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Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
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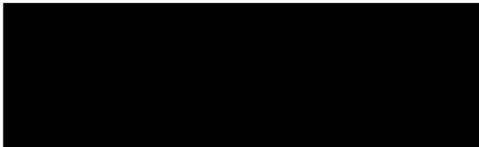
Date: **JUL 18 2003**

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:



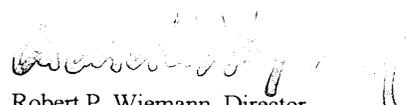
INSTRUCTIONS:

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 sustained and the petition approved.

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 biochemical/biomedical research scientist. At the time she filed the petition, the petitioner was employed as a research scientist for Burstein Technologies, a health science research and development company. 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 chemistry in 1986 from the M.V. Lomonosov Moscow State University. 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 United States worker having the same minimum qualifications.

The petitioner works as a biochemical/biomedical researcher specializing in immunological analyses of biomarker molecules and pesticides. Improved methodologies in this field have varied medical and military applications. The director did not contest that the petitioner's work has intrinsic merit and that the benefits of her services could be characterized as 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 own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n.6.

The record contains evidence that the petitioner's biography was included in a 2000 reference called "Who's Who in the World," and that it was solicited for initial review for the 2002-2003 edition of "America's Registry of Outstanding Professionals," "Strathmore Who's Who," and "Who's Who in

Fluorescence." The record included very little information indicating what the specific criteria for inclusion in these volumes required. While such evidence might conceivably represent some degree of recognition for achievements and significant contributions to her field, that is simply one criterion for exceptional ability found at 8 C.F.R. § 204.5(k)(3)(ii)(F), a classification that normally requires a labor certification. Regardless, we cannot conclude that satisfying one, or even the requisite three criteria for a classification that normally requires a labor certification warrants a waiver of the labor certification requirement in the national interest.

In support of her claim, the petitioner submits numerous recommendation letters. Her current employer has submitted four of these letters. E. Jack Bookout, a vice president of immunoassay development at Burstein Technologies, asserts that the petitioner's research plays a crucial role in several projects that the company is developing. The petitioner is providing support for technology that will enable individuals to use specially designed CD-R discs in a newly designed reader to deliver a wide range of tests, "including clinical laboratory diagnostics, biological warfare agent detection, forensic DNA tests, and food and water contamination tests." [REDACTED] states that the petitioner has contributed five new patent applications and has submitted an additional one.

[REDACTED] provide similar praise about the petitioner's exceptional scientific skills. They indicate that she is developing cardiac marker tests using CD-R discs to help identify patients that may be at risk for heart attacks.

[REDACTED] a vice president of optical disc technologies [REDACTED] echoes the recommendations of his colleagues and notes that scientists "have been working on the possibility of using optical media for medical diagnostics for nearly 20 years," and that the petitioner's participation in the company's effort to introduce their product to the marketplace is extremely important. [REDACTED] also confirms that the petitioner was named as a principal inventor in the five patent applications filed by the company. With respect to patents, we note that an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. *Matter of New York State Dept. of Transportation* at 221, n. 7. Whether a specific innovation serves the national interest must be examined on an individual basis. Here, we note also that while it is clear that her employers value the petitioner's contribution to their research effort, their letters speak more to the ongoing development and potential of the CD-R discs and the petitioner's contributions to the company project, rather than to tangible results which have already been realized in the wider biomedical community.

[REDACTED], has known the petitioner since 1980. He relates that she also worked in his laboratory in 1994. [REDACTED] states that the petitioner successfully led a project in his laboratory that improved an anti-cancer therapy known as photodynamic therapy (PDT). She developed a "one-step homogeneous immunoassay method for detecting small amounts of specific chemical compounds, such as pesticides." [REDACTED] regards the petitioner as a researcher of extraordinary ability.

[REDACTED] a professor of entomology and environmental toxicology at the University of California-Davis, supervised the petitioner's work in his laboratory as a visiting researcher. He confirms that she developed a new method for detecting pesticides in "homogenous solutions in a single step (without pre-cleaning or separation) and in a short time period (10-15 minutes) using a florescence quenching technique."

[REDACTED] an assistant professor of chemical and nuclear engineering at the University of New Mexico, is jointly editing a book on the field of immunoassays. He states that the petitioner was invited to provide a chapter because of her "breakthrough studies in non-aqueous media assays." [REDACTED] asserts that the first draft was very satisfactory and that he had intense discussions with the petitioner the following year during their personal meeting. He claims that he has been using her numerous findings in his research, but he did not elaborate.

[REDACTED] a professor of pharmaceutical sciences at the University of Nebraska, has known the petitioner for many years and supervised her work in his laboratory for about five years. [REDACTED] describes her extensive research experience and states that she developed "drug delivery systems based of magnetic microparticles (which she synthesized herself) and polymeric Pluronic micelles."

[REDACTED] states that he first met the petitioner when she worked in [REDACTED] [REDACTED] states:

I was very interested in her work there related to immunoassay using novel fluorescent labels. About one year later, in November 1999, she was invited to Irvine to give a presentation, which was mostly devoted to her earlier work in Russia. I was very impressed with her work. . . . The use of a colloidal reverse micellar solution as a medium for immobilization allows control of size of the protein-containing particles. Considering that the resulting immobilized protein can be modified via any desired chemical groups (e.g., hydrophobic ones to change the lipophilicity of the particle and it's solubility in a particular solvent, or groups having extraordinary fluorescent properties to serve as fluorescent labels), one can see that her skills can be used in a wide area of chemistry, biotechnology, and medicine, especially in the fast growing area of microassays and biosensors which will be widely used in clinical and environmental analysts in the near future.

[REDACTED] asserts that in "his expert opinion," the petitioner has tremendous potential to contribute to the advancement of scientific research. As a Nobel Prize laureate, we give significant weight to [REDACTED] recommendation.

We concur with the director that the petitioner's references appear to come from those who have been connected to the petitioner through collaboration, supervision, or networking. These witnesses are certainly in the best position to describe the details of the petitioner's work and their statements cannot be discounted, but their statements do not show, first-hand, that the petitioner's

work has already influenced the wider scientific community as a whole, as might be expected with research findings that are especially significant. We note that a few letters, such as [REDACTED] recommendation, indicate that the authors have had more attenuated connections. We agree with counsel, that the national interest waiver standard under section 203(b)(2) of the Act does not require "widespread acclaim" and "widespread recognition," as expressed in some portions of the director's decision, but something slightly less which demonstrates that the alien has influenced her field as a whole. The benefit she brings to her field must "greatly exceed the 'achievements and significant contributions'" set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(ii) describing one of the criteria for an alien with exceptional ability. See *Matter of New York State Dept. of Transportation* at 218. 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.

The record also includes evidence of nine published articles in which the petitioner was the lead author, two articles that she co-authored, a handbook for Russian high school students that she wrote, and evidence of several conference presentations. We note that the record indicates that petitioner has submitted additional articles for consideration, which were not yet published at the time the petition was filed. Eligibility must be established 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 I&N Dec. 45, 49 (Comm. 1971).

The record contains no evidence that publication or presentation of one's work is rare in the petitioner's field. We note that 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 supports the Bureau's position that publication of scholarly articles is not automatically evidence of influence. [REDACTED] publishing one's research results does not compel anyone to read them or utilize the findings presented. The scientific community's reaction to the published articles is often manifested by the citation of a petitioner's published work by other researchers. We disagree with the director's finding that citations to a published work by other researchers do not indicate that a petitioner has demonstrated influence on her field. Heavy citation by other independent scientists can demonstrate that a petitioner has influenced the field as a whole.

In this case, we have carefully reviewed the citation index, the copies of the petitioner's articles, and the publications listed on the petitioner's resume included in the record. The file indicates that the petitioner's work has been cited seventy-five times by other researchers. Forty-five citations represent self-citations by the petitioner or her colleagues. While self-citation is a common and acceptable practice, it does not establish an alien's influence in the wider scientific community. In this case, although not the quantity asserted in the record, thirty citations to the petitioner's work

by other independent researchers is sufficient to indicate that the petitioner has influenced her field to some degree. Taken together with the other evidence previously discussed, the petitioner has demonstrated that her past achievements justify a national interest waiver.

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 field of research, rather than on the merits of the individual alien. The evidence of record establishes that the community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.