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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



File: WAC 02 097 052932 Office: CALIFORNIA SERVICE CENTER

Date: 10/16/2003

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:

SELF-REPRESENTED

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: This 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 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 postdoctoral molecular researcher. At the time he filed the petition, the petitioner was a postdoctoral researcher at the Keck School of Medicine at the University of Southern California (USC). 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 denied the petition, concluding that the petitioner's evidence 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. from Ohio State University in 1999. 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 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 Service 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 pertinent 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, supra, 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, molecular research, and that the proposed benefits of his work, improved understanding of genetic disorders and tissue engineering in animals and humans, are national in scope. It remains to determine whether the petitioner has established that he will serve the national interest to a substantially greater degree than would 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 it 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. *Matter of New York State Dept. of Transportation*, at 219, n.6.

The petitioner submits four reference letters in support of his petition. [REDACTED] a doctor of veterinary medicine and the petitioner's academic advisor at Ohio State University, describes the petitioner as an outstanding student. He states:

During the 4-year period of [the petitioner's] PhD study, he worked on a USDA funded project, which involved a team from several prestigious universities to battle a new infectious disease affecting young turkeys. The disease, poult enteritis and mortality syndrome, has caused significant losses to the turkey industry. [The petitioner's] work led to the recognition of the multietiology of the disease, a small round virus and a coronavirus. The results of his work were presented at several conference meetings in Chicago, Atlanta, and Minneapolis. Three papers were published in the peer reviewed journal, Avian Diseases. His work was very important in the successful control of the disease. In 1999, he graduated with comprehensive expertise in virology and immunology. . . . I truly believe he will make substantial contributions in his current research that will help improve the health care and economy of the United States.

[REDACTED] a professor in the pathology department at USC, supervises the laboratory where the petitioner currently works. Dr. [REDACTED] states that the petitioner joined his laboratory in 1999 following his completion of his Ph.D. program at Ohio State. Dr. [REDACTED] characterizes the petitioner as an "outstanding researcher with multi-disciplined training." He provides:

Particularly, he has done an excellent job in the study of gene regulation in the development of skin appendages. He has developed a new model of 'transgenic feather' using the plucking / regeneration of chicken feathers and replication competent avian sarcoma (RCAS) retrovirus. This model becomes a powerful tool to decode the complex gene regulation and signaling transduction networks during the organogenesis of epithelial-derived tissues. . . . Using this model, the petitioner has already made great progresses [sic]. He has studied the role of the Bone Morphogenesis Protein (BMP) pathway and found out that they play critical roles in the branching morphogenesis of feathers – a fundamental feature that makes fly possible [sic]. . . . Besides impact on our field directly, [the petitioner's] work will have great significance impact in related fields, such as the study of hair, skin related cancers and diseases; the principle of morphogenesis of epithelial organs such as the lung, kidney, and mammary glands, etc. [sic]. It also sheds new light on the evolution and origin of feathers that will give clues to the study of feathered dinosaurs.

[REDACTED] an associate professor in the USC pathology department, confirms Dr. [REDACTED] high opinion of the petitioner's skills and believes that the petitioner will make significant contributions in his research career. Professor Widelitz states that the petitioner "has successfully established an efficient gene expression system in the feather follicles using a replication competent avian sarcoma retrovirus. Using this system, he has studied several molecular signaling pathways and has made significant progress in a difficult project revealing new and important gene functions."

██████████ a professor and research director at the Institute of Biotechnology, University of Helsinki, Finland, is engaged in the study of the development of mammalian organs. She asserts that the petitioner's field is close to her area of expertise. Professor ██████████ summarizes the petitioner's current work at USC in similar terms as the other witnesses and concludes that [the petitioner's] research "will generate a lot of information that is of great importance for the study of signaling transduction; the study of the developmental biology of the hair follicle; and the organogenesis of epithelial-derived organs." Professor ██████████ characterizes the petitioner as one of the top postdoctoral researchers whom she knows and expresses confidence that he will make significant research contributions. Professor ██████████ does not explain how she became acquainted with the petitioner's work. While it is clear she has a high opinion of the petitioner's abilities, her regard is generally focused on the petitioner's future contributions. Her letter does not persuasively distinguish the petitioner from other researchers who have long since completed their educational training and who would also be subject to the labor certification requirements.

Three out of the four above cited letters are from the petitioner's supervisors, mentors, collaborators or colleagues from his past and present research institutions. Letters from those with direct ties to the petitioner certainly have value, because such persons have direct knowledge of the petitioner's contributions to a specific research project; however, their statements do not show, first-hand, that the petitioner's work has attracted attention on its own merits from the wider scientific community, as might be expected with research findings that are especially significant. Independent evidence that would have existed whether or not this petition was filed, would be more persuasive than the subjective statements from individuals selected by the petitioner. The general observation that the petitioner has a great future in research does not support the argument that his work has already been influential.

The record contains evidence that the petitioner published two articles as a lead author and one article as a co-author as of the filing date of the petition on January 25, 2002. It is important to note that a petitioner's reputation and influence on the wider scientific community 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). Here, the record indicates that the petitioner made a conference presentation in July 2002, but his most significant and notable accomplishment did not occur until November 2002 when he published an article as the lead author in *Nature*. The petitioner's materials submitted on appeal reflect that this article generated media interest and coverage. Again, this article and ensuing coverage did not occur by the time of filing and cannot retroactively establish that the petitioner has impacted the field as a whole.

We also 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 acknowledgment 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." When judging the influence and impact that the petitioner's

work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work.

In this case, the record contains no evidence that independent researchers have cited the petitioner's work.

The record contains evidence that the petitioner is a member of the American Society for Virology and the Society for Developmental Biology. The evidence also shows that the petitioner received a September 2000 award at USC for "best oral presentation," and became a member of "Phi Zeta," a veterinary medicine society. While this evidence may reflect recognition for achievements and significant contributions his field, it would establish one regulatory criterion for aliens of exceptional ability, a classification that normally requires a labor certification as set forth in 8 C.F.R. § 204.5(k)(3)(ii) enumerating the criteria for an alien of exceptional ability. Similarly, membership in professional associations is another possible criterion to establish eligibility for exceptional ability. We cannot conclude that satisfying two requirements or even the requisite three requirements for this classification makes one eligible for a waiver of the labor certification process.

On appeal, the petitioner asserts that the director's decision misinterpreted the importance of being a lead author and the validity of the petitioner's witness letters. The petitioner also submits an additional letter from Dr. [REDACTED]. In this letter, Dr. [REDACTED] explains that the petitioner has played an instrumental role in carrying out the goals of the government funded studies in his laboratory. Dr. [REDACTED] describes the importance of the petitioner's work reflected in the article in *Nature* and notes that he was interviewed by several U.S. and European journalists about the article. Dr. [REDACTED] adds that he thinks that those who know the petitioner can write the best letters for him.

As noted previously, while publication in a highly esteemed and mainstream journal like *Nature* can increase the chance that one's work will be influential and widely cited, at the time of filing the petitioner's article had not yet appeared in this journal. See *Matter of Katigbak, supra*. Similarly, witness letters that come from those who are directly connected to an alien through mutual collaboration often provide the most informative and useful information about the alien's abilities, but do not usually demonstrate the alien's influence outside the research or educational institutions where he has worked.

Clearly, the petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research. It is apparent that the petitioner has excelled academically and is a talented researcher. Nevertheless, his superior ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique credentials or an impressive background. The labor certification process exists because it is in the national interest to protect jobs and employment opportunities of U.S. workers

having the same objective minimum qualifications. The alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

The petitioner's documentation of his achievements and projections of future contributions may support the argument that the petitioner has exceptional ability in molecular or genetic research, but do not overcome the statutory mandate of a labor certification for this occupation or show that the petitioner's work was of such recognized significance at the time of filing that it had already significantly influenced the work undertaken by other independent researchers.

As is clear from the plain wording of the statute, it is 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 the national interest. Similarly, 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. Based on the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification would 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.