

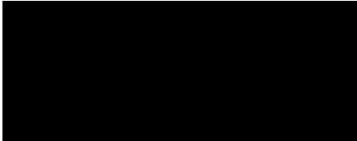
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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



JUL 16 2003

File:  Office: Nebraska Service Center Date:

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, 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 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 Ph.D. in biochemistry from Beijing Medical University. 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, endocrinology, and that the proposed benefits of his work, improved fertility treatments and reduced early pregnancy loss, 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.

In looking at this issue, after discussing the evidence, the director stated:

The Service does not disagree that the petitioner has demonstrated his potential to make worthy contributions to his field, but that is expected of all postdoctoral researchers. The record of publications, the demonstrated impact of the research on the field, and the esteem in which a researcher is held by others in his or her field are indicators of whether a particular researcher will likely make contributions which exceed those of others in the field. While the submitted evidence in this case establishes that the petitioner scores high on the latter indicator, it does not establish that in respect to the other two he is at a level substantially above other researchers with similar qualifications.

On appeal, counsel asserts that this “newly invented three factor test” is not found in the regulations or precedent decisions and that the director erred by applying this new standard.

We acknowledge that neither the regulations nor any precedent decision sets forth this list of factors to be considered. While we continue to decline to set forth a list of factors, we do not find that the director abused his discretion. 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. While not setting forth a specific list of factors, *Matter of New York State Dept. of Transportation, supra*, does state that 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.

Publishing original results is inherent to the field of research. While every case is adjudicated on its own merits, in general it can be expected that a medical researcher who has made contributions of unusual significance would be able to demonstrate a publication history consistent with the claim of influence. Thus, the director did not err by considering whether the petitioner’s publication record was indicative of his claimed influence on the field. Nor did the director err by finding that the subjective opinions of experts, while an important consideration, are generally insufficient unless supported by some objective evidence of the petitioner’s past history of achievement and influence on the field.

Finally, eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we 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. Given the above considerations, we will consider the evidence submitted.

Prior to coming to the United States, the petitioner worked in China as a researcher in immunology. In 1997, the petitioner came to the United States to work as a postdoctoral researcher in endocrinology in the laboratory of Dr. [REDACTED] then a scientist at the Population Council, Center for Biomedical Research. In 2001, Dr. [REDACTED] became an associate professor at the University of Illinois at Urbana-Champaign and the petitioner moved with her. While the record contains the petitioner’s articles in the field of immunology, counsel and the petitioner’s references focus more on the petitioner’s accomplishments in endocrinology upon entering the United States.

Dr. [REDACTED] asserts that in her laboratory, the petitioner began work on a “challenging research project to identify and analyze the role of steroid-regulated genes in embryo implantation.” As part of this project the petitioner “cloned a novel gene from the uterus and showed it to be regulated by estrogen and interferon during implantation,” which revealed new insights into the mechanisms of gene regulation. The final results of this project were published in *Endocrinology*. Dr. [REDACTED] asserts that several laboratories requested the new gene cloned by the petitioner, including a laboratory headed by a member of the National Academy of Sciences, and that these laboratories are now performing research on this gene.

According to Dr. [REDACTED] the petitioner subsequently “elucidated the mechanism by which the peptide hormone calcitonin controls the process of implantation by down-regulating the expression of a calcium-dependent epithelial cell adhesion molecule E-cadherin from cell-cell contact sites.” Dr. [REDACTED] asserts that this work is “widely appreciated and considered to be in the cutting edge of reproductive endocrinology.” Finally, Dr. [REDACTED] asserts that the petitioner has performed some of the most critical research in the laboratory, that he is the most effective person to continue this research that “may eventually” lead to the identification of genetic markers of implantation relating to in vitro fertilization, and that his absence would impose a hardship on the laboratory.

Other scientists at the University of Illinois at Urbana-Champaign and the Population Council provide similar information. Dr. [REDACTED] at the University of Illinois adds that the petitioner’s cloning research was presented at the most prestigious conference relating to reproduction and that he received a coveted travel award to present his work. Dr. [REDACTED] further states that the petitioner “is currently employing DNA Microarray and gene targeting knockout technology to gain an understanding of the precise nature of molecular mechanism of implantation in more detail, and to identify more genetic markers of implantation, which will be of great potential for clinical application in the field of female infertility.” Dr. [REDACTED] at the Population Council finds the petitioner’s work with calcitonin most significant. Dr. [REDACTED] provides:

The complex interplay between immune system cytokines and steroid hormones is finally being clarified by the techniques mastered by [the petitioner], which produce large volumes of data. He has successfully organized these data and provided them with a thoughtful mechanistic interpretation.

While not at the University of Illinois or the Population Council, Dr. [REDACTED] a professor at Wayne State University, states that he is a long-time collaborator of Dr. [REDACTED] and recently collaborated with the petitioner on a project whose results were recently submitted for publication. Dr. [REDACTED] notes that the petitioner’s work has been part of a National Cooperative Agreement on Markers of Implantation sponsored by the National Institute of Child Health and Human Development at NIH.

The above letters are all from the petitioner’s collaborators and immediate colleagues. While such letters 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.

We acknowledge that the record does contain letters from sources that appear more independent. Dr. [REDACTED] Chairman of the Department of Biological Sciences at the University of Delaware, states that he is very familiar with the petitioner’s research. Dr. [REDACTED] continues:

Using gene expression screening techniques, he has identified a novel gene from the pregnant uterus and showed this gene is regulated by both estrogen and interferon during implantation. He also has generated a provocative hypothesis

that the peptide hormone, calcitonin, facilitates embryo implantation by down-regulating the cell surface junctional protein, E-cadherin. These findings now only greatly advance our understanding of the molecular basis of embryo implantation, but also direct efforts to the design of new genetic markers of uterine receptivity during embryo implantation. In addition to the application of these markers in human *in vitro* fertilization procedures, they are also useful in understanding the causes of female infertility and as targets for the development of new agents to enhance fertility or promote contraception.

While Dr. [REDACTED] does not specify any connection with the petitioner or Dr. [REDACTED] we note that Dr. [REDACTED] resume reflects that Dr. [REDACTED] collaborated with Dr. [REDACTED] on an article published in 2000. Thus, the fact that Dr. [REDACTED] is aware of the petitioner's work is not a reflection of the petitioner's reputation outside of his immediate circle of colleagues.

Three of the remaining independent references indicate that their evaluations are based on a review of the petitioner's credentials. These statements suggest that these references were unaware of, and therefore not influenced by, the petitioner's work prior to being contacted for a reference letter.

Dr. [REDACTED] an assistant professor at the University of Kansas Medical Center, characterizes the petitioner's cloning of a new gene as "exciting" and asserts that the petitioner's work with calcitonin in rats has tremendous implications for human fertility because recent studies have reflected that calcitonin also plays a role in implantation in humans.

Dr. [REDACTED] a professor at the Catholic University of Chile, summarizes the petitioner's projects in endocrinology, characterizes his findings as "novel" and asserts that they have tremendous implications in the field. Dr. [REDACTED] continues:

Currently, [the petitioner] is pursuing a progesterone receptor-mediated lipoxygenase-signaling pathway in mouse uterus during the process of implantation. His preliminary studies seem to suggest that lipoxygenase-signaling pathway could play an important role during implantation, since inhibition of this pathway leads to the blockade of embryo implantation.

It is not clear that the petitioner had made any progress on this recent project as of the date of filing. As such, it is not evidence of his eligibility at that time.

Dr. [REDACTED] Director of the Neuroendocrine Laboratory at Harvard Medical School who has previously performed research at the Population Council, asserts that he is impressed with the "number of important discoveries" made by the petitioner. He summarizes the petitioner's work discussed above, concluding that the petitioner is productive and creative.

The final two independent references claim to be familiar with the petitioner's work. Dr. [REDACTED] a professor at Vanderbilt University Medical Center and previously the postdoctoral supervisor of Dr. [REDACTED] at the University of Kansas, provides:

[The petitioner's] findings not only greatly advance our understanding of the molecular basis of embryo implantation, which is under the control of steroid hormones, growth factors and some cytokines, but also direct our efforts to design the genetic markers of uterine receptivity during embryo implantation. These markers will have tremendous application in in-vitro fertilization techniques and may help to understand the causes of infertility in women or to develop novel and effective contraceptive.

Dr. [REDACTED] Director of Transgenic Core at Baylor College of Medicine, provides similar accolades.

The director stated that while the Service (now the Bureau) "shows considerable deference to the opinions of experts in a field," "the other documentation must also support a finding that the specific prior achievements of the petitioner demonstrate his ability to benefit the national interest to a substantially greater degree than others in the field of reproductive biology." On appeal, counsel cites decisions from this office issued prior to *Matter of New York State Dept. of Transportation, supra*, for the proposition that witness letters are sufficient. Counsel asserts that the record contains 14 expert letters, six of whom have no ties to the petitioner.

We do not find that counting the number of reference letters is a useful test. What is relevant is how the references became aware of the petitioner's work and what they say about its significance. While the above letters are very positive, the independent experts do not explain how, or if, the petitioner's results have influenced their own research. Notably absent are letters from the independent researchers¹ who requested the petitioner's cloned gene, especially Dr. [REDACTED] the member of the National Academy of Sciences. Such letters might explain the significance of the cloning and its influence on the laboratories that requested and received the gene for their own projects. Such letters might also explain the significance of the request itself. Specifically, the authors might indicate how many genes they routinely request and how they use them. Nor does the record contain letters from prestigious fertility clinics or independent laboratories that have begun clinical testing on improving *in vitro* fertilization techniques based on the petitioner's results.

The petitioner initially submitted five published articles on endocrinology. The director noted that only one of these articles reflects the petitioner as first author. Counsel challenges this conclusion on appeal, asserting that the petitioner has nine first-authored articles. Counsel misreads the

¹ The record does include a letter from Dr. [REDACTED] who requested the gene according to a list provided by the petitioner in response to the director's request. Dr. [REDACTED] however, is a professor at the University of Illinois and is not an independent researcher.

director's decision. The director specifically stated that the petitioner had only been the first-author for one article *in the field of endocrinology*. The record supports that conclusion.

Regardless of the number of first-authored articles, the Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Bureau's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

In his initial cover letter, counsel referenced Exhibit N as "documentation showing numerous citations" of the petitioner's work. The director concluded that the petitioner's citation history did not set him apart from other researchers in the field. Counsel does not address this conclusion on appeal. We will examine the citation evidence below.

The petitioner only submitted the citation history of three articles, all relating to endocrinology. Thus, we find that the director did not err in failing to consider the impact of the petitioner's earlier work in immunology. As noted by the director, the petitioner's first-authored article reporting the regulation by interferon of the novel gene has been cited only once. Two of the petitioner's earlier articles published in June 1999 (regarding estrogen induced genes) and November 1999 (reporting the initial cloning of the novel estrogen-regulated gene) have been cited four and three times respectively. Dr. [REDACTED] was a co-author on all of the petitioner's endocrinology articles.

The petitioner also submitted the citation history for other articles authored by Dr. [REDACTED] on which the petitioner is not listed as an author. Some of Dr. [REDACTED] articles on which the petitioner is not a co-author have been cited as many as 26 times. One of the citations is a review of a November 1999 meeting that evaluated the National Cooperative Program on Markers of Uterine Receptivity for Blastocyst Implantation. The evaluation notes Dr. [REDACTED] calcitonin research, but cites an article that does not list the petitioner as a co-author.

The above materials suggest that the petitioner's work with Dr. [REDACTED] has either been less influential than Dr. [REDACTED] other work or, as suggested by the director, that the petition may have been filed prematurely, before the influence of the petitioner's work could be gauged.

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 publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is working with a government grant inherently serves the national interest to an extent that

justifies a waiver of the job offer requirement. The record does not establish that the petitioner's work represented a groundbreaking advance in endocrinology.

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.