

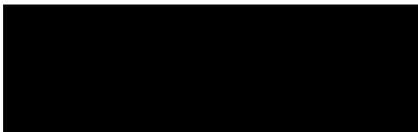


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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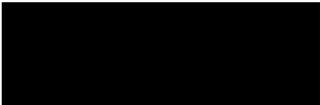
File: WAC-99-124-54393

Office: California Service Center

Date:

JAN 06 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:



**PUBLIC COPY**

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

*for Elizabeth Hayward*  
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 Associate Commissioner for Examinations 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 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 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 holds a Master's degree in vegetable crops from the Chinese Academy of Agricultural Sciences. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor 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.

We concur with the director that the petitioner works in an area of intrinsic merit, plant biology research, and that the proposed benefits of her work, improved crop production and safer food handling, would be national in scope. It remains, then, to determine whether the petitioner 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 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 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. *Id.* at 219, note 6.

The petitioner submitted evidence that she is a member of the American Society of Plant Physiologists (ASPP) and the American Society for Horticultural Science (ASHS). On appeal, the petitioner submits evidence of her membership in the American Association for the Advancement of Science (AAAS). The petitioner does not submit the membership requirements

for these organizations. As such, it is not clear that belonging to these societies is a remarkable accomplishment. Regardless, membership in professional associations is simply one of the requirements for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, or even the requisite three requirements for that classification warrants a waiver of the labor certification process.

Initially, the petitioner submitted two letters from former fellow laboratory researchers, Dr. [REDACTED]. These two researchers worked with the petitioner under the direction of Professor [REDACTED] at the University of California, Davis. [REDACTED] asserts that as a "key researcher" in Professor [REDACTED] group, the petitioner "constructed a celery map based on DNA-assisted markers and located two molecular markers to the *septoria* resistant gene," important for developing septoria resistant celery. [REDACTED] further asserts that the petitioner has successfully utilized this research in agriculture breeding programs. According to [REDACTED] the petitioner's methods are important for reducing the use of pesticides and the petitioner's work in this area has been "recognized worldwide." Finally [REDACTED] states that the petitioner subsequently joined [REDACTED] laboratory where the petitioner has "played a key role in several projects including fresh storage of asparagus, identification of melon viruses and biosynthesis of carrot carotenoid." [REDACTED] provides similar information.

[REDACTED], a senior research fellow at the Division of Cancer Epidemiology and Genetics of the National Institutes of Health, asserts that the petitioner's work with plant physiology and genetics to improve postharvest quality has already benefited the U.S. economy. [REDACTED] however, fails to explain how he knows of the petitioner's work. Moreover [REDACTED] does not adequately explain how his cancer research experience qualifies him to evaluate the petitioner's accomplishments in crop research.

In response to the director's request for additional documentation, the petitioner submitted additional letters. [REDACTED] the director of the Mann Laboratory where the petitioner worked under [REDACTED] asserts that the petitioner has contributed to the research in [REDACTED] laboratory and that the petitioner's training and experience is unique and irreplaceable.

[REDACTED] vegetable and plant pathology advisor with the University of California Cooperative Extension for [REDACTED] California, discusses the importance of the petitioner's area of research, which is not in question. He further states that the petitioner is the first researcher to develop the Polymerase Chain Reaction (PCR) method to identify single cells of salmonella in foods within several hours after harvest. In addition [REDACTED] asserts that the petitioner "has been a critical participant in a new research project in the identification of the cause of light root syndrome of carrots," a costly disease for California carrot growers.

[REDACTED] the chair of the plant biology section at the University of California, [REDACTED] asserts that her letter is based on the strong recommendations of the petitioner's supervisors and Professor [REDACTED] understanding of the petitioner's contributions to the U.S. economy and public safety. In addition to discussing the importance of the petitioner's work on

salmonella and E.coli. [REDACTED] asserts that while working on "the carrot project," the petitioner cloned a gene that had never been identified by other scientists in the field. [REDACTED] concludes that this accomplishment was groundbreaking and "is stimulating research in new directions to breed disease resistant lines." [REDACTED] does not provide examples of these new projects. As will be discussed below, the record does not reveal that the petitioner's articles, published after the date of filing, have been widely cited, or even cited at all.

Professor [REDACTED], professor emeritus at the University of California, Davis, the director of the Tomato Genetics Resource Center and a member of the National Academy of Sciences, asserts that the petitioner's expertise in oxidation reduction potential (ORP) could benefit the nation through minimizing crop loss. Professor [REDACTED] further asserts that the petitioner's work on salmonella has "had significant implications on solving severe food borne illness in the United States and the whole world." In addition, Dr. [REDACTED] asserts that the petitioner's presence in the United States would permit the continuation of her pioneering work on light root syndrome in carrots. Finally, Professor Rick states that the petitioner's work "has changed how the researchers identify the pathogen quickly and safely - something that is crucially important for improving our food quality." Professor Rick does not provide an example of a single state or federal agricultural or health agency that has adopted the petitioner's methods.

[REDACTED] a research plant molecular biologist at the United States Department of Agriculture (USDA), asserts that the petitioner is well known for her work in post harvest pathology and that she has "pioneered the development of a diagnostic technology for identifying bacteria *Salmonella* quickly and easily in vegetables, fruits and meats." [REDACTED] further asserts that the petitioner has presented her results at several major international conferences, published an article in a peer-reviewed journal, and trained "several hundred workers" to handle post harvest produce safely. [REDACTED] concludes that the petitioner's work is vital to this area of research and that the labor certification process would delay the research.

[REDACTED] provides no details regarding the training provided by the petitioner, such as who sponsored the training, where it occurred, or who attended the training. On appeal, the petitioner asserts that she served as a course associate instructor during which time she gave more than ten presentations and trained hundreds of people for fresh vegetable production safety. In addition, the petitioner asserts that she traveled to farms in Bakersfield and Salinas to advise farmers on crop handling. 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). The record does not demonstrate the significance of the training provided by the petitioner. Finally, Dr. Zhu does not indicate how he has come to know of the petitioner's work or whether or not the USDA has adopted the petitioner's methods for salmonella testing. Dr. Zhu's opinion does not appear to be the official opinion of the USDA.

Frederick Bliss, Chair of the American Society for Horticultural Science (ASHS) and the director of Worldwide Breeding at Siminis, Inc., asserts that while he does not know the petitioner personally, he has reviewed her research. Mr. Bliss states that the petitioner is a valued member

of her research group and that she brings her genetics expertise to the multi-disciplinary group with which she works regarding problems relating to post harvest crop issues [REDACTED] does not indicate that the petitioner's results have influenced his own work or that the ASHS has adopted or is reviewing the petitioner's methods.

The above letters do not establish the petitioner's influence over the field. Many of the letters are from the petitioner's collaborators. Even the references who claim not to know the petitioner have connections with the University of California, Davis, and base their opinion on the recommendations of others who have worked with the petitioner. The letters from those outside the petitioner's circle of colleagues provide no examples of the petitioner's influence. While letters from the petitioner's supervisors would be insufficient on their own, such letters do provide evidence of the petitioner's role on a specific project. The petitioner, however, has not provided letters from Professor [REDACTED]

Beyond the reference letters, the petitioner initially submitted articles demonstrating the importance of her area of research. As stated above, the importance of the petitioner's area of research is readily apparent. The petitioner, however, is not the author of those articles. Nor do the articles reference the petitioner personally or her research group. As such, these articles are not evidence of the petitioner's personal contributions to her field. In response to the director's request for additional documentation, the petitioner submitted an article on light root syndrome co-authored with [REDACTED] published in the November 1999 issue of *Perishables Handling Quarterly*. This article was published eight months after the petitioner filed the petition. The petitioner also submitted other manuscripts in preparation. As these articles were not published as of the date of filing, they cannot establish the petitioner's eligibility at that time. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the record contains no evidence that the published article has been influential, such as evidence that it has been widely cited.

On appeal, the petitioner relies mostly on accomplishments from after the date of filing, such as an innovation for Zyomyx, her current employer, and recently published articles. Once again, these post-filing accomplishments cannot be considered evidence of the petitioner's eligibility as of the date of filing. The petitioner also notes her development of a method for testing for salmonella and her cloning of the phytoene gene that could eventually increase carrot production by 25 percent. The petitioner's articles on carrot disease, however, were published after the date of filing, and the petitioner's article on salmonella had not yet been published as of the date of appeal.

The petitioner submitted a new reference letter on appeal [REDACTED], the petitioner's supervisor at Zyomyx, only discusses the petitioner's work at that company, which began well after the petition was filed. As such, his praise of her post-filing accomplishments cannot be considered.

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 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. At best, the petition was filed prematurely.

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.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.