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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: EAC 00 068 52035 Office: Vermont Service Center

Date:

FEB 25 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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

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

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

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the 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, 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. The petitioner seeks employment as a research associate at the Marvin M. Schuster Center for Digestive and Motility Disorders, Johns Hopkins University School of Medicine. 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.

(ii) Physicians working in shortage areas or veterans facilities.

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.

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.

The application for the national interest waiver cannot be approved. The regulation at 8 CFR 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the beneficiary cannot be considered for a waiver of the job offer requirement. The director, however, does not appear to have informed the petitioner of this critical omission. Below, we shall consider the merits of the petitioner's national interest claim.

Along with documentation pertaining to his field of research, the petitioner initially submitted three

witness letters. Dr. Marvin M. Schuster, Director of the Marvin M. Schuster Center for Digestive and Motility Disorders at the Johns Hopkins Bayview Medical Center, states:

Motility disorders of the digestive system affect 35 million American men, women, and children. To develop new and effective treatment for them, to create awareness of their debilitating effects and promote compassion and understanding for the many people who suffer from them, to explore their root causes, and someday to discover cures, these are the goal of our Center... [The petitioner] is in the process of completing the basic and clinical training in this field that will prepare him to make contributions towards the understanding of gastrointestinal ("GI") motility disorders.

I have known [the petitioner] and his scientific work since October 1996 when we recruited him as the first postdoctoral research fellow in our Center, which is the first center of its kind in the nation to conduct research into the areas of gastrointestinal motility disorders... During his three years of postdoctoral training, he has participated in and conducted several clinical and basic research projects under my supervision. His research fields covered many aspects of GI motility disorders from pathogenesis and diagnosis to treatment.

One of his clinical research projects concerns the ability of the drug EM 574 to improve esophageal motility and reduce acid reflux... [The petitioner], along with other research staff in our center, studied 24 healthy male volunteers on four separate doses of the medication. Motility in the esophagus and lower esophageal sphincter pressure was measured. The drug appeared successful in improving motility and increasing the pressure within the sphincter.

* * *

Another of his research efforts focuses on the understanding the [sic] pathogenesis of GI motility disorders in diabetic mellitus. Cooperating with scientists at the National Institutes of Health (NIH), he applied quantitative stereological analysis in study the density of interstitial cells of Cajal (ICCs) in diabetic intestinal tissue. Interstitial cells of Cajal have been recently identified as the pacemaker cells for contractile activity of the gastrointestinal tract. The role of interstitial cells of Cajal in these complications is not well understood. He applied immunohistochemistry [sic] methods to study the density of ICCs in human small bowel tissue; and the stereological analysis of the results reveals that the ICCs density in diabetic small bowel is less than that in non-diabetics. This finding will provide us with insight into the pathogenesis of these wide-ranging disorders and will also help to approach rational therapy by targeting the pacemaker activity through the ICCs.

* * *

Beside the clinical research projects, his basic research focus [sic] on the study of the central nervous system (CNS) mapping of visceral nociception in a murine model by immunohistochemistry study of the c-fos, one of most important immediate-early genes

involved in the signal transduction, expression in the mice brain. The results of this ongoing project will enable us to make precise anatomical records of neuronal populations that are activated during nociceptive processing, to advance our understanding of where many analgesic drugs and endogenous analgesics act to reduce pain. Finally, these will help us know more about visceral sensation and reactivity in the pathogenesis of irritable bowel syndrome (IBS), one of the most common motility disorders in this country.

* * *

As a results of all these works, [the petitioner] has presented 6 papers in nationwide scientific meetings, contributed to two NIH grant applications (75%, 25% effort) and is the first author on two papers that are in preparation.

Since gastrointestinal motility disorders affect 35 million Americans, diminish quality of life, and cause absence from the workplace, they are a significant health and economic problem. [The petitioner] has been trained both in clinical and basic aspects on these disorders. He certainly is an outstanding young scientist, possessing an exceptional ability to conduct research in this field. His research contribution will improve our knowledge of the pathogenesis and treatment of these common disorders.

In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). The petitioner must establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. It cannot suffice to state that the alien possesses useful skills, or a unique background. As noted previously, regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The petitioner must show that he has already significantly influenced his field of endeavor.

██████████ Director of Gastrointestinal Physiology and Motility ██████████
Center for Digestive and Motility Disorders, directly supervised the petitioner since 1996. Dr. Crowell states that the petitioner has received "extensive, specialized training" in the understanding and treatment of chronic gastrointestinal disorders. We note here that ██████████ Schuster both emphasize the petitioner's basic and clinical training in gastrointestinal motility disorders. However, 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 which could be articulated on an application for a labor certification.

The majority of ██████████ letter is devoted to the petitioner's ongoing research projects rather than the petitioner's past record of research accomplishments. 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. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *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.

We cannot ignore that [REDACTED] claims to have "published extensively in professional literature and authored chapters in many textbooks." Similarly, [REDACTED] claims "over 200 publications concerning gastrointestinal motility and its disorders." The petitioner's publication record, however, is much more limited and it is not clear as to how many times the petitioner served as a primary author. We note that the publication records, scientific achievements, and responsibilities of Drs. Schuster and Crowell far exceed those of the petitioner.

We note [REDACTED] statement that the petitioner "presented 6 papers in nationwide scientific meetings... and is the first author on two papers that are in preparation." The record, however, contains no evidence that the presentation or publication of one's work is a rarity in 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 petitioner in this case offered no evidence showing that his work was heavily cited.

[REDACTED] ong, President, Tongji Medical University (China), states that the petitioner excelled in his graduate studies at the university, ranking in the "highest five percent" of the students. A significant portion of [REDACTED] letter is devoted to the petitioner's academic achievement. University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's academic achievement may place him among the top students at his educational institution, but it offers no meaningful comparison between the petitioner and those individuals who have long since completed their educational training.

Dr. Hong describes the petitioner's master's thesis research project, stating: "[The petitioner's]

research revealed that during the proliferation in culture with rIL-2, the tumor infiltrating lymphocytes ("TILs") from human enhanced gastric carcinoma could not generate more cytotoxic lymphocytes." [REDACTED] states that the petitioner's results provided insight into gastric cancer immunotherapy and earned the petitioner his M.S. degree. While the petitioner's findings may have added to the general pool of knowledge, it has not been shown that researchers throughout the field viewed the petitioner's findings as particularly significant.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional background materials and witness letters.

In his second letter, [REDACTED] again generally describes the petitioner's ongoing research activities rather than addressing the issue of how the petitioner's findings have already influenced the greater field. [REDACTED] describes how he and the petitioner are developing novel methods for mapping brain activation and assessing neurochemical modulation in the central nervous system for acute and chronic gastrointestinal pain conditions. [REDACTED] states: "Unfortunately, due to the early, developmental phase of the projects, the Center has chosen to minimize or delay publicizing these models until they are more fully developed and program funding obtained."

[REDACTED] Research Psychologist and Acting Chief, Laboratory of Cellular and Molecular Biology, National Institute on Aging, National Institutes of Health, indicates that the petitioner has served as a guest researcher in his laboratory for eighteen months. [REDACTED] states:

Our laboratory is a leading center for the use of a technique called unbiased stereology, which provides the investigator a means of accurate estimation of micromorphological features, such as the number of cells in an organ or a particular region of the organ.

* * *

[The petitioner] eagerly learned our technique and applied them to his research question, specifically counting the number of cells in the colon known as the Interstitial Cells of Cajal (ICCs). [The petitioner] made several important discoveries. For example, the density of ICCs in the small bowel of diabetic patients was less than that of nondiabetic patients. He is also using this technique to examine patients with a condition known as slow transit constipation. He is applying similar methods to map the brain cells in mice that are involved in motility. To my knowledge, [the petitioner] is one of only a few scientists in the world conducting such research, and he is certainly the only one using unbiased stereology to address his research questions.

Thus, it should be clear that [the petitioner] is conducting research that addresses questions highly relevant to the biomedical enterprise of our country. He is attempting to understand how the brain and colon regulate motility and how this process might be impaired in certain diseases affecting digestion and elimination. These are novel and important areas of investigation in the field of gastroenterology.

We note here that any objective qualifications that are necessary for the performance of a research position, such as the petitioner's mastery of the unbiased stereology technique, can be articulated in an application for alien labor certification.

Edward Spangler collaborated on a project with the petitioner at the National Institute on Aging. Edward Spangler states:

[The petitioner's] area of specialization in medicine and research is and has been gastroenterology. As such, he has looked at central nervous system control of gastrointestinal function. He has specifically evaluated the hypothesis that the central nervous system mechanisms involving nitric oxide release may play a role in bowel function. The clinical implications of his research involve inflammatory bowel diseases, afflictions that affect millions of Americans. This type of research with its potential for relief of suffering by millions of Americans is clearly of national significance.

While the Service recognizes the overall importance of understanding and developing treatments for motility disorders of the digestive system, eligibility for the waiver must rest with the petitioner'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. 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). By asserting that the petitioner's employment as a highly trained gastroenterological researcher inherently serves the national interest, witnesses for the petitioner essentially contend that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect. Congress plainly intends the national interest waiver to be the exception rather than the rule.

The petitioner's initial witnesses consisted entirely of individuals with direct ties to the petitioner. Their letters described the petitioner's expertise and value to his current and former research projects, but they do not demonstrate the petitioner's influence on the field beyond the laboratories where he has worked. The evidence did not show that the petitioner's work has attracted significant attention from independent researchers in the gastroenterological research field.

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 indicated that the petitioner had not shown "a significant impact on the field of endeavor to greater degree than other individuals involved in similar pursuits." The director also stated that the petitioner had not shown "scientific advances in his area of expertise" having a "national impact." The director further stated that the petitioner's accomplishments "paled in comparison" to those of his witnesses.

On appeal, the petitioner submits four additional witness letters. In his third letter [REDACTED] now the Director of Scientific and Medical Affairs for Novartis Pharmaceuticals, states:

[The petitioner] was the first investigator to develop a murine model to objectively study central processing of visceral pain sensation. He was also the first to apply design-based stereology to quantify the density of Interstitial Cells of Cajal (ICCs) in the diabetic small bowel and the quantification of immediate-early genes (*c-fos*) in the mouse brain following noxious visceral stimulation.

The fact that the petitioner was among the first to make such discoveries carries little weight. Of far greater importance in this proceeding is the importance to the field of the petitioner's discoveries. The petitioner has not provided sufficient evidence showing that his research has attracted significant attention independent researchers in the scientific community. The petitioner must show not only that his discoveries are important to his own research institutions, but throughout the research field.

Dr. Crowell notes that the petitioner has published articles on gastric cancer immunotherapy and is the first author of some papers on clinical gastrointestinal motility disorders. 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 himself has cited sources in his 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 can have, if that research does not influence the direction of future research. In this case, the petitioner has offered no evidence demonstrating independent citation of his research articles.

The petitioner submits letters from [REDACTED] Acting Director of the [REDACTED] Center for Digestive and Motility Disorders, and [REDACTED] Chief of the Gastroenterology Division at Tongji Medical University. Their letters describe the petitioner's background and objective qualifications (which are amenable to labor certification) and generally repeat the assertions of previous witnesses.

[REDACTED] Professor of Medicine and Chief of the Division of Gastroenterology and Hepatology at the Milton S. Hershey Medical Center, College of Medicine, Pennsylvania State University, indicates that she first met the petitioner in 1996 at the Annual Meeting of the

American College of Gastroenterology [REDACTED] describes two research papers presented by the petitioner at scientific conferences held in 1999 and 2000. In describing the significance of his 1999 presentation, [REDACTED] states: “[The petitioner’s] finding that the decreased density of ICCs might account for the abnormal motor function changes in diabetes is very important and, based on the results of his study, further research is made possible which in turn may lead to a new pathway to control these abnormal motor functions in diabetes.” Assertions as to the future significance of the petitioner’s work cannot suffice to demonstrate eligibility for the national interest waiver [REDACTED] of phrases such as “might account for the abnormal motor function” and “may lead to a new pathway to control these motor functions” are speculative in nature and seem to address future results rather than a past record of demonstrable achievement.

The second paper described by [REDACTED] was published and presented in 2000. This evidence came into existence subsequent to the petition’s filing. *See Matter of Katigbak, supra.*

Counsel states that the witness letters demonstrate that the “petitioner’s contributions have had a significant impact on the diagnosis and treatment of Irritable Bowel Syndrome.” We note, however, that all but one of the petitioner’s witness letters are from individuals with direct ties to the petitioner. Letters from those close to the petitioner certainly have value, for it is those individuals who have the most direct knowledge of the petitioner’s specific contributions to a given research project. It remains, however, that very often, the petitioner’s projects are also the projects of the witnesses, and no researcher is likely to view his or her own work as unimportant. The petitioner’s witnesses became aware of the petitioner’s research work because of their close contact with the petitioner; their statements 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, is more persuasive than the subjective statements from individuals selected by the petitioner.

Clearly, the petitioner’s former educators, supervisors, and collaborators have a high opinion of the petitioner and his work, as does [REDACTED] who knows the petitioner from encounters at scientific conferences. 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 his 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, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.