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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.
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Washington, D.C. 20536



APR 21 2003

File: EAC 01 036 51425 Office: Vermont Service Center

Date:

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:



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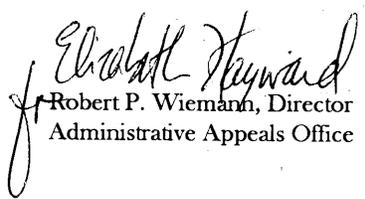
INSTRUCTIONS:

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. Wieman, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont 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. At the time of filing, the petitioner was working as a postdoctoral fellow in the Department of Medicine, Division of Gastroenterology, at Johns Hopkins University ("JHU"). 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.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 holds a Ph.D. in Biological Science from South Dakota State University ("SDSU"). 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 remaining issue 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 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 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.

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.

Along with documentation pertaining to her field of research, the petitioner submitted several witness letters [REDACTED] Professor of Medicine and Head of the Postdoctoral Fellowship Program in the Department of Medicine at JHU, states:

Our department has been conducting numerous research programs on cancer prevention and treatment through funding obtained from federal, state and private foundation sources. One of the funded research programs, in our department, is to study the molecular mechanism of two newly identified intestinal transcriptional factors, GKLf and IKLf, in the development of colon cancer.

* * *

This project is funded by the NIH, and headed by Dr. [REDACTED] the discoverer of GKLf. Primary data indicate that GKLf causes programmed cell death in human colon cancer cells. Therefore, it may be an important component in suppressing cancer cell growth. [The petitioner] joined Vince's research group in our department as a research fellow... She is engaged in the study of molecular mechanisms of GKLf and IKLf in regulating cell growth, differentiation and tumor formation... By creatively using molecular and cellular biological techniques, she has successfully demonstrated that growth arrest cells express high amounts of GKLf, and a small amount of IKLf. Tumor cell growth is directly related to the activity of GKLf and IKLf. This finding... provided new insights into the basic aspects of how cells function to activate specific genes in the development of tumors. These new insights will be essential for the development of new agents, with which to diagnose and treat cancer and other diseases, as well as in advancing our ability to prevent colon cancer. Moreover, the continued follow-up of her initial discoveries may significantly impact the development of drugs and treatment for colon cancer. It will have significant impact and will greatly benefit the people of the United States who suffer from colon cancer, which is a major public health problem to the citizens of the United States. Moreover, this work will provide insights into the prevention and control of other cancer. Cancer is one of the leading causes of disease and death in the United States, with one third of all Americans predicted to develop cancer during their lifetime. These diseases also cost American's billions of dollars. Thus, [the petitioner's] work is of major national importance and she is uniquely qualified to do it.

We generally do not accept the argument that a given project is so important that any alien qualified to work on that 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). Congress plainly intends the national interest waiver to be the exception rather than the rule. Witness statements and documentation pertaining to the undoubted importance of colon cancer research fail to distinguish the petitioner from other competent researchers in that same field. Similarly, assertions as to the petitioner's potential to make future contributions would fall short of demonstrating her eligibility for a national interest waiver. We note Dr. [REDACTED] statements that the petitioner's work "may significantly impact the development of drugs and treatment for colon cancer" and "will provide insights into the prevention and control of cancer." The petitioner, however, must demonstrate that her work has already significantly influenced the research field.

Dr. [REDACTED] Professor of Medicine and Physiology, JHU School of Medicine, and Director, Hopkins Center for Epithelial Disorders, states:

[The petitioner's] research is focused on the newly identified intestinal transcriptional factors (GKLf/IKLf) and its role in intestinal cell growth, differentiation and tumor formation (specifically colon cancer). She has already made critical progress in understanding the

biological function of GKLf and IKLf. For example, for the first time she has showed that IKLf is important for cell proliferation, and GKLf is important in keeping cells in a non-proliferating stage. This provides a basic knowledge in understanding the biological function of IKLf and GKLf and suggests a complementary mechanism for IKLf and GKLf in regulating the intestinal epithelial cell proliferation and differentiation. Thus alterations in the activity of GKLf and/or IKLf could effectively regulate cell proliferation and differentiation. This has important implications in colon cancer treatment and could lead to the development of new drugs for fighting tumors in the intestinal tract.

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for the national interest waiver. Again, we note that petitioner must show that her findings have already significantly influenced the cancer research field.

Dr. [REDACTED] Associate Professor in Gastroenterology, JHU School of Medicine, is the petitioner's research supervisor. Dr. [REDACTED] states:

The focus of our research interest is on colon cancer... We have been studying two gut-expressed transcription factors called gut-enriched Kruppel-like factor (GKLf) and intestinal-enriched Kruppel-like factor (IKLf), both of which have important functions in regulating proliferation and differentiation of the intestinal epithelial cells. Importantly, we have obtained evidence that both GKLf and IKLf may be implicated in the formation of intestinally derived tumors. For these reasons, we believe that continued investigation in the mechanisms of action of the two proteins might provide novel insights into the mechanism of colon cancer.

The specific project that [the petitioner] has been involved in since she joined our lab earlier this year is focused on the biological effect of IKLf on cell proliferation. Using a number of highly sophisticated experimental techniques, she was able to identify a potentially exciting mechanism by which IKLf regulates cell growth. This effort requires considerable background knowledge in biochemistry, cell and molecular biology as well as extensive expertise in state-of-the-art molecular techniques. The findings of her studies have been very exciting and may pave the way for future projects that would further reveal the mechanisms regulating cell proliferation.

Dr. [REDACTED] letter emphasizes the petitioner's educational background and laboratory experience. We note here that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

Dr. [REDACTED] further states:

Specifically, [the petitioner] has identified a novel activity for IKLf in that she is the first to

show that it can cause cell transformation, a process central to the formation of cancer. She is now performing additional experiments to further support this novel pro-proliferative effect of IKLF. The results of her present study are being collected and will be written up in the form of a manuscript for submission to a scientific journal in the near future.

The fact that the petitioner was among the first to make such a discovery carries little weight. Of far greater importance in this proceeding is the importance to the field of the petitioner's discovery. At the time of the petition's filing, the petitioner's finding that IKLF can cause cell transformation had not yet been published. *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. The petitioner has not provided sufficient evidence that her research has consistently attracted significant attention from independent biomedical researchers. The petitioner must show not only that her discoveries are important to her own research institution, but throughout the cancer research field.

Dr. [REDACTED], Professor of Veterinary Science, SDSU, states:

One of the individuals whom I have recently mentored is [the petitioner], who was awarded a Ph.D. in Biological Science from South Dakota University in the spring of this year.

* * *

[The petitioner] completed course requirements at South Dakota State University with very good grades and addressed an important and challenging problem for her dissertation. The scientific problem that she addressed concerned the mechanism of adherence of K88 fimbrial of porcine strains of enterotoxigenic *Escherichia coli* to pig intestinal epithelial cells. [The petitioner] mapped the region of the K88 fimbrial adhesin protein critical for porcine host cell recognition, and in the process developed several reagents and recombinant *E. coli* strains that will be valuable in future work. In identifying the region on K88 fimbriae critical for host cell recognition, [the petitioner] initiated work making possible a new generation of preventive and/or therapeutic products for an important swine disease. Diarrheal disease caused by enterotoxigenic *E. coli* is one of the most common and costly diseases in swine, and an emerging problem in nursery-age pigs... The results of [the petitioner's] investigation were published in the journal, *Infection and Immunity*, which is a high impact, international journal addressing issues of infectious diseases in both humans and animals. Her work was sufficiently important to serve as preliminary data for a USDA National Research Initiative Competitive Grant Award (Francis, D. H, and R.R.R. Rowland. 1999. 'Receptor binding specificity of K88 fimbriae of *E. coli*.' USDA NRICGP. \$210,000). Two papers that were the basis of the journal article were accepted for presentation at a national, and an international research conference, respectively.

Dr. [REDACTED] asserts that the petitioner's work "serve[d] as preliminary data for a USDA National

Research Initiative Competitive Grant Award.” The record, however, contains no evidence that the petitioner was named on this grant. Furthermore, even if that were the case, the very existence of documentation indicating that the petitioner’s findings resulted in a USDA research grant would carry little weight in this matter. The notion that contributing to a project awarded funding by the USDA would somehow elevate the petitioner above other competent researchers is flawed in that it applies equally to all researchers who receive governmental funding for their studies. We note here that the U.S. Government routinely awards millions of dollars in research grants to many thousands of scientists and research institutions on an annual basis. The record contains no statement from any official governmental source indicating that the petitioner’s specific results were viewed as particularly important when compared to the results of the thousands of other biomedical researchers in the United States also receiving governmental funding. Grants from the USDA generally support future research rather than recognize prior achievement and therefore we reject the argument that the receipt of grant funding significantly distinguishes the petitioner from other competent researchers.

Dr. [REDACTED] further states:

In 1999, [the petitioner] was the recipient of the Graduate Student Research Paper Presentation Award given by the South Dakota State University chapter of Sigma Xi, an international honorary society of scientists and engineers. In addition, in 1998, [the petitioner] was granted an Experimental Program to Stimulate Competitive Research (EPSCoR; National Science Foundation/State of South Dakota) full stipend Fellowship for her Ph.D. studies. [The petitioner] was granted membership in the Honor Society of Gamma Sigma Delta, which membership recognizes achievement and scholarship in agriculture science.

University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner’s scholastic achievement may place her among the top students at a particular educational institution, but it offers no meaningful comparison between the petitioner and experienced professionals in the research field who have long since completed their educational training.

The letters from Dr. [REDACTED] and Dr. [REDACTED] another member of the petitioner’s Ph.D. advisory committee at SDSU, complimented the petitioner on her journal publications and conference presentations. The record, however, contains no evidence that the publication or presentation of one’s work is a rarity in the petitioner’s field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner’s findings 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, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The record, however, does not contain citation records or other evidence to establish that independent researchers throughout the biomedical research community regard the petitioner's published work as especially significant.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a statement regarding her ability to serve the national interest, evidence of additional articles prepared subsequent to the petition's filing date, and further background information.

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 intrinsic merit and national scope of the petitioner's work, but found that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director indicated that the petitioner's mere involvement in a research project "at a major university" did not significantly distinguish her research accomplishments from those of other competent researchers.

On appeal, counsel cites the witness letters attesting to the petitioner's contributions in her field. We note here that the petitioner's witnesses consist entirely of individuals with direct ties to the petitioner. Their letters describe the petitioner's expertise and value to her current and former research projects, but they do not demonstrate the petitioner's influence on the field beyond the institutions where she has studied or worked. While letters from those close to the petitioner certainly have value, the letters do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might 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 one's published findings, would be more persuasive than the subjective statements from individuals selected by the petitioner. In this case, the petitioner's findings may have added to the general pool of knowledge, but it has not been shown that researchers throughout the field have viewed the petitioner's findings as particularly significant.

Counsel states that publication of the petitioner's work in "well known international journals" shows the importance of the petitioner's research findings. Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of*

the National Academy of Sciences of the U.S.A.) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner herself has cited sources in her own articles. Numerous independent citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research. In this case, the petitioner has offered no evidence demonstrating heavy independent citation of her research articles.

Clearly, the petitioner's educators, research supervisors, and 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 numerous 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 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 the 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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.