of articles after the filing date of the petition cannot retroactively establish the petitioner's reputation or impact on her field. Aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. *Matter of Katigbak, supra*.

The record contains evidence that two of the petitioner's academic theses were presented at seminars in China and that she has authored sixteen articles and co-authored two. 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 acknowledgment 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, would demonstrate more widespread interest in, and reliance on, the petitioner’s work.

In this case, the record contains no evidence that independent researchers have cited the petitioner’s work. We cannot conclude that the petitioner’s work has already been influential on her field as a whole.

The record contains evidence that the petitioner is a member of two professional associations and that the petitioner’s academic work and research efforts resulted in “awards and honors” in China. While this evidence may reflect recognition for achievements and significant contributions to her field, it would establish one regulatory criterion for aliens of exceptional ability, a classification that normally requires a labor certification as set forth in 8 C.F.R. § 204.5(k)(3)(ii) enumerating the criteria for an alien of exceptional ability. Similarly, membership in professional associations is another possible criterion to establish eligibility for exceptional ability. We cannot conclude that satisfying two requirements or even the requisite three requirements for this classification makes one eligible for a waiver of the labor certification process.

On appeal, counsel asserts that the very nature of the petitioner’s work is not amenable to the labor certification process because universities typically do not sponsor labor certifications on behalf of their researchers. Although the petitioner may not yet be at the stage in her career where she qualifies for a permanent job offer in the U.S., it does not follow that it is in the national interest to waive the requirement for a labor certification, when this requirement applies to other aliens with more experience or credentials. Members of the professions holding advanced degrees (including scientists) as well as aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement. The petitioner must still demonstrate that she will serve the national interest to a substantially greater degree than do others in the same field. *Matter of New York State Dept. of Transportation* at 218, n.5.

Clearly, the petitioner’s work has added to the overall body of knowledge in her field, but this is the goal of all such research. It is apparent that the petitioner has excelled academically and is a talented biomedical researcher. Nevertheless, her superior ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to her field of endeavor must greatly exceed the “achievements and significant contributions” contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique credentials or an impressive background. The labor certification process exists because protecting jobs and employment opportunities of U.S. workers having the same objective

minimum qualifications as an alien seeking employment is in the national interest. The alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

The petitioner's documentation of her achievements and projections of future contributions may support the argument that the petitioner has exceptional ability in biomedical research, but do not overcome the statutory mandate of a labor certification for this occupation or show with specificity that the petitioner's work was of such recognized significance at the time of filing that it had already influenced the work undertaken by other independent researchers.

As is clear from the plain wording of the statute, it is 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 the national interest. Similarly, 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. Based on the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification would 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

2007 07 24