

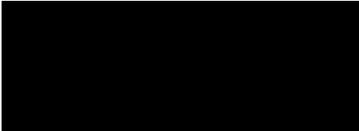
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Washington, DC 20536.

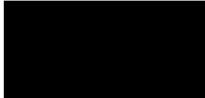


File: WAC-02-041-51696

Office: California Service Center

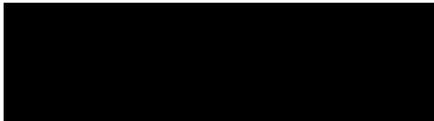
Date: **JUL 10 2003**

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)

ON BEHALF OF PETITIONER:



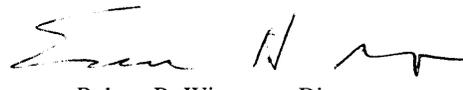
INSTRUCTIONS:

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

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

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the 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, 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 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.

On appeal, counsel submits a brief that essentially reproduces her earlier briefs almost verbatim with few additions. Her only rebuttal of the director's decision is to assert that the director focused on the petitioner's status as a Ph.D. candidate, failing to consider that the petitioner was pursuing his second Ph.D. Counsel asserts that the petitioner's "academic accomplishments alone distinguish him from others." Inexplicably, the petitioner resubmits copies of almost all previously submitted documentation. We note that such documentation is already part of the record. Unless the director's decision suggests that previously submitted material is not part of the record, the resubmission of such material cannot be considered part of a substantive appeal that addresses the director's concerns or alleges errors in the director's conclusions.

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 Ph.D. in Forestry from Beijing Forestry University. The petitioner is also pursuing a second Ph.D. in agricultural biotechnology at the University of Hawaii at Manoa. 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.

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.

The director did not contest that the petitioner works in an area of intrinsic merit, biotechnology research relating to agriculture, and that the proposed benefits of his work, improved crops through biotechnology, 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 he 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, n. 6.

The petitioner received student awards in 1995, the title of excellent student from the Bao Gang Educational Foundation of China in 1996, a first level science and technology progress award from the Education Committee of Henan Province in 1996, the title of excellent graduate student in the major of forestry from the Department of Forestry in China in 1997, a second level forest science and technology progress award and a third level science and technology progress award from the credentials committee of Henan Province in 1998, and the title of excellent researcher from the Chinese Academy of Forestry in 1998. The director concluded that the record lacked evidence that these awards were indicative of national acclaim. We note that national acclaim is not required for the benefit sought.¹

Recognition of achievements and contributions from peers and government entities is one of the criteria for establishing exceptional ability. Thus, were the issue not moot for the reasons discussed above, a discussion of the awards would be necessary as they relate to exceptional ability. The petitioner also provided evidence of professional memberships, another criteria for establishing exceptional ability. As the exceptional ability classification normally requires an approved labor certification, however, we cannot conclude that meeting one, two, or even the necessary three of the regulatory criteria for exceptional ability warrants a waiver of the labor certification requirement in the national interest.

Dr. [REDACTED] Acting Center Director of the U.S. Pacific Basin Agricultural Research Center, Hawaii, a U.S. Department of Agriculture (USDA) research leader, and an affiliate faculty member of the University of Hawaii, indicates that he runs the USDA laboratory in which the petitioner is completing his Ph.D. thesis. Dr. [REDACTED] discusses the importance of genome research in improving agriculture. As stated above, the director did not question the intrinsic merit of the petitioner's area of work. Dr. [REDACTED] asserts that the petitioner's work is too complicated to explain in detail, but provides generally that the petitioner is "refining the required technologies and using them to develop genetic and physical maps of the genome of the tropical fruit tree

¹ The first few pages of the director's decision contain several references to "national acclaim" and the requirements for aliens of extraordinary ability, a benefit not sought by this petition. While counsel does not challenge this language on appeal, we acknowledge its use by the director. The director's use of such language, however, is not reversible error, as on page nine of his decision he acknowledges that the petitioner need not place himself at the very top of the field of endeavor and begins a discussion of the appropriate considerations for the classification sought. Further, the director raised legitimate concerns, which will be discussed below, that counsel has not addressed on appeal. Thus, while we withdraw any inference from the director's decision that a petitioner need demonstrate national or international acclaim, we find that, in light of the remaining discussion, the director's use of such language is not reversible error.

Carica papaya.” Dr. [REDACTED] continues that the petitioner’s research, “directed towards the identification and isolation of agronomically important genes plus developing molecular maps for the purpose of using these maps to assist breeders in the breeding and selection of improved cultivars, is truly on the cutting edge of modern agricultural research.” Dr. [REDACTED] further states that the petitioner has completed his coursework, has completed a research proposal, “has already isolated several important flowering genes and should have a fairly good genomic map of the fruit tree *Carica papaya* within the next 2 months.” Finally, Dr. [REDACTED] concludes that “by the time [the petitioner] graduates, I expect that he will have a long list of accomplishments that contribute [to] improving agricultural biotechnology.”

Dr. [REDACTED] letter is not persuasive. While he explains the importance of the petitioner’s area of research, he does not identify a specific breakthrough and explain its significance. All Ph.D. candidates in science must complete their coursework, develop an original research proposal, and complete original research. Dr. [REDACTED] letter does not explain how the petitioner’s research sets him apart from other Ph.D. candidates. Nor does Dr. [REDACTED] explain how the petitioner has already influenced the field of agricultural biotechnology. Dr. [REDACTED] prediction that the petitioner may have such accomplishments by the time he graduates is insufficient to warrant a waiver of the labor certification process in the national interest.

Dr. [REDACTED] a research scientist at USDA and a member of the petitioner’s committee at the University of Hawaii, provides more detail about the petitioner’s work. Dr. [REDACTED] explains that papaya fruit from a hermaphrodite tree is more valuable on the market and that the current method of planting five seedlings to ensure a hermaphrodite is wasteful. The petitioner’s research goal, according to Dr. [REDACTED] is to develop a technique to control the sex determination of the papaya tree. Dr. [REDACTED] asserts that the petitioner has made significant progress in isolating a sex determination gene in papaya through map based cloning. The petitioner has identified more than 150 markers and mapped the target gene “within 0.3 cM to a SCAR marker.” Dr. [REDACTED] continues: “Another breakthrough is that he has isolated 4 large DNA fragments from a papaya genomic library” which the petitioner will use to finally isolate the gene he is seeking. While Dr. [REDACTED] asserts that the petitioner’s accomplishments “have been recognized” in that he was invited to present his findings, Dr. [REDACTED] does not provide examples of how the petitioner has influenced the work of other biotechnology researchers.

Dr. [REDACTED] and Dr. [REDACTED] other members of the petitioner’s research group, provide similar information to that discussed above. Dr. [REDACTED] the principal investigator on the project, further attests to the difficulty of the petitioner’s work and the recognition it has received based on his presentations and two submitted articles, one of which had been published.

Dr. [REDACTED] a biotechnologist at the Hawaii Agriculture Research Center, indicates that he has worked directly and indirectly with the petitioner. Dr. [REDACTED] asserts that the petitioner’s “combination of scientific backgrounds of quantitative genetics and molecular biology is quite unique and significant.” It cannot suffice to state that the alien possesses useful skills, or a “unique background.” Special or unusual knowledge or training does not inherently meet the national

interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

Dr. [REDACTED] another research scientist at the Hawaii Agriculture Research Center, provides similar information to that discussed above, asserting that the petitioner's research "is significant not only for the methodology of unknown gene isolation, but also for its importance in [the] papaya industry and other crop species and thus the improvement of the economy of the United States."

[REDACTED] a professor at the Chinese Academy of Forestry, asserts that the petitioner is a productive researcher, reiterates the Chinese titles and awards received by the petitioner, but provides no examples of breakthrough or influential contributions by the petitioner while working in China.

In his request for additional documentation, the director noted that "the record does not demonstrate that the petitioner has been thus acknowledged by independent experts in the [field], as opposed to those individuals who had worked directly with the petitioner/beneficiary." In response, the petitioner submits three more references from research scientists in Hawaii.

Dr. [REDACTED] an associate professor at the University of Hawaii at Manoa, provides:

[The petitioner's] research is currently focus[ed] on the characterization of [the] papaya genome. His further goal is to clone important genes from papaya. In less than three years, he has characterized and replicated [the] papaya BAC library; from this library he identified some clones using *arabidopsis* flower genes as probes. He has generated more than 700 AFLP polymorphic markers by using about 30 primer sets. Those markers will be used to construct a high-resolution papaya genetic map, and some important morphologic traits such as sex type and fruit color will be mapped to the linkage group. This is the most important step toward map based cloning [the] papaya sex determination gene and [the] fruit color gene. In addition, [the petitioner] used other markers to do [a] papaya fine map. Currently he has screened 991 F₂ individuals to calculate the distance between sex determination gene(s) and the flanked markers. He will further clone these genes and transform them to papaya and other crop species.

Dr. [REDACTED] a professor at the University of Hawaii at Manoa, discusses the implications of the petitioner's work and asserts that he will complete it within one year. Dr. [REDACTED] does not identify a specific breakthrough that the petitioner had already accomplished at the time of filing or explain its significance and influence in the field.

Finally, Dr. [REDACTED] Head of the Genetics and Pathology Department at the Hawaii Agriculture Research Center, provides similar information to that discussed above, adding that the petitioner's research has supported a "previously proposed hypothesis that genetic recombination is suppressed in the region here the papaya sex gene is located."

Starting on page five of his decision, the director raises the concern that most of the above references “have worked or collaborated directly with the self-petitioner.” While the director specifically states that he is not questioning the credibility of the references and acknowledges their value in detailing the petitioner’s role in various projects, he notes that letters of record can only demonstrate that the petitioner “is a skilled researcher who has earned a good reputation primarily among researchers with some connection to the university or institution where he conducts his research.”

On appeal, counsel does not address this concern other than to quote extensively from the witness letters already part of the record. We find that the director’s concerns were valid. While letters from a petitioner’s immediate circle of colleagues are important in providing details about the petitioner’s role in various projects, they cannot by themselves establish the petitioner’s influence over the field as a whole. On appeal, the petitioner does not submit letters from more independent sources outside Hawaii. Thus, the petitioner has not overcome the director’s valid concerns.

The record establishes that the petitioner has authored several published articles. The director’s decision includes a paragraph dismissing citations as inherent to the field. We cannot concur with such a general dismissal of citations. We acknowledge, and often note ourselves, that the publication of original research is inherent to the field of scientific research. Specifically, the Association of American Universities’ Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, sets 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.” This report reinforces our position that publication of scholarly articles is not automatically evidence of influence. Nevertheless, an extensive citation history is objective evidence that the cited article has influenced the field.

The record contains no evidence that the petitioner’s work has been cited by independent researchers or, in fact, at all. The director stated:

Virtually all Ph.D. and Master’s degree candidates are required to conduct research, under the supervision of academic advisors who are conducting ongoing research. Additionally, they are required to document their research as part of the requirements of their degree program. As such, virtually all individuals who have achieved a Ph.D. degree will be able to present evidence of authorship of scientific articles. Consequently, authorship of articles in furtherance of their degree program including dissertations is not routinely judged to be indicative of exceptional ability, nor does it warrant exemption from the requirement of a job offer/labor certification based on national interest.

The director then concluded: "Nothing in the record distinguished the self-petitioner's publications from the published work of countless others in the field."

As stated in the introduction to this decision, counsel criticizes the director for considering the petitioner as a Ph.D. candidate when the petitioner is actually in the process of completing a second Ph.D. program. Regardless of whether the petitioner previously obtained a Ph.D. and subsequently worked in his field for several years, the director is not incorrect when stating that the work discussed by the references relates to the petitioner's work in pursuit of a degree. While we do not find that work performed while a student can never warrant a waiver of the labor certification process in the national interest, that is not how we read the director's decision. Rather, the director appears to be stating that original research, culminating in published results, is required of all Ph.D. candidates. Thus, according to the director's logic, a Ph.D. candidate must show more than published results to demonstrate that he will benefit the national interest to a greater extent than an available U.S. worker with a similar degree, presumed to be a minimum qualification for the occupation sought by the petitioner.

On appeal, the petitioner does not submit evidence that his articles have been widely cited or other objective evidence of the influence of his articles. Therefore, the petitioner has not overcome the director's valid concerns.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any research, in order to be accepted for a degree, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D., is published or is working with a government grant inherently serves the national interest to an extent which justifies a waiver of the job offer requirement. The record does not establish that at the time of filing the petitioner's work was already viewed in the field in general, or even among some of his colleagues, as a groundbreaking advance in biotechnology.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has 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.