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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, DC 20536



11 18 2003

File: WAC-02-187-51017 Office: California 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 sustained, and the petition will be 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 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.

While not raised by counsel on appeal, we note that 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. The director's use of such language, however, is not by itself 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. Nevertheless, it is not clear why the director would discuss factors that were not a consideration in his decision. For the reasons discussed below, we conclude that the director imposed too high a standard in this case.

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 nutritional science and toxicology from the University of California at Berkeley. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, nutrition and toxicology, and that the proposed benefits of her work, improved understanding of the relationship between nutrition and cancer, 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 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.

██████████ a professor at the University of California at Berkeley and a principal investigator at the Brain Tumor Research Center (BTRC) of the University of California at San Francisco (UCSF), asserts that the petitioner has upgraded BTRC's capacity for analyzing methylation in thousands of genes from a manual system to a computerized system. The petitioner is establishing a database that will allow BTRC to organize and share its data. Beyond this technical work, Professor ██████████ asserts that the petitioner is doing the following:

In collaboration with Dr ██████████ in the Pathology Dept. and Dr ██████████ a neuro-oncologist in our department, [the petitioner] is testing the DNA from patient tumors for the inactivation of particular sets of genes that make some of these tumors much more aggressive than others. The success of this project would have significant impact on the diagnosis and treatment of these patients. It is our goal to move beyond the ineffectual and toxic chemotherapy and radiation currently used to treat these patients, into a rational and molecular approach to therapy.

Dr ██████████ Chair of the Department of Nutritional Sciences and Toxicology at University of California at Berkeley, discusses the petitioner's Ph.D. work.

[The petitioner] has made important contributions in the understanding of the mechanism of dietary indoles to inhibit the growth of human breast cancer cells. One of her projects was to study the actions of 3,3'-diindolymethane (DIM) derived from the dietary indole, indole-3-carbinol (I3C). DIM, a major vivo product of I3C, has been shown to have strong protective effects against breast cancer. [The petitioner] examined the role of DIM in both antiproliferation and apoptosis in human breast cancer cells with the techniques she developed and optimized in my laboratory. She found that DIM induced cell death of human breast cancer cells regardless of estrogen receptor status by decreasing expression of the death protective protein (Bcl-2) and increasing expression of death promoting factor (Bax). This is the first report characterizing a central role for the Bcl-2 family of regulatory factors in DIM. This finding is [sic] suggests that DIM may be useful in treatments of both estrogen sensitive and estrogen insensitive breast cancers. [The petitioner's] work was well received by researchers in the field and she was selected to give an oral presentation at [the] 40<sup>th</sup> American Society of Cell Biology (ASCB) conference.

In a second series of experiments, [the petitioner] observed that DIM blocked breast cancer cell growth specifically at the G1 stage of the cell cycle by increasing expression of the p21 cell cycle inhibitor. Her investigation demonstrated that

DIM directly induced expression of this cell growth inhibitor by increasing SP1 binding ability within this gene promoter. These results uncover the complex cellular activities of this dietary compound and shed light on the mechanism of protective actions against breast cancer.

Dr. [REDACTED] a professor at the University of California at Berkeley, Director of the United States Department of Agriculture Western Human Nutrition Research Center and a member of the National Academy of Sciences, provides similar information. Dr. [REDACTED] asserts that “the impact of this work is tremendous and offers important clues to improved therapies for breast cancer.” Another professor and a former postdoctoral researcher at Berkeley provide similar information and general praise of the petitioner’s thesis.

Dr. [REDACTED] a professor at Zhejiang University, discusses the petitioner’s work while a student of his. Dr. [REDACTED] asserts that the petitioner’s project on vitamin A and iron availability was recognized with an award from Zhejiang Province.

In his request for additional evidence, the director requested independent reference letters. In response, the petitioner submitted another letter from Dr. [REDACTED] and two more independent letters. Most significant is the letter from Dr. [REDACTED] an associate professor at Ohio State University. Dr. [REDACTED] discusses the petitioner’s work that was published in *Nature Genetics* in November 2002. While published six months after the date of filing, the paper does report the results of work the petitioner completed prior to the date of filing. Thus, we can consider Dr. [REDACTED] discussion of that work. Dr. [REDACTED] states that the petitioner “generated the very first integrated genomic and epigenomic view of the human cancer cell genome.” Dr. [REDACTED] explains that an integrated approach improves our understanding of tumor and cancer genomes and is more effective and accurate than “deletion mapping alone.” Dr. [REDACTED] further asserts:

The computer applications developed and refined by [the petitioner] are currently being adopted by my own laboratory and others. Prior to this work, analysis of the 2-D gels for methylation analysis (RLGS) and cloning of abnormally methylated genes were two major bottlenecks in the research of my laboratory and that of others using RLGS. As a direct result of [the petitioner’s] work, we are now able to proceed at a much more rapid pace in our research, and look forward to the further refinement and implementation of these methods under the guidance of [the petitioner.]

In his final decision, the director quoted this letter but stated: “It cannot be ignored that most of the witnesses have worked or collaborated with the self-petitioner, employer or the research facility.” While letters from collaborators are more useful in establishing the details of the petitioner’s work than establishing the petitioner’s influence in the field, dismissing independent witnesses because “most” of the letters are from collaborators is problematic. What the independent witnesses say is more relevant than whether they outnumber the collaborators who support the petition. In this case, Dr. [REDACTED] supports the claims made by the petitioner’s collaborators, establishing that the petitioner’s techniques are being adopted in independent laboratories.

Moreover, in response to the director's concerns, the petitioner submits yet another independent witness letter on appeal. Dr. [REDACTED] Branch Chief of the Molecular Radiation Therapeutic Branch at NIH, asserts that he learned of the petitioner through her publications and his personal discussions with other scientists. He discusses the importance of her work, characterizing it as "groundbreaking."

We disagree with the director that "nothing in the record distinguished the self-petitioner's publications from the published work of countless others in the field." As stated by the director, it is expected of graduate students to complete theses, many of which are published. 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 are 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.

The director's additional statement, however, that "citation of the work of others is expected and routine in the scientific community," incorrectly implies that the petitioner's citation history is irrelevant. Frequent citation is an indication of the cited article's influence in the field despite, and even due to, the fact that a researcher is expected to cite his sources. The director failed to consider that two of the petitioner's articles have been cited over 20 times by independent researchers and other articles have been cited somewhat less.<sup>1</sup> This citation history supports the witness letters attesting to the petitioner's influence in the field.

Finally, the director failed to consider the evidence demonstrating that the petitioner's Ph.D. thesis received coverage in the media. Specifically, both the University of Michigan and Johns Hopkins, two institutions with which the petitioner is not affiliated, posted news articles on their websites regarding the petitioner's discoveries regarding DIM. Both articles mention the petitioner by name. The article on the University of Michigan's website was reprinted from *Reuters Health*. Information on this study also appears on cancer and nutrition websites. Whether or not such coverage constitutes coverage in the "major media," such coverage is not required for the classification sought. The articles submitted lend further support to the claims in the record that the petitioner's research has been influential in the field.

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 field of research, rather than on the merits of the individual alien.

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<sup>1</sup> While the citation list provided by the petitioner lists one of his articles as having been cited 31 times, all but nine of those citations are self-cites. While self-citation is a normal and expected practice, such citations are not evidence of the petitioner's influence beyond his collaborators.

That being said, the above testimony, and further testimony in the 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.