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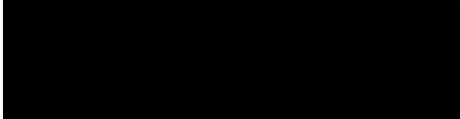
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date:

FEB 14 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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

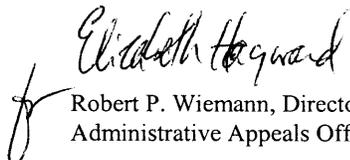
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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 a postdoctoral research associate at the University of Wisconsin-Madison. 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) . . . 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 director did not dispute that the petitioner 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.

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 Service 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.

Counsel describes the petitioner’s work:

[The petitioner’s] area of expertise is in plant genetics and molecular biology, especially as related to breeding improved as well as disease resistant plants. His past achievements in this area relate to the improvement of the poplar tree which is an important forest tree used in the paper making industry. [The petitioner’s] genetic modifications to the poplar resulted in a tree that grew 76% faster than unmodified poplar trees. . . .

[The petitioner] is currently applying his expertise in plant genetics and molecular biology to a major agricultural and economic problem – fighting scab disease in barley. . . . Scab has dramatically decreased the yield and quality of barley and produces a mycotoxin which is toxic to animals and humans. Scab also damages wheat. Experts estimate that scab has caused more than a \$3.0 billion loss in the US since 1993. Additionally, application of chemical fungicides is expensive, causes environmental concerns, and [is] becoming less effective because fungi acquire resistance. . . .

Many leading researchers in the field, including those who know [the petitioner] by reputation assert that he is an “outstanding” researcher with a proven record of significant contributions.

Along with documentation pertaining to the petitioner's field of research, the petitioner submits ten witness letters. Because many of these letters simply repeat the same details about the nature of the petitioner's work, we need not discuss every letter in detail. As a representative letter regarding the petitioner's work with poplar trees, we cite the letter of [REDACTED] of the University of Malaga, Spain. Prof. Cánovas states:

I met [the petitioner] at two international conferences. . . . I also knew of [the petitioner's] research work at Rutgers because his research was a main part of a collaborative research project between professor Edward Kirby's lab at Rutgers and my lab in Spain.

In plants, nitrogenous compounds . . . are derived from glutamine and thus the level of glutamine limits plant growth and development. . . . [C]ommercial nitrogen fertilizers . . . are costly and raise environmental issues. [The petitioner] took a unique and important step to increase glutamine level. At Rutgers University, he transferred a pine glutamine synthetase (GS) gene cloned in my lab into . . . the poplar. . . . Compared with non-transgenic control plants, the transgenic poplar plants [the petitioner] developed have higher contents of proteins and chlorophylls because the glutamine level is increased. Most importantly, the transgenic plants grew 76% faster than the control plants. . . .

[The petitioner] is an outstanding and internationally recognized scientist with significant scientific achievements.

Most of the witnesses have supervised or collaborated with the petitioner. Counsel asserts that three of these witnesses have never worked with the petitioner "in the same lab," and that one of those three has never met the petitioner in person. The first of these three witnesses is Dr. [REDACTED] president of the Milwaukee-based American Malting Barley Association, which is a trade association that seeks to "ensure an adequate supply of high quality malting barley for the malting and brewing industry." According to [REDACTED] the association is "comprised of all six US malting companies and four major US brewing companies" including Anheuser-Busch, Inc., and Miller Brewing Company. [REDACTED] is also a top official of related organizations, for instance serving as executive secretary of the North American Barley Genome Mapping Project. He states:

I have developed a close working relationship with the scientists at the USDA ARS Cereal Crops Research Unit, Madison, Wisconsin, where [the petitioner] is conducting his research. . . . It is my belief that [the petitioner] is an outstanding scientist. His barley scab research is vital to our nation's interests through its contribution to the agriculture economy and protection of our environment. . . .

[The petitioner] is using cutting-edge biotechnology to develop new methods to stop scab. One of his projects is to produce transgenic barley plants resistant to

Fusarium using genetic engineering. Barley plants naturally produce an antifungal protein called thionin. However, naturally occurring thionin cannot protect barley plants from Fusarium infection because the thionin is not located in the path of Fusarium infection and the amount of thionin produced is too small. [The petitioner] has made three thionin extracellular targeting constructs to target thionin in the path of the Fusarium infection. He identified an inhibitory DNA sequence of the thionin gene and deleted this sequence. . . . [The petitioner] is also developing a new protein fungicide by producing thionin in a large scale in a bacterium system.

Dr. Lynn Dahleen is a research geneticist and project leader at the Fargo-based Northern Crop Science Laboratory, part of the Agricultural Research Service of the U.S. Department of Agriculture. She is also the coordinator and chair of the Biotechnology Research Area of the US Wheat and Barley Scab Initiative, “a national consortium consisting of research scientists, brewing industries, milling companies, wheat and barley growers, and food processors.” Dr. Dahleen states “[t]he mission of the Initiative is to stop Fusarium Head Blight (FHB; scab) from damaging barley and wheat crops in the USA.” In her official capacity, Dr. Dahleen has been funding and monitoring the research at the University of Wisconsin. She states that the petitioner’s “ideas and approach to fight FHB are unique. He is the only scientist to target the antifungal protein thionin to the barley extracellular spaces and to develop a thionin fungicide in the US, probably in the world.”

Professor Patrick Hayes of Oregon State University is coordinator of the North American Barley Genome Mapping Project, “an international consortium of barley researchers in the U.S. and Canada.” Prof. Hayes states:

I came to know [the petitioner’s] work by reading his publication on barley scab research. . . .

No barley varieties are resistant to Fusarium. Attempts to use traditional breeding methods for the production of barley varieties resistant to Fusarium have had little success. . . .

[The petitioner] is using biotechnology to fight scab. . . .

[The petitioner] has taken an extremely important step in this direction in the development of novel approach[es] to control fungus disease.

In short, even though I have never met with [the petitioner] in person, I know that his scab research is vital to national interests by improving our nation’s economy and improving [the] environment. I can conclude, without reservation, that the quality of [the petitioner’s] work is among the very best.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding 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 stated "The record does not persuasively establish that the petitioner's discoveries substantially exceed in importance those of others working in the field."

On appeal, counsel argues that the director focused too narrowly on the petitioner's temporary status as a post-doctoral research associate, and that the director "missed critical information concerning the relationship and the credentials of the individuals who wrote the letters" in the record. Counsel correctly observes that "three of the letters are from leading industrial, governmental and scientific leaders with relevant expertise who are outside evaluators of [the petitioner's] work and who are outside [the petitioner's] immediate circle of colleagues." As described above, those three witnesses hold leadership positions at the national level (international for projects involving Canada) in the study of barley's genetic structure and the efforts to control Fusarium infection. The petitioner's work has come to the attention of top-level officials, who do not merely assert that barley is an important crop and that therefore any efforts to help the barley crop are in the national interest. They have, instead, specifically singled out the petitioner's work as unique, rather than representing incremental improvement on existing knowledge. In sum, the petitioner has submitted persuasive testimony indicating that his work stands out from that of others in the field and is regarded by top experts not only in Wisconsin, but throughout the United States, as a significant innovation of national importance.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the scientific community recognizes the significance of this petitioner's research rather than simply 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. Therefore, 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.