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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

NOV 17 2006

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

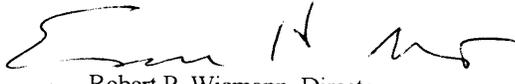
INSTRUCTIONS:

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 seeks employment as a research associate. At the time of filing, the petitioner did not indicate that she had any standing job offer, but she stated that she seeks to earn \$1,000 per week. 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 has 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 requirements 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 director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now the Bureau] 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.

Counsel describes the petitioner's work and explains why the petitioner believes this work to qualify her for a waiver:

[The petitioner's] study of soy products improves the healthcare and well-being of U.S. citizens and makes more productive use and efficient allocation of U.S. resources. . . .

[The petitioner's] study is to observe the effect of cyclodextrin on the chemical composition affecting the flavor and odor of soy products, specifically soy milk. . . . Soy milk and other soy products are known as a low cost and high quality protein source in diet. . . .

However, whole soybean and soybean produc[t]s, such as soy milk, tofu, and soy isolate, are not widely consumed by Americans because of their objectionable flavors and odors. [The petitioner's] research has mainly focused on the use of cyclodextrins to remove undesirable volatile compounds . . . to improve acceptance of soy foods.

Counsel claims that an approval of the waiver “is also requested by a U.S. government agency, specifically the Food and Drug Administration” (FDA). The record contains a letter from Dr. [REDACTED] an FDA supervisory research chemist (discussed below), but Dr. [REDACTED] does not state or imply that the FDA, as a matter of institutional policy, supports the waiver application; Dr. [REDACTED] merely states “I recommend” the petitioner for the waiver. Dr. [REDACTED] does not claim to be authorized to speak on behalf of the entire agency. Thus, a personal endorsement from a chemist who happens to work for the FDA does not amount to a request from “a U.S. government agency.”

Along with background documentation pertaining to her field of research, the petitioner submits several witness letters. As noted above, Dr. [REDACTED] is a supervisory research chemist at the FDA Center for Biologics Evaluation and Research. Dr. [REDACTED] praises the petitioner’s “extensive experience in food science and technology” but offers no specific information that would distinguish the petitioner from other well-trained professionals in her specialty.

Professor [REDACTED] of the Ohio State University, where the petitioner obtained her doctorate, states:

[The petitioner] became expert in a new objective method for controlling flavor quality in foods. This technique, the Electronic Nose, is a new approach that is becoming highly significant in the food industry as a quality control tool. [The petitioner] is one of the relatively few individuals [who] has the understanding of this methodology in the United States.

This type of research, in which [the petitioner] has expertise, could be extremely important to the food industry of the United States. . . .

Moreover, a number of organizations (including Kraft Foods, Ault Foods, Nestle and the International Soybean Program [INSOY] have expressed interest in her research.

Prof. [REDACTED] does not state what impact the petitioner’s work has already had on the food industry; he merely indicates that the potential exists for future impact. Other witnesses, similarly, speak in terms of the future potential of the petitioner’s work. Dr. [REDACTED] research scientist at AMPC, Inc., states that the petitioner’s research “is very likely a way of improving soymilk acceptability,” implying that it is not yet known whether the petitioner’s findings have indeed increased consumer acceptance of soy milk and other soy products.

The record contains nothing from the corporations named above to confirm the nature or extent of their claimed interest in the petitioner’s work. The only named corporation represented in the record at all is Nestle. The Nestle employee is Prakash Venkata, a development technologist who knew the petitioner as a graduate student at the Ohio State University. Prakash Venkata states the petitioner “has made good progress in masking/eliminating some of the off flavors in soy protein, continuation of her work for a few more years is critical for the successful completion of

these projects.” These comments add to the conclusion that it is not yet known whether the petitioner’s work will, in fact, result in more palatable soy-based foods.

General arguments about the health benefits of soy-based foods are not, in themselves, persuasive because these arguments apply to every researcher working with such foods. While the intrinsic merit and national scope of this field of research are not in doubt, it does not follow that an alien’s choice to pursue a career in the specialty automatically warrants a waiver.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted copies of previously submitted letters and new arguments from counsel. Counsel states that the petitioner “has been offered the position of research fellow at the University of Delaware to continue her ground-breaking work on soy products.” Counsel does not establish the extent to which independent figures in the field consider the petitioner’s work to be “ground-breaking.” Counsel asserts that the labor certification process could delay the petitioner’s work by several years, but counsel does not explain how this is so when 8 C.F.R. 214.2(h)(16)(i) permits an alien to work in the U.S. as a nonimmigrant while an application for labor certification is pending.

Counsel repeats the assertion that the U.S. Department of Health and Human Services (which includes the FDA) has recommended the approval of the waiver, but it remains that the petitioner has not shown that the FDA as an agency, or the Department of Health and Human Services as a department, has taken any significant interest in this matter. We recognize Dr. [REDACTED] professional standing to attest to scientific matters, but the personal recommendation of one scientist at the FDA is not binding on the agency as a whole.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner’s work but finding that the petitioner’s own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated that the petitioner has not sufficiently distinguished herself from other qualified and competent workers in the same field. The speculative assertion that the petitioner’s work may eventually prove to be of value after several more years of study is simply too conjectural and tenuous to form a basis for permanent immigration benefits.

On appeal, counsel asserts that a brief is forthcoming, but to date the record contains no further correspondence from the petitioner or counsel except for a letter inquiring as to the progress of the appeal. Counsel argues that “[t]he national interest waiver is intended as a means of securing the talents of alien workers who offer significant prospective national benefit, and [the petitioner] has proved that she is such a worker.” The petitioner has proved that she is trained and talented in a useful scientific specialty, but the record contains only speculation regarding the potential benefit arising from her work, contingent on certain not-yet-realized outcomes from her work. The petitioner’s goal of making soy-based foods more palatable does not prove that she will be ultimately successful in reaching that goal, nor does it establish that the public will embrace such foods if made available. Hypotheses about how the consumer may behave, in the event that certain conditions are one day met, form a weak foundation for a national interest waiver.

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 petition⁴ 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.