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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]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date: JUN 03 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*

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 to classify the beneficiary 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 an anatomic/clinical pathologist, studying prostate, kidney, and bladder cancer. At the time of filing, the petitioner was a research scientist at the Cleveland Clinic Foundation. 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 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 the 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:

[The petitioner] is a Cancer Researcher at the distinguished Cleveland Clinic Foundation (CCF). . . . **Currently, [the petitioner’s] research focus and great passion is predominantly in an area of national interest, namely, Prostate Cancer, its diagnosis, early detection and prevention of Prostate Cancer.** He has also done extensive biomedical research in kidney diseases. His most notable contribution in the area has been the application of immunohistochemistry, namely cytokeratin 5/6, in the early and accurate diagnosis of prostate cancer. In addition, he has made significant contribution[s] to the diagnosis in the kidney and bladder with novel use of immunofluorescent antibodies in these settings.

Although the petitioner worked at CCF at the time of filing, letters submitted with the petition indicate that the petitioner had won an appointment at Brigham and Women’s Hospital in Massachusetts.

Along with copies of the petitioner’s articles and manuscripts, as well as various other evidence, the petitioner submits several witness letters from individuals who have supervised and worked

with the petitioner at various locations. Dr. [REDACTED] director of the Cytology Laboratory at Summa Health Systems, states:

This critical research that has been completed by [the petitioner] has significantly enhanced the understanding of mucosal morphologic changes associated with neoplasms of the small intestine. It was largely not understood why mucosal abnormality such as polypoid changes occurred in conjunction with certain tumors of the small intestine. [The petitioner] has elaborated a fascinating treatise on the biochemical, hormonal and physio-mechanical aspects of this described mucosal alteration.

Professor [REDACTED] a consultant at the Mayo Clinic in Scottsdale, Arizona, lists extensive credentials including a prior office as the first president of the Pulmonary Pathology Society. Prof. [REDACTED] states:

I met [the petitioner] when he spent a one-month elective as a Pathology Resident at Mayo Clinic Scottsdale. . . . [The petitioner] is still in his residency but has been extremely productive in a relatively short period of time. . . . He has written the definitive review of pulmonary hemangiomas of infancy and childhood, which is in press for one of the pediatric pathology journals. [The petitioner] has been instrumental in evaluating changes in the tissues adjacent to certain tumors in the intestine and to the role of microscopic examination of blood clots removed from the head for which there was no obvious cause prior to surgery. . . .

I think granting permanent resident status to [the petitioner] is definitely in our national interest in order to help maintain the strength and pre-eminence of surgical pathology in this country by attracting the best and the brightest while they are relatively young in their career.

Dr. [REDACTED] assistant professor at University Hospitals of Cleveland, has collaborated with the petitioner on several projects. Dr. [REDACTED] states:

[The petitioner's] most notable contributions have been in the field of primary detection of prostate cancer, with the assessment of the utility of cytokeratin 5/6 in the diagnosis of prostate cancer. . . . The first trial showed excellent results with a 97% sensitivity and a 100% specificity. This enormous contribution to the field will enable pathologists to reach more definitive diagnoses on the biopsies submitted from patients with suspected prostate cancer. . . .

Within the kidney cancer realm, additional studies by [the petitioner] and the same research group have led to the discovery that the thickness of the margin when resecting these tumors does not affect the overall outcome. When a kidney tumor is resected, the surgeon is preoccupied with obtaining the widest margin possible. [The petitioner's] group has demonstrated that the thickness of this margin does

not alter the outcome in these cases, and has suggested that biologic features of the tumor . . . determine the recurrence or metastasis (distant spread) of the kidney cancer. This is acknowledged as being a great breakthrough in this field; through [the petitioner's] discovery, surgeons are now able to preserve the maximal amount of normal kidney in the patient, and thus speed the rate of return to normal kidney function. . . .

[The petitioner] has made many significant contributions to the field of prostate cancer and kidney cancer while working in the Department of Pathology at the Cleveland Clinic Foundation. I personally believe that his work has helped advance these fields immeasurably. He is certainly one of the most brilliant researchers that I have had the privilege to work alongside.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. The director addressed some questions to the petitioner:

You wrote that at the Cleveland Clinic Foundation you are part of "the only research team in the world with the expertise and knowledge to adequately evaluate (CK 5/6)." . . . Then, you indicated that you plan to leave Cleveland and begin a fellowship in Boston. If, by your statements, Cleveland has the only laboratory in the United States and the only research team in the world which adequately allows you to pursue that which distinguishes you from other cancer researchers, how will the national interest be greatly served by your being a fellow in Boston for the next two years?

If you are a key part of the only research team in the world which can evaluate CK 5/6, how crippling of an effect on that research will your absence cause?

Dr. [REDACTED] chairman of the anatomic pathology department at the Cleveland Clinic Foundation, indicated that your leaving his institution for Boston was for the better. How could he feel that way if your work at the Cleveland Clinic Foundation was essential in combating prostate cancer? Does he believe that your project at the Foundation could wait for a couple of years? Does he believe that another cancer researcher with your same minimum qualifications could adequately replace you?

In response, the petitioner has submitted additional letters and articles. In an accompanying letter, counsel acknowledges that the petitioner's witnesses have worked with the petitioner, but counsel contends the director cannot ignore the high standing of those witnesses in their collective field. Counsel does not directly answer the director's specific questions quoted above, but indicates that "movement of researchers to different institutions is not unusual" and that the petitioner's work is significant not in its impact on any one research facility, but rather its effect on research throughout the United States. Counsel adds that the petitioner ultimately declined the fellowship position in Boston, and instead had accepted a position at the MD Anderson Cancer Center at the University of Texas.

Dr. [REDACTED] section head of Genitourinary Pathology at MD Anderson Cancer Center, states "I cannot emphasize enough the importance of [the petitioner's] original contributions to his field. He has opened up an entirely new avenue of research in the area of cancer research." Dr. [REDACTED] credits the petitioner with "tremendous progress in new diagnostic techniques in his laboratory at the Cleveland Clinic." Researchers at CCF assert that the petitioner's contributions merit special consideration in the form of a national interest waiver.

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 noted that the petitioner had not answered the specific questions regarding his departure from the Cleveland Clinic Foundation. The director stated "the evidence does not establish that the one specific prior achievement of the alien petitioner which distinguishes him from others in his field was all that terribly important."

On appeal, counsel asserts that the director, by referring to "the one specific prior achievement of the alien petitioner," has "ignored evidence presented regarding other findings of [the petitioner] and the importance of those other findings." Review of the record shows that the petitioner has in fact shown contributions in several related, but not identical, areas. For instance, as detailed in Dr. [REDACTED] letter, excerpted above, the petitioner made a discovery that fundamentally affects the method used to surgically remove kidney tumors. Thus, the record on its face shows that the director was in error in attributing only one significant contribution to the petitioner.

With regard to the petitioner's departure from the Cleveland Clinic Foundation, counsel indicates that the research grant which funded the petitioner's work, and that of several other researchers on the same project, "ran its course" after which time the researchers dispersed to other institutions. Counsel acknowledges that the initial claim that CCF was the "only" facility equipped to conduct such research was hyperbolic and rather inaccurate. While the consequences of this inaccurate claim demonstrate the importance of objectivity and accuracy, and highlight the pitfalls of inadvertent exaggeration, this misstep by the petitioner and counsel does not appear to warrant denial of the petition; an inaccurate assertion of this kind does not amount to perjury or fraud, nor does it compromise the credibility of the petitioner's several witnesses. The director's decision rests very heavily on the assertion that the petitioner is unable to make useful contributions outside of CCF, but the record plainly shows that the petitioner had made valuable contributions and discoveries both before and after his time at that facility. The director's decision should not have hinged so thoroughly on what was virtually an offhand comment contained in the initial filing.

While the record contains little discussion of the petitioner's work from fully independent sources, several witnesses have established their own expertise in the petitioner's field and their statements lucidly establish both the importance of the petitioner's work, and the conviction of these experts that the petitioner stands above the majority of others in his field. For the classification sought, the petitioner's reputation need not rise to the level of national acclaim, provided the significance of the petitioner's work is manifest. The appeal, meanwhile, includes a letter from an apparently

independent witness. Dr. [REDACTED] of Sidney Kimmel Cancer Center states that the petitioner "has develop[ed] a new diagnostic test for prostate cancer which exceeds the performance profile of the other existing tests for prostate cancer," and that the petitioner "is sought after by many institutions." While brief, Dr. [REDACTED] comments are fully concordant with a finding of eligibility.

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

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