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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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File: EAC 00 056 53556 Office: Vermont Service Center

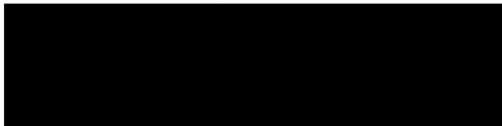
Date: **MAR 11 2003**

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)

IN BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, Vermont 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. At the time of filing, the petitioner was working as a postdoctoral fellow in the Department of Medicine, Gastroenterology Division, at Howard University Hospital. 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) Subject to clause (ii), 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.

(ii) Physicians working in shortage areas or veterans facilities.

The petitioner holds a Ph.D. in Physiology from Howard 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 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 Service 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.

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 sought. 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 note 6.

The application for the national interest waiver cannot be approved. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the petitioner cannot be considered for a waiver of the job offer requirement. The director, however, does not appear to have informed the petitioner of this critical omission. Below, we shall consider the merits of the petitioner's national interest claim.

Along with documentation pertaining to her field of research, the petitioner submitted several witness letters. [REDACTED] Associate Professor in the Gastroenterology Division of the Department of Medicine, Howard University, states:

I have known [the petitioner] for approximately 3 years. She conducted much of her dissertation research in my laboratory during this time. In April of this year she began working as a postdoctoral fellow in my laboratory.

* * *

Over the last 3 years, I have had a good opportunity to evaluate [the petitioner's] scientific knowledge, research skills and ability. Her dissertation elucidated the effects of *H. pylori* on the regulation of the cell cycle of gastric epithelial cells. *H. pylori* is a common infectious pathogen that causes stomach ulcers and may cause stomach cancer. *H. pylori* has been listed as class 1 carcinogen by the World Health Organization. The mechanisms by which *H. pylori* participates in gastroduodenal carcinogenesis and in gastric carcinogenesis are the focus of research centers around the world.

* * *

[The petitioner] was successful in her experiments and was able to present her data at Digestive Disease week, in New Orleans, May of 1998; and at the American Association for Cancer Research Annual Meeting in Philadelphia, PA, March 1998. Results from [the petitioner's] thesis dissertation greatly improved our understanding of the impact *H. pylori* has on the gastric epithelial cell cycle. [The petitioner] is currently taking her research one step forward, she is now conducting experiments to identify more of the factors that *H. pylori* may stimulate and pathways utilized that might lead to gastric cancer in persons infected with this bacterium.

* * *

[The petitioner's] laboratory techniques are excellent which was demonstrated by the ease at which she was able to perform repeat experiments to confirm her results. She is very efficient and able to complete experiments in a timely fashion. [The petitioner] is also able to work through problems with experimental protocols so that her experiments would be of the highest quality. She also is designing many of her own experiments using her preliminary data as a guide.

* * *

In light of her training, research experience, and desire to learn, I am confident that she is eminently qualified to be a successful scientist. [The petitioner] will make even more contributions in the area of gastric cancer research in the next few years.

letter emphasizes the petitioner's training and laboratory experience. We note here that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

Associate Professor of Physiology and Biophysics, Howard University, College of Medicine, states:

I was [the petitioner's] Dissertation Advisor for her Ph.D. degree obtained in May of this year... I have been working to develop an interdisciplinary gastrointestinal physiology research program with the gastroenterology division. [The petitioner] was uniquely qualified to facilitate this effort because of her clinical background as a veterinarian and a basic science background steeped in biochemical techniques. It was through this relationship that I got a chance to observe [the petitioner] first-hand. She was able to master an entirely new field of study by becoming conversant with the literature and techniques of tissue culture, western blot analysis and flow cytometry, in a relatively short time. [The petitioner] had spent the formative years in the program studying in reproductive endocrinology.

[The petitioner's] doctoral research, "The Effect of Helicobacter Pylori on the Regulation of the Cell Cycle in Gastric Epithelial Cells" was a study aimed at helping to better understand how this bacterium might possibly be involved in gastric epithelial cell arrest and lead to apoptosis. This was a crucial study in that it explicitly defines H. pylori's effect on the inhibition of growth and proliferation of gastric epithelial cells. The study elucidated the role of p53 and p21 control points in the cell cycle as well as the expression of cyclin E and cdk2. The ultimate value of this work will be in its contribution to understanding H. pylori's role in the pathogenesis of gastric cancer. As a consequence, two papers have been submitted for publication in peer-review journals.

[The petitioner] is currently pursuing postdoctoral research in the gastroenterology division at Howard University Hospital. Since her postdoctoral preceptor, and who provided technical direction, were implicitly involved in the doctoral study - this postdoctoral tenure will be an excellent extension of these initial studies. It will allow [the petitioner] to extend this knowledge base further by identifying additional control points in the cell cycle as a result of H. pylori infection. In addition, [the petitioner] is making available her valuable expertise by performing flow cytometry analysis for a related prostate cancer project being pursued in laboratory.

[The petitioner] has provided essential molecular biology expertise to research which is of essential importance to the United States. She is currently engaged in critically important studies which will hopefully help us to better understand pathogenic processes.

We generally do not accept the argument that a given project is so important that any alien qualified to work on that project must also qualify for a national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule. Witness statements and documentation pertaining to the undoubted importance of gastroenterology research fail to distinguish the petitioner from other competent researchers in that same field.

We note the statements from [REDACTED] and [REDACTED] pertaining to the petitioner's publications and conference presentations. The record, however, contains no evidence that the publication or presentation of one's work is a rarity in petitioner's field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's findings in their research.

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 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." 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 petitioner failed to provide evidence showing that her work was heavily cited.

[REDACTED] Hackley, Scientific Advisor, U.S. Army Medical Research Institute of Chemical Defense, Aberdeen Proving Ground, states:

[The petitioner] is involved in studying mechanisms by which *Helicobacter pylori* may increase the risk of developing gastric cancer. *Helicobacter pylori* is a bacterium which infects the gastrointestinal tract and is associated with gastritis, peptic and duodenal ulcer, gastric carcinoma and lymphoma. Indeed, *H. pylori* is recognized by the World Health Organization as a Class 1 carcinogen and, therefore, [the petitioner's] contribution to this research with regard to the national interest of the United States cannot be overstated. The fundamental aspects of her work provide potential benefit not only for gastrointestinal

disorders but also for a variety of diseases that may share similar pathogenic mechanisms. Any insight into these mechanisms would further our goal in the reversal or eradication of these pathogenic diseases.

While the Service recognizes the overall importance of understanding and developing treatments for gastric cancer, eligibility for the national interest waiver under *Matter of New York Dept. of Transportation* must rest with the petitioner's own qualifications rather than with the position sought. [REDACTED] letter demonstrates the intrinsic merit and national scope of the petitioner's work, but it does not describe how the petitioner's past research efforts have already significantly influenced her field of endeavor.

[REDACTED] Assistant Professor of Physiology and Biophysics, Howard University, College of Medicine, states:

[The petitioner] has developed her doctoral gastroenterology research to the point of being internationally competitive. This is evidenced by significant publications in peer-reviewed journals, and is a substantial accomplishment for a doctoral student at a minority institution such as Howard. [The petitioner's] doctoral research work on effects of the infectious agent *Helicobacter pylori* on stomach lining cells has been a great advancement of new knowledge, and her findings are applicable to the treatment of stomach cancers. Stomach cancers are a group of diseases affecting the lives of thousands of Americans annually. The recent findings of [the petitioner's] alone, may contribute to saving the lives of many Americans. However, [the petitioner] is only in the beginning stages of her career, and I fully expect her to become one of the foremost minority biomedical researchers in the United States. Failure of the Government to grant a National Interest Waiver to [the petitioner] will result in a large loss of the investment of American resources in her biomedical training early stages [sic] of her research career.

Postdoctoral positions are inherently temporary for the very reason that they represent advanced training rather than independent career positions. Nothing in the legislative history suggests that the national interest waiver was conceived as a means to facilitate the ongoing training of alien researchers. We reject [REDACTED] claim that, for the very reason that the petitioner has yet to complete her training, she is entitled to an exemption from the job offer requirement which, by law, attaches to the visa classification she seeks.

Several witnesses offer assertions regarding the petitioner's potential to make future contributions in her field. For example [REDACTED] states: "I strongly believe that [the petitioner's] work will provide a major contribution to stomach cancer research [REDACTED] asserts his confidence that the petitioner "is eminently qualified to be a successful scientist." Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate the petitioner's eligibility for the national interest waiver. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. See *Matter of Katigbak*, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the

filing date of the visa petition.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a letter from counsel, evidence of her published work, and further background information.

Counsel's response letter stated:

[The petitioner] has provided the INS with independent, corroborative evidence of her major research discoveries. This evidence is presented in the form of articles, authored by the petitioner, which have been published in leading scientific journals. This is the method commonly used in the scientific world to record significant discoveries.

Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner herself has cited sources in her own articles. Numerous independent citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work can have, if that research does not influence the direction of future research. In this case, the petitioner has offered no evidence demonstrating heavy independent citation of her research articles.

The petitioner's witnesses consisted mostly of her colleagues from Howard University. Their letters described the petitioner's expertise and value to her current and former research projects, but they do not demonstrate the petitioner's influence on the field beyond Howard University. The evidence does not show that the petitioner's work has attracted significant attention from independent researchers in the gastroenterological research field. We acknowledge the letter from [REDACTED] but it is devoted to the overall importance of the petitioner's work rather than her specific individual research accomplishments and how those accomplishments have already impacted the field. We cannot ignore [REDACTED] statement that "[t]he mechanisms by which *H. pylori* participates in gastroduodenal carcinogenesis and in gastric carcinogenesis are the focus of research centers around the world." The petitioner, however, offered no evidence to show that her research has significantly influenced researchers from these other institutions. The petitioner's findings may have added to the general pool of knowledge, but it has not been shown that researchers throughout the field have viewed the petitioner's findings as particularly significant.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found 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 stated that the petitioner had not provided conclusive evidence showing that her research has been recognized as significantly influential among other "gastric cancer researchers in the U.S." or that her findings have been viewed throughout the field as a significant advancement.

On appeal, counsel argues "[t]he record is replete with evidence that [the petitioner's] work affected and contributed to the understanding of gastric cancer." Counsel cites witness letters from [REDACTED] and [REDACTED] that attest to how the petitioner's results contributed to the pool of knowledge in understanding gastric cancer. These witnesses note that the petitioner's studies "could have important public health implications" and that her findings "contribute to explaining possible pathways" that might lead to gastric cancer. Their letters also repeat information regarding the petitioner's educational background and research qualifications (which are amenable to labor certification). While letters from those close to the petitioner certainly have value, the letters do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are especially significant. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of one's published findings, would be more persuasive than the subjective statements from individuals selected by the petitioner.

Counsel refers to evidence showing that the petitioner's work was cited in *Gastroenterology*, but a single citation is hardly sufficient to demonstrate that the petitioner's findings have significantly influenced her field.

Clearly, the petitioner's former educators, research supervisors, and collaborators have a high opinion of the petitioner and her work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in her field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent researchers.

In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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.

ORDER: The appeal is dismissed.