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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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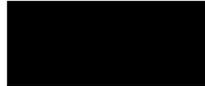
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: WAC 01 254 53213 Office: CALIFORNIA SERVICE CENTER

Date: APR 21 2003

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:



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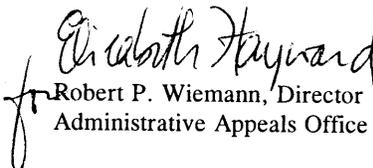
INSTRUCTIONS:

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 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 genetic researcher. At the time she filed the petition, the petitioner was a postdoctoral researcher at the Howard Hughes Medical Institute 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. from the University of Houston in 1999. 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.

We note that the director considered the evidence under the standard for a higher classification than that sought by the petitioner. 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 also discusses the evidence under the correct standard and even states that national acclaim is not required for the classification

sought, the discussion referencing the criteria to establish eligibility as an alien of extraordinary ability is erroneous, and that portion of the director's decision is 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, genetic research, and that the proposed benefits of her work, improved understanding of the HIV virus and cancer, are national in scope. It remains to determine whether the petitioner has established that she will benefit the national interest to a greater extent than 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, Id.* at 219, n.6.

Together with copies of her publications, academic degrees, and awards and honors, the petitioner submits eight witness letters. Dr. [REDACTED] a professor at the Baylor College of Medicine, collaborated with the petitioner for almost four years. He explains:

[The petitioner] collaborated with me in the functional analysis of the mouse Ext1 gene, the goal of which was to develop a mammalian model system for understanding the role of Ext1 in humans. . . . [The petitioner] is responsible for cutting-edge genetic embryonic stem cell tissue culture work. The embryonic stem cells are used to make precise mutations in particular genes to study the functions of these genes *in vivo* in transgenic mice. . . . It is due to her expertise and diligence that we were able to publish such a high quality manuscript describing the Ext1 mutant mice using this technology. The mice lacking Ext1 function due at the earliest stage of embryonic development [sic]. Thus, not only is Ext1 important for tumor formation but also these studies suggest that mutations in the human Ext1 is a cause of birth defects and miscarriages of unknown etiology in the first trimester, a cause for great emotional distress for couples.

[REDACTED] a professor of biochemistry at the University of Houston, was the petitioner's doctoral advisor. Professor Wells states that the petitioner was his best graduate student in fifteen years and continues:

[The petitioner's] doctoral research primarily focused on genetic cloning and functional analysis of the gene responsible for cause Hereditary Multiple Exostosis (EXT). EXT occurs at a frequency of about 1 in 50,000 individuals world-wide and results in a variety of bone malformations including one of the most common forms of bone cancer. [The petitioner's] breakthrough research in developing a mouse model system has been absolutely fundamental in understanding the genetic causes of EXT and has greatly enhanced our current ability to look for possible treatments.

[REDACTED] professor of biochemistry at the University of Texas, echoes the sentiments of the other testimonials. The petitioner worked in his laboratory as a graduate student. Dr. [REDACTED] characterizes the petitioner's work as having made a significant impact within the national human genetics community. He credits the petitioner with developing mouse models that were critical in the ultimate understanding of an inherited gene related to bone and cartilage tumors. He states that "the research performed by [the petitioner] on the exostoses gene was a seminal contribution to human genetics and without [the petitioner's] efforts, progress in understanding the basis of bone and cartilage tumors would have been substantially delayed. "

Although Professor [REDACTED] and Professor [REDACTED] use superlatives such as "breakthrough" and "seminal" in describing the petitioner's work, neither describes how the petitioner's findings have specifically influenced other independent researchers in the field or persuasively distinguish her accomplishments from others who have long since completed their training.

[REDACTED] a professor of zoology at the University of Hawaii, worked with the petitioner at the M.D. Anderson Cancer Center in Houston when the petitioner was a graduate student. Dr. [REDACTED] reiterates the praise of the other testimonials and confirms that one of the petitioner's significant achievements was the "identification of the human gene responsible for Hereditary Multiple Exostoses and the elucidation of its function."

[REDACTED] a professor of medicine and microbiology at the Howard Hughes Medical Institute (UCSF), considers the petitioner to be "a person of exceptional ability." The petitioner works in Dr. [REDACTED] laboratory. Dr. [REDACTED] states that [the petitioner] has identified mutations that can lead to hereditary multiple exostoses, a common form of bone tumor. The petitioner has also "established a transgenic mouse model that can produce a modified HIV viral protein" which may lead to the development of gene therapy strategy to fight AIDS.

Dr. [REDACTED] an assistant professor in the bioengineering department at the Howard Hughes Medical Institute reiterates Dr. [REDACTED] sentiments and considers the petitioner "a person of extraordinary ability." Dr. [REDACTED] summarizes the quality of the petitioner's more recent publications relating to the mechanisms of HIV virus that retreat into latency and states that the petitioner is "key to the Peterlin lab's research for the next few years and her continued easy presence within the U.S. HIV community is a must."

[REDACTED] a scientist with the Food and Drug Administration, states that she is familiar with the petitioner's work through published literature. Dr. [REDACTED] states:

After joining the Peterlin laboratory in 1999, [the petitioner] has carried out successful independent research that has resulted in three recent publications. [The petitioner's] study on using viral protein Tat as an adjunct therapeutic reagent with the common anti-viral drugs has been awarded with an independent research grant from the Campbell Foundation.

* * *

[The petitioner's] breakthrough research provided an important means for our understanding of prenatal tumor development. [The petitioner's] previous research on human diseases has made significant contributions to alleviate these conditions using modern molecular biological techniques. The petitioner has developed the most important techniques and creative scientific ways of thinking during years of training, she is one of the most promising young biomedical scientists I know.

██████████ a scientist with AGY Therapeutics, states that her area of research in the effects of HIV in the brain and the relation to AIDS dementia has prompted her acquaintance with the petitioner's work in HIV research and human genetics. Dr. ██████████ states:

[The petitioner] has been focusing her studies on the pathogenesis and clinical therapeutic strategies of AIDS since 1999. She has published two important papers about a critical host cellular factor named positive transcriptional elongation factor b (P-TEFb). These studies illustrated the important connection between the virus and the human system that supports HIV virus replication.

* * *

Many AIDS patients responded very well in their initial 'cocktail' treatment, yet because the viruses can develop latency and hide in the human body, the 'cocktails' can not kill the hidden viruses. These viruses can also mutate into drug-resistant forms and become the most difficult problem in HIV therapies. [The petitioner] in her research proposal has demonstrated an elegant new idea to use the viral Tat protein to 'flush out' the hidden viruses in the human body and she has tested her idea in animal models. This idea is now ready for clinical test. The success of this research is a good example of the uniqueness of [the petitioner's] scientific expertise.

Although Dr. ██████████ and Dr. ██████████ appear to have no direct connection to the petitioner, neither specifically describes how the petitioner's research achievements have already been relied upon or have already impacted the scientific community as a whole to any significant degree. We further note that Dr. ██████████ testimonial, although submitted on the letterhead of the Food & Drug Administration, does not appear to represent the official endorsement of that agency. The petitioner's other witnesses are 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, 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 record contains evidence that the petitioner has published thirteen articles, including nine in which she was the lead author. The record also contains evidence that the petitioner has submitted articles for publication after the filing date of the petition. Publication of these articles 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*, 14 I&N Dec. 45 (Reg. Comm. 1971).

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.

The petitioner submits a citation list that indicates that her articles have been cited numerous times by independent researchers. Although impressive, this citation list appears to have been prepared by the petitioner. Without independent corroboration of this record of citations, such as copies of the articles citing her work or an index from an original source, it carries little evidentiary weight. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel contends that the petitioner's receipt of a "young scientist travel grant award" to the XIV International AIDS Conference and the receipt of a Campbell Foundation grant demonstrate the petitioner’s prominence in the field. Even if this evidence resulted from the petitioner’s outstanding research achievements, the regulations at 8 C.F.R. 204.5(k)(3)(ii)(F) provide that "recognition for achievements and significant contributions to the industry or field by peer, governmental entities, or professional or business organizations" is one kind of evidence to establish exceptional ability, a classification normally requiring a labor certification. We cannot conclude that satisfying one requirement or even the requisite three requirements for this classification makes one eligible for a waiver of the labor certification process.

While the record clearly indicates that the petitioner is a talented genetic research scientist, her superior ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to the 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.

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.