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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

[REDACTED]

File: [REDACTED] (SRC-99-023-54062) Office: Texas Service Center

Date: JUL 18 2003

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]

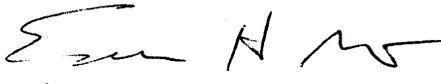
**INSTRUCTIONS:**

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, Texas 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 immunology from Mississippi State 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.

On the appeal form, Form I-290B, counsel asserts that "the standard set out in NYSDOT is contrary to the statute INA 203 and congressional intent." In his attached brief, counsel provides little support of that argument, stating only that rules of statutory construction reveal that Congress did not intend for the "substantial benefit" requirement for aliens of exceptional ability to apply to advanced degree professionals. While counsel's arguments may be true for aliens who are not seeking a waiver of the labor certification requirement, the excerpt from the federal regulations quoted above, published seven years before *Matter of New York State Dept. of Transportation*, provides that advanced degree professionals seeking a waiver in the national interest must make a showing above the substantial benefit requirement for aliens of exceptional ability. Thus, this principle was not enunciated for the first time in *Matter of New York State Dept. of Transportation*.

It remains that *Matter of New York State Dept. of Transportation* does not represent a fundamental change in the underlying law, but rather an interpretation of already-existing regulations. To date, neither Congress<sup>1</sup> nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

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

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<sup>1</sup> Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

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, medical research, and that the proposed benefits of his work, improved understanding and treatment of non-Hodgkins' lymphoma, 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 record contains several reference letters, all from the petitioner's immediate circle of colleagues. Dr. [REDACTED] an associate professor at St. Jude's Research Hospital, indicates that he oversees the petitioner's current research. Dr. [REDACTED] indicates that the National Cancer Institute of the National Institutes of Health (NIH) funds the petitioner's work on abnormal gene function. Dr. [REDACTED] further states that the petitioner has observed the mechanism by which the oncogenic (tumor suppressing gene) NPM-ALK protein activates the signal transducers and activators of transcription (STATs) that result in lymphoma. Dr. [REDACTED] asserts that this information could lead to clinical treatments for lymphoma because it suggest that gene therapy could be used to specifically kill cells that express NPM-ALK without unnecessarily harming normal cells. Dr. [REDACTED] concludes that researchers with the petitioner's experimental expertise and science knowledge are rare. Dr. [REDACTED] Chairman of the Experimental Oncology Department at St. Jude Children's Research Hospital, provides similar information.

Finally, Dr. [REDACTED] Director of Veterinary Medical Research at Mississippi State, discusses the petitioner's work while a Ph.D. student at that institution. At Mississippi State, the petitioner studied a novel leucine zipper protein and established that it is a DNA binding protein. In addition, the petitioner initiated molecular biology procedures, which were previously not being performed in Dr. [REDACTED] laboratory. While doing so, the petitioner "established a superb channel catfish cDNA library that has been screened in the search for genes analogous to those found in humans." Dr. [REDACTED] concludes with general praise of the petitioner's abilities.

While letters from one'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. The petitioner has not submitted letters from independent

experts in non-Hodgkins' lymphoma or high-level officials at interested government agencies attesting to the significance of the petitioner's work and its influence on the field.

In addition to the above letters, the petitioner submitted evidence of his membership in the American Association for the Advancement of Science and several published articles. Professional memberships can be considered evidence relating to one of the criteria for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, or even the requisite three, of the regulatory criteria for that classification warrants a waiver of the labor certification requirement in the national interest.

Further, 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 the Bureau's position that publication of scholarly articles is not automatically evidence of influence in the field; we must consider the research community's reaction to those articles. The record contains no evidence that any of the petitioner's articles have been cited by independent researchers, or at all.

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 graduation, 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. or 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 lymphoma research.

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.