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Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date:

JUL 08 2003

IN RE: Petitioner:
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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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, Nebraska 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 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 did not dispute that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner obtained a Ph.D. in microbiology from the Institute of Applied Ecology, China in July 1997. 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 pertinent 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 the 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.

We concur with the director that the petitioner works in an area of intrinsic merit, gene transcription and cancer-related research. Although the director initially concluded that the proposed benefits of the petitioner's work might provide benefits that are national in scope (page five of the director's decision), he ultimately concluded otherwise. We cannot agree. This prong of the *Matter of New York State Dept. of Transportation* test focuses more on the nature of the alien's occupation rather than on the alien's specific credentials and experience. *Id.* at 217. The proposed benefits of biomedical research would accrue to the population as a whole. For this reason, we find that the proposed benefits of the development of biological strategies related to gene research to prevent and cure cancer are national in scope. The remaining issue is whether the petitioner will serve the national interest to a substantially greater degree than would an available United States 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 qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The issue is whether this petitioner's contributions in the field are of such unusual significance that the beneficiary 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 the alien's past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submits several witness letters in support of his petition. Dr. [REDACTED] an associate professor in the Department of Molecular, Cellular and Developmental Biology at the University of Colorado (CU) and an assistant investigator with the Howard Hughes Medical Institute (HHMI), submits two lengthy statements on the petitioner's behalf. The petitioner works in Dr. [REDACTED] laboratory. His first letter states that for the past year and a half, the petitioner has been working on specific research projects as a post-doctoral research associate for the University of Colorado and now for the Howard Hughes Medical Institute. Dr. [REDACTED] continues:

[The petitioner's] cutting-edge research is studying specific components of the RAS/MAP signal pathway in order to understand the complex role of specific components. Furthermore, his research is focusing on what causes the pathway to fail in terms of the appropriate regulation of the gene pathway, which causes tumors or decreased organ development. Once these components can be discovered, analyzed and understood, the scientific community can develop drugs and other treatments to correct the malfunctioning RAS/MAP signal pathways.

* * *

At the same time, [the petitioner] has been studying the function of Rb (retinoblastoma) tumor suppressor genes. . . . Rb plays an extremely important role in the suppression of tumors. In this aspect of his research, [the petitioner] is searching for genes that act redundantly with Rb. . . . In fact, after [the petitioner] completes the work of cloning this gene, he will transfer this research to mouse and human cell studies to determine the potential usage of this gene for cancer prevention and/or treatment.

* * *

[The petitioner] has been studying a particular gene that is a downstream target in the RAS/MAP signal pathway. He has located a specific site which is responsible for gene expression and regulation in that particular cell and is using that site to identify the transcription factor for that particular gene that is a specific target in the RAS/MAP signal pathway. He has also gotten the gene which act redundantly with the Rb gene resulting in dramatic effects.

These discoveries by [the petitioner] are extremely important and significant. [The petitioner] is currently preparing papers about these discoveries for publication in two scholarly journals.

Dr. [REDACTED] second letter submitted in support of the petition emphasizes that HHMI researchers are spread in sixty universities in the United States and include Nobel Prize winners. He asserts that if he had to keep one postdoctoral fellow in his laboratory, that he would keep the petitioner. Dr. [REDACTED] states that the petitioner's research has led to further information which has enabled scientists to have a "substantially increased capability to further identify more specific target genes and therefore, to create

drug-related cancer treatment to reach these specific targets." He adds that this research will be published in *Developmental Biology*. Dr. [REDACTED] also asserts that the petitioner's "substantial experience and unique skills in the field of gene transcription regulation is crucial to resolve questions on how *slr-6* regulates downstream genes transcription and interacts with *lin-35/Rb* to suppress tumor growth." Dr. Han additionally states:

In addition, [the petitioner] also discovered several new functions of *slr-6* in *C. elegans*, which was not previously known to any other scientists. [The petitioner] found that this particular gene was involved in embryonic development, muscle development, and vulval development. Considering the similarities of this species' genetic makeup with a human, such a finding could mean that this particular gene in humans could also be involved in these processes. Obviously, determining an unknown function of a gene is quite an astounding finding that could lead to endless potential beyond just cancer treatment. Because these findings are so recent, they have yet to be submitted for publication but no doubt will be in the near future.

We note that the importance of the petitioner's field of research or the prestige of his research institution is not at issue, but rather whether this petitioner's contributions to the field have already had such unusual significance and influence so as to merit the special benefit of a national interest waiver. Because the petitioner's findings are so recent, it is difficult to assess how influential his research results have already been. We analyze prospective benefits to the national interest based upon past achievements and not upon the promise of future success. We cannot conclude that his work may benefit the national interest in the future when the petitioner's work has not yet been disseminated to the wider scientific field.

[REDACTED] a professor in the Department of Molecular, Cellular and Developmental Biology at CU and a member of the National Academy of Sciences, also submits a letter in support of the petition. Professor [REDACTED] describes the importance of understanding how the activity of RAS/MAPK signals is regulated and the relationship to cellular functions in developing treatments to cancer. He states that the petitioner's research could develop "means to increase the activity of other genes so as to compensate for a mutated Rb gene." He characterizes the petitioner's research as providing "fundamental contributions to the ongoing fight against cancer" and believes that the petitioner "has the potential to become a leader in the field of gene regulation in development." While we give Professor Wood's opinion considerable weight as a member of the National Academy of Sciences, we note that his letter doesn't explain how the petitioner's work has already had any significant influence.

[REDACTED] an assistant professor in the genetics department at the University of Pennsylvania, also submitted two letters praising the petitioner's genetic research skills. Dr. [REDACTED] indicates that she worked in Dr. [REDACTED] lab in the past and is engaged in similar research. Both letters provide similar information as those submitted by Dr. [REDACTED] citing the petitioner's work in the study of the *C. elegans* organism, the components of the RAS/MAP signal pathway, and the Rb tumor suppressor gene. Dr. [REDACTED] emphasizes that the petitioner's knowledge base and research skills are critical in this area of research.

[REDACTED] an assistant professor in the biochemistry and molecular biology department at Pennsylvania State University, indicates that she met the petitioner when she performed research in Dr. [REDACTED] lab. She asserts that the petitioner's work in identifying a gene in the "downstream target in the RAS/MAP signal pathway" could aid scientists in preventing or counteracting gene mutations causing the formation of tumors.

[REDACTED] a professor in the biological chemistry department at the University of Michigan Medical School, indicates that he is familiar with the petitioner's work from his own collaborations with Dr. [REDACTED] lab. He notes that the petitioner's work in mapping and cloning a gene that could compensate for a mutated Rb gene has significant potential in the area of cancer prevention and treatment.

[REDACTED] a co-associate director of the Basic Sciences division at the Fred Hutchinson Cancer Research Center in Seattle, Washington, indicates that she has followed the work at Dr. [REDACTED] laboratory for the past ten years and has become acquainted with the petitioner's research from reading research papers and speaking with people in his laboratory. Dr. [REDACTED] also explains that the research projects in her own laboratory are very closely related to the petitioner's work. Dr. [REDACTED] provides:

With regard to his work on RAS/MAP signal pathways, [the petitioner's] excellent skills in gene transcription regulation, molecular analysis of gene promoter, DNA-protein interaction, etc., he assigned a gene for FGF (fibroblast growth factor, also known as *egl-17*) as a target of this pathway. Identifying the cis-acting elements responsible for specific transcription of *egl-17* gene will allow scientists to identify more specifically a target gene of RAS/MAP pathway. Such a development is major for this particular research. . . . I understand that his work is soon to be published in the top biology journal, *Developmental Biology*.

[REDACTED] is a chief investigator in the genetics laboratory at the National Institute on Aging/NIH, Dept. of Health and Human Services. He states that he is familiar with the petitioner's work from reading research papers and from meetings. Dr. [REDACTED] also states that his laboratory and Dr. [REDACTED] laboratory pursue similar areas of research. He echoes the other testimonials submitted in stating that the petitioner has made important contributions to the work on RAS/MAP signal pathways and the Rb tumor suppressor gene. Like the other witness statements, Dr. [REDACTED] also anticipates the petitioner's findings will be published in upcoming scholarly journals. There is no indication in the record that Dr. [REDACTED] endorsement represents the official opinion of the Dept. of Health and Human Services.

We note that all the letters but those from Dr. [REDACTED] and Dr. [REDACTED] come from a circle of colleagues directly connected to the petitioner or Dr. [REDACTED] laboratory in the past or present. This does not detract from the value of their opinions, as they are in the best position to describe the details of the beneficiary's work; however, it does not demonstrate that the beneficiary's work has had any influence outside of these entities.

As noted in the director's denial, while most of the witnesses discuss the potential applications of the petitioner's research and anticipated publication of his results, there is little first hand independent corroboration that these applications had yet been realized, or that the petitioner's work was of such recognized significance at the time of filing that it had already influenced the work undertaken by other researchers. For example, while Dr. [REDACTED] and Dr. [REDACTED] both claim that they were already aware of the petitioner's work, neither identifies whether, or to what extent other research was building upon the petitioner's work, or even whether their own research has already been influenced by the petitioner's findings. As expressed by several witnesses, the petitioner's most significant findings had not yet been published at the time of filing the petition (March 2002). We note that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14&N Dec. 45, 49 (Comm. 1971).

The record would be more persuasive if it were supported by evidence from independent researchers who have recognized or relied upon the petitioner's accomplishments, which might demonstrate his contributions to the field are of such unusual significance as to merit a national interest waiver. Independent evidence that would have existed whether this petition were filed would be more persuasive than the subjective statements from individuals selected by the petitioner.

Such independent evidence could take the form of a significant publication history by the petitioner along with evidence that his articles have been widely cited by other scientists in his field. In this case, the petitioner submits cover pages of two articles that he co-authored and three in which he was the lead author while working in China. The record also contains evidence that one of the petitioner's research projects was presented as a conference paper in 1999. The record does not indicate that the presentation or publication of one's work is unusual 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. If an alien is pursuing research which he and his immediate circle of colleagues consider to be critical, but which other researchers do not view as particularly significant, then the extent of the alien's influence is not established. 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 record contains no evidence that other independent researchers in the field have cited the petitioner's work. On appeal, the petitioner submits evidence that *Developmental Biology*

accepted one of his articles for publication in December 2002. The record also contains a copy of an article that he has recently submitted to *Molecular Cell* for consideration. As noted above, this evidence cannot retroactively establish the petitioner's reputation at the time of filing the petition. See *Matter of Katigbak, supra*. As such, we cannot conclude that the petitioner's published research findings have influenced other independent scientists in his field.

It is apparent that the petitioner is a talented and innovative biological and gene researcher. Nevertheless, his exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the beneficiary 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 training or is engaged in promising research. The labor certification process exists because protecting jobs and employment opportunities of United States 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.

On appeal, the petitioner suggests that it is impractical to apply the labor certification process in his case because his employer does not apply for permanent residence for any of its employees. The petitioner offers no further argument. Pursuant to published precedent under *Matter of New York State Dept. of Transportation*, the inapplicability or inconvenience of the labor certification process cannot be considered as sufficient cause for a national interest waiver; the alien must still serve the national interest to a substantially greater degree than do others in the same field. The plain meaning of the statute indicates that members of the professions holding advanced degrees (including biomedical researchers) as well as aliens of exceptional ability in the sciences are subject to the job offer/labor certification requirement. It is not persuasive to argue that a private employer's decision not to petition for immigrant visas for its employees justifies waiving the labor certification process. The argument also begs the question why an abundantly endowed private institution, such as the petitioner's employer, would not utilize the labor certification process if the petitioner's value to the research project were critical.

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 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.