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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

[REDACTED]

JUN 24 2003

File: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner:
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 dismissed.

The petitioner seeks to classify the beneficiary 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, a university, seeks to employ the beneficiary as a research associate.¹ At the time the petition was filed, the petitioner had employed the beneficiary as a post-doctoral research associate for seven months. 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 beneficiary 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 beneficiary obtained a Ph.D. in chemistry from the University of New South Wales, Australia in May 1997. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary 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.

¹ Counsel initially represented the petitioner; however, the petitioner filed the appeal itself. A copy of this decision will be mailed to the petitioner's counsel, as she has not withdrawn her representation.

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 is not contested that the beneficiary works in an area of intrinsic merit, chemical research, and that the proposed benefits of his work, improved understanding of drug toxicity and drug metabolism, are national in scope. The remaining issue is whether the beneficiary 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.

Eligibility for the waiver must rest with the alien's qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The issue is whether this beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of

proof. A petitioner must demonstrate the alien's past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submits several witness letters in support of its petition. Dr. [REDACTED] a professor with the department of medicinal chemistry at the University of Kansas (KU), filed the petition on behalf of the University. He submits a lengthy statement in support of the petition:

With the novel research skills of [the beneficiary], we have successfully used two strongly complementary approaches for recognizing proteins adducted by bromobenzene metabolites, radioactivity and adduct-specific antibodies. Radioactivity provides general detection and quantitation of all bromobenzene adducts while the antibodies recognize specific structural types of adducts. Currently, the antibody to S-(p-bromophenyl)-cysteine moieties recognizes only a few of the numerous microsomal proteins labeled by C-bromobenzene. This potentially gives scientists a method to identify those adducted proteins, which may be of greater relevance than others to the toxic responses.

* * *

There is no doubt that [the beneficiary] is best suited for these tasks as he has developed tremendous experience in organic synthesis and analytical chemistry. In addition, he has a proven record of performing excellent organic synthetic research work in his past positions.

* * *

[The beneficiary] is not only an outstanding organic synthetic chemist, but he also has a wealth of experience in the development and validation of HPLC analytical methodology for the analysis of various organic compounds and peptides. At least three of his previous research publications have been directly related to HPLC methodology development and validation.

[The beneficiary] is a particular suited [sic] for his position because of his specialized background in both synthetic and analytical chemistry. *It would be almost impossible for us to make further strides without the contributions of [the beneficiary] and scientists like him.* [The beneficiary] is a key member of our research group. He possesses substantial skills, abilities, knowledge and techniques not available through other members of the group.

(emphasis in original).

Dennis Moore, a congressman from the third district in Kansas, endorses the petition and states that the beneficiary "has a specialized background in both synthetic and analytical chemistry, and is the only organic synthetic research associate in the research group" at KU.

Senator [REDACTED] of Kansas also submits a letter of support. He states that the beneficiary's continued presence will benefit the United States.

Neither Congressman Moore nor Senator [REDACTED] explain how the beneficiary's credentials are significantly different than other accomplished chemical researchers or how he has already influenced his field as a whole.

[REDACTED] a professor at the University of New South Wales, supervised the beneficiary's doctoral work. He praises the petitioner's expertise and observes:

[The beneficiary's] task was to synthesize . . . and then study the properties of . . . new organic molecules containing tricyclic and tetracyclic ring systems. Such work requires great technical skill. He proved to be an excellent synthetic chemist and succeeded in carrying out much innovative work in obtaining these new substances. . . . This is an outstanding outcome by for [sic] so young a scientist, and is a good indication of his future promise in his field of expertise.

[REDACTED] was one of the beneficiary's post-doctoral research colleagues at the Australian National University. Dr. [REDACTED] explains that the goal of their project was to develop an anti-bacterial drug based on a lead compound isolated at SmithKline Beecham. He states that the beneficiary demonstrated "an in-depth understanding of advanced concepts and techniques in organic chemistry," and proved himself "invaluable with his broad experience in analytical, organic synthesis supramolecular chemistry."

[REDACTED] a senior research associate at the University of California, Davis, has known the beneficiary for nine years and also attended school at the University of New South Wales. He describes the beneficiary's background and states that the beneficiary's research in cytotoxicity is of great importance in both cancer research and diagnosis. The importance of the beneficiary's field of research is not at issue, but rather whether this beneficiary's contributions to the field have already had such unusual significance and influence so as to merit the special benefit of a national interest waiver.

[REDACTED] is a project scientist at the University of New South Wales. He worked with the beneficiary during his research with Professor [REDACTED] team. Dr. [REDACTED] states that the beneficiary worked on a multi-disciplinary synthetic project in the area of bioactive molecules. He describes the beneficiary as making a "major contribution to the project" and was a "key person responsible for the synthetic aspects of this project." Dr. [REDACTED] does not specifically explain what contributions the beneficiary made or how this has already influenced the field of bioactive molecules to any significant degree.

[REDACTED] a retired professor of chemistry at Zhejiang University (formerly Hangzhou University), rates the beneficiary as one of the best undergraduate students that he taught. He states that the beneficiary successfully combined teaching with research and expresses confidence that the beneficiary will be an asset to the field of organic/medicinal chemistry. Professor [REDACTED] general observation that

the beneficiary will be an asset to his field does not support the argument that his work has already been influential.

██████████ is a professor at Kyoto University. Dr. ██████████ directed a research team in which the beneficiary participated in 1997. Professor Aoyama describes the beneficiary as an "expert organic chemist" and "highly skilled with modern spectroscopy, X-ray diffraction and other instrumental techniques" with an "outstanding understanding of modern organic synthesis." Professor ██████████ then describes the beneficiary's other positions and praises him as an individual with the "potential to make significant contributions" to his field.

We note that virtually all of the reference letters are from the beneficiary's immediate circle of colleagues, employers, mentors, and collaborators from his present and past educational or research institutions. This does not detract from the value of their opinions, as they are in the best position to describe the details of the beneficiary's work; however, these letters do not demonstrate that the beneficiary's work has had any influence outside of these institutions. While many of the witnesses discuss the potential applications of the petitioner's research, there is little first hand independent corroboration that these applications have been realized, or that the petitioner's work was of such recognized significance at the time of filing that it had already influenced the work undertaken by other researchers. The record would be more persuasive if it were supported by evidence that independent authorities have recognized or relied upon the beneficiary's past achievements, or that otherwise demonstrates that the beneficiary's contributions to the field are of such unusual significance that a national interest waiver would be warranted. 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.

Along with the witness letters and evidence of the beneficiary's educational credentials, the petitioner submits copies of four articles that the beneficiary co-authored and three in which he was the lead author. The record also contains evidence that four of the beneficiary's co-authored works were presented as conference papers. The record does not indicate that the presentation or publication of one's work is unusual in the beneficiary's field. 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 beneficiary'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 beneficiary's findings. If an alien is pursuing research which he and his immediate circle of colleagues consider to be critical, but which other researchers do not view as particularly significant, then the extent of the alien's influence has not

been established. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the beneficiary's work.

In this case, the record indicates that the beneficiary's work has been cited five times. The petitioner emphasizes that a Nobel Prize winner, [REDACTED] cited the beneficiary's research. As noted in the director's denial, the evidence submitted shows that Professor [REDACTED] 999 co-authored article cites one of the beneficiary's co-authored articles. The citation also names two other articles by eight other authors within the same reference paragraph. This citation was one of eighteen references listed by Professor [REDACTED] and his co-author. We cannot conclude that Professor [REDACTED] finds the beneficiary's individual work to have significantly influenced the field of research from this one bibliographical citation. The five citations to the beneficiary's work included in the record do not represent any significant recognition of the beneficiary's research achievements by the wider scientific community.

It is apparent that the petitioner has excelled academically and is engaged in important research. Nevertheless, his exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the beneficiary 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 training or is engaged in promising research. The labor certification process exists because protecting jobs and employment opportunities of United States workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. 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.

In denying the petition, the director noted that the record failed to establish that the beneficiary's prior achievements demonstrated that his expertise would benefit the national interest to a substantially greater degree than other researchers in his field.

On appeal, the petitioner suggests that the relevant field for comparison should be composed of researchers at the beginning of their career and exclude those with more experience. This contention is not supported by statute or regulation. Furthermore, with regard to experience, the regulation at 8 C.F.R. 204.5(k)(3)(ii)(B) indicates that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement. It would certainly not be in the national interest to waive the labor certification requirement for aliens still in training or at the beginning of their careers, when that same requirement applies to fully trained individuals who have long since completed their educational training.

The petitioner also contends on appeal that long delays in the labor certification process should mandate the approval of a national interest waiver in cases involving very high-level professionals. Pursuant to published precedent in *Matter of New York State Department of Transportation* and current regulations, the inapplicability or unavailability of labor certification cannot be considered as sufficient cause for a national interest waiver; the alien must still serve the national interest to a substantially greater degree than do others with the same minimum qualifications. The plain meaning of the statute indicates that members of the professions holding advance degrees (including chemical

research associates), as well as aliens of exceptional ability in the sciences, are subject to the job offer/labor certification requirement. Congress plainly intends the national interest waiver to be the exception rather than the rule.

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 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.