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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.
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Washington, D.C. 20536

[REDACTED]

File: WAC 99 216 50711 Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 2003

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:

[REDACTED]

INSTRUCTIONS:

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

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

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

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral researcher in chemical physics. At the time he filed the petition, the petitioner was a postdoctoral researcher for the Veterans Affairs Medical Center at the University of California (VAMC). 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.

(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.

The petitioner describes his proposed employment as being a postdoctoral researcher in chemical physics for the VAMC. At the time the petition was filed, his research involved the application of "computation chemistry techniques to model enzyme structures" and the study of methods for "growing bacteria and purification of various proteins and enzymes." The intrinsic merit and national scope of such research was not disputed by the director. At issue here is not the overall value of such research to the medical or environmental fields, but rather the significance of the petitioner's individual contributions to that research and the degree to which the national interest would be benefited when measured by the petitioner's accomplishments and influence.

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.

Together with copies of his published articles, copies of articles that cite the petitioner's work, and documentation pertaining to some of his various fields of research, the petitioner submits several witness letters. William S. McIntire, a research chemist with the VAMC, indicates that the petitioner has been in his research group since 1996. Dr. McIntire states:

[The petitioner] was instrumental in deciphering a very complex mechanism-of-action of an enzyme important in the usage of vitamin B2 by living organisms. Currently, [the petitioner] is involved in applying computation chemistry techniques to model enzyme structures, to help us understand the energetic and structural changes that occur on cofactor and subunit association for enzymes. He is also

studying the complex spectral kinetic properties of normal and genetically altered form of an enzyme, which will lead to a better understanding of its atom-level chemical mechanism-of-action.

....

[The petitioner] is a very gifted experimentalist and theoretician. It's rare for an individual to have skills in such diverse areas as biochemistry, biophysics, computation chemistry, surface chemistry, and physics. These skills allow [the petitioner] to tackle important problems that few others would consider.

[REDACTED] a research biochemist with the VAMC, indicates that the petitioner "has many attributes to offer. He is exceptionally qualified, an expert in his field, and very highly regarded by his peers worldwide. He has already made very useful technical advances in his chosen field of chemical physics that will be exploited by industry."

[REDACTED] a retired chief of the molecular biology department at the VAMC, asserts that [the petitioner] "soon learned and adapted to techniques used in the structural elucidation of enzymes and the determination of parameters determining the interreaction of proteins and cofactors to yield a catalytically competent enzyme and soon made major new contributions to the field. "

[REDACTED] a professor at the University of Dusseldorf, was impressed by the petitioner's skills when he worked with the petitioner on a team researching the "microstructuring of solids and its measurements by the quartz-microbalance [REDACTED] states:

[The petitioner] is particularly renowned [sic] for developing a sophisticated technique for measuring local mass loss at an atomic level. This technique [sic] helped to solve a problem that had hindered scientists for years. He is also an acknowledged leader in the development of methods [sic] to make very localized changes in metals. He has developed a ground breaking methodology [sic] for calculating the non-stationary deformation and stress fields produced by laser heating.

[REDACTED] a retired professor of the Technical University in Clausthal, Germany, worked with the petitioner in 1995 pursuant to the petitioner's receipt of a Humboldt fellowship. Dr. Heusler indicates that "[s]urface stress of solids is gaining technical importance e.g. in the semiconductor industry due to miniaturization. During his work in Clausthal, [the petitioner] improved our instrument with respect to speed and sensitivity, performed careful measurements and discussed them theoretically. Results are published in scientific journals."

Roland Oltra, a director of research at the University of Bourgogne in Dijon, France, employed the petitioner in his laboratory in 1992-93 as a postdoctoral researcher in the field of laser activation of electrodes. Dr. Oltra states that the petitioner "developed very original physical and mathematical models for calibration of new acoustic sensors allowing to perform mass measurements in liquid environment."

In response to the director's request for additional documentation, the petitioner submitted a letter from [REDACTED] a professor of biochemistry and molecular biophysics at Washington University in St. Louis. Professor Mathews has collaborated with the VAMC group, where the petitioner has worked since the end of 1996. The VAMC group is supervised by Dr. McIntire. Professor Mathews describes this research and the petitioner's work:

[The petitioner] has been studying the flavin-binding and electrochemical properties of p-cresol methylhydroxylas (PCMH), an intramolecular electron transport system that we have recently characterized by x-ray crystallography and which carries out the oxidative detoxification of p-cresol, an aromatic alcohol. Biological electron transfer is one of the most important and fundamental processes of cellular metabolism and is the key means by which energy and growth potential is derived from foodstuffs. Furthermore, many of these aromatic alcohols are important and potentially toxic environmental pollutants. These studies may lead to the design of improved methods for environmental cleanup.

[REDACTED] research fellow of Honeywell, and [REDACTED] a principal scientist for Honeywell, offer a joint letter of recommendation, dated March 2001. The record indicates that these researchers were named as part of a collaboration team between Honeywell and the New Jersey Institute of Technology which offered a job to the petitioner. They praise the petitioner's research expertise and superior level of talent, noting that his doctoral thesis was published in the "Journal of Electroanalytical Chemistry," and offered "profound insight into various aspects of laser stimulation of electrochemical activity of metals," which they characterize as a "first study of action of nanosecond laser pulses on the electrochemical environment." They similarly endorse the petitioner's more recent work at the University of California, San Francisco and state:

In further research devoted to redox properties of flavocytochrome, p-cresol methylhydroxylas, [the petitioner] has showed that covalent attachment of flavin to the polypeptide changes dramatically a redox potential of the prosthetic group. But, what is more important, subsequent association of cytochrome subunit changes it even further, thus stimulating a covalent attachment process itself. This exciting results [sic] have been obtained originally by [the petitioner] for the first time (published in Biochemistry, 2001) and contributes significantly to our understanding of operation and assembling of complex redox proteins.

....

As we have observed, [the petitioner] easily obtains grants in various countries and is welcome there. Therefore it would be harmful to us to let him go through lengthy labor certification process, since somewhere else it can be more rapid and, as result, we would lose a talented, hard working and extremely creative and able worker.

The record corroborates that the petitioner has accepted post-doctoral research appointments in different countries as noted by Dr. Baughman and Dr. Zahidov. By the time of filing the petition, the petitioner had worked in Germany and France. While this breadth of experience reflects well on the petitioner's abilities, fellowships or research grants as a part of overall recognition by one's peers is simply one possible requirement for aliens of exceptional ability, a classification that normally requires a labor certification as set forth in 8 C.F.R. § 204.5(k)(3)(ii) enumerating the criteria for an alien of exceptional ability. 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.

Similarly, the argument that the labor certification process in the U.S. is inconvenient in comparison to other countries' procedures is not recognized as sufficient cause to approve a national interest waiver. There is no indication that Congress intended that the national interest waiver be used to ameliorate any delays inherent in the U.S. labor certification process. To hold otherwise would eliminate the job offer requirement altogether. The petitioner must still demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *Matter of New York State Dept. of Transportation* at 218, n.5.

On appeal, the petitioner submits an additional supporting letter. [REDACTED] a staff scientist with the Lawrence Berkeley Laboratory in California, summarizes the petitioner's background and praises his professional excellence, noting that the petitioner's expertise in biochemistry and physical electrochemistry enabled him to publish two different papers relating not only to research in "redox flavoproteins," but also to the "applications of electrochemical quartz crystal microbalance. [REDACTED] doesn't indicate how he is familiar with the petitioner's work.

Virtually all of the petitioner's witnesses are past or present supervisors, mentors, collaborators or colleagues. 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, such as heavy citation of the petitioner's findings, would be more persuasive than the subjective statements from individuals selected by the petitioner.

In this case, the petitioner has submitted copies of several articles which he has published. The petition was filed in August 1999. The record contains copies of three articles in which the petitioner is a co-author, two articles in which he is the lead co-author and one article which does not indicate the date it was published. The record also contains copies of three of the petitioner's papers that were presented at conferences. The record contains nothing showing that the presentation or publication of one's work is rare in the petitioner's field.

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgment

that “the appointment is viewed as preparatory for a full-time academic and/or research career,” and that “the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.”

Thus, this national organization considers publication of one’s work to be “expected,” even among researchers who have not yet begun “a full-time academic and/or research career.” When judging the influence and impact that the petitioner’s work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner’s findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner’s work. In this case, the petitioner has submitted copies of nine articles from researchers in which his work is cited. One of these is a self-citation from one of the petitioner’s former collaborators. Self-citation is an accepted practice, but it has little value as an indicator of the impact of the cited work. Based on a review of this record, we cannot conclude that eight citations of the petitioner’s work represent a significant level of influence over the petitioner’s field of endeavor. We note that the petitioner claims authorship of and citation to a greater number of published articles than herein discussed; however, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). We further note that the record contains copies of three articles that were published after the petition’s filing date. Publication of these articles cannot retroactively establish the petitioner’s reputation or impact on his field. Beneficiaries 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).

Clearly, the petitioner’s work has added to the overall body of knowledge in his field, but this is the goal of all such research. It is apparent that the petitioner has excelled academically and is a talented chemical physicist. Nevertheless, his superior 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 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 such as having held several postdoctoral positions like this petitioner. 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. In this case, we cannot conclude from the witness letters and other evidence of the petitioner’s work that this petitioner’s contributions to the field of biochemistry or electrochemistry have been of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks or that the evidence shows that he has already influenced his field to any significant degree. The witnesses’ speculation that the petitioner’s research accomplishments may have potential positive application in the medical or environmental field do

not persuasively demonstrate the petitioner's present influence over these fields as a whole.

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.

Beyond the decision of the director, the record does not contain an official academic record showing that the petitioner holds a U.S. advanced degree or a foreign equivalent degree pursuant to 8 C.F.R. § 204.5(k)(3)(i)(A). As the appeal will be dismissed on the grounds discussed, this issue need not be addressed further.

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.