

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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File:  Office: Nebraska Service Center

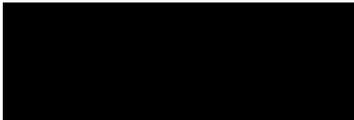
Date: **MAR 17 2003**

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:



PUBLIC COPY

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, Nebraska 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.

On appeal, counsel argues that the director erred by not issuing a request for additional documentation or notice of intent to deny prior to denying the petition. Even if the director's failure was in error, the remedy would be the submission of evidence on appeal that could have been submitted in response to a request for evidence of notice of intent to deny, addressing the director's concerns. The director's decision expressed concern that the petitioner had not established that his work is known and considered influential outside his immediate circle of colleagues. The director also concluded that the petitioner had failed to submit the required Form ETA-750B. As noted by counsel on appeal, the ETA-750B was submitted subsequent to the filing of the petition. The petitioner submits copies of the form on appeal. Thus, the petitioner has overcome the director's latter argument. Despite the director's concerns regarding the petitioner's influence outside his circle of colleagues, however, the petitioner failed to submit any new evidence that might have been submitted in response to a request for evidence or notice of intent to deny, such as letters from more independent sources or citation indices reflecting that the petitioner's articles are widely cited. Thus, the petitioner has not established that there was any additional documentation available to address the director's expressed concerns. Counsel's remaining arguments will be addressed below.

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 genetics from the Institute of Hydrobiology, Chinese Academy of Sciences. 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.

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, cancer and alcoholism research, and that the proposed benefits of his work, improved treatment of cancer and alcoholism, 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, note 6.

██████████ in whose laboratory the petitioner used to work at Washington State University, discusses the petitioner's prior work on trout immunology. ██████████ explains that Rainbow Trout are a favored species for work in toxicology and physiology, and that results with Rainbow Trout can be applicable beyond lower vertebrates to mammals. ██████████ asserts that the petitioner was the first to describe the genomic organization of the trout natural killer cell enhancement factor, which in mammals enhances the natural killer cell effect by an antioxidant mechanism. According to ██████████ the petitioner also discovered more than ten C-type lectin genes and several series of receptor genes such as T-cell receptors and IL-8 receptors. She notes that more than 40 DNA sequences that were cloned and sequenced by the petitioner are on the internationally utilized GenBank database.

██████████ in whose laboratory the petitioner works at Washington State University, asserts that the petitioner has made "exceptional contributions to our cancer biology and alcohol dependency research projects." Regarding the cancer research, the petitioner is "studying the cellular and molecular mechanisms by which dietary factors modulate the gene expression and tumor metastasis." Specifically, "he was the first one who applied functional genomics theory and techniques to screen and study the genes regulated by the dietary factor in tumor cells." ██████████ continues:

By screening and comparing the gene expression changes between regular melanoma tumor cells grown under normal nutrient conditions and melanoma cells modulated by deprivation of tyrosine (Tyr) and phenylalanine (Phe), two dietary factors, he has established a melanoma tumor cell gene expression profile and successfully identified 18 genes in melanoma cells that are differentially regulated by tyrosine and phenylalanine deprivation. [The petitioner] was the first who discovered that by downregulating some cytoskeleton genes like Vimentin and Tropomodolin expression, dietary factor Tyr and Phe inhibit the melanoma invasion and metastasis. [The petitioner] was also the first to discover [that] dietary factors can suppress some tumor market genes such as FUSE/CHOP gene

and enocalse gene expression. These findings are new breakthrough[s] in this field, because his findings will lead us to develop new approaches to control and cure melanoma and other cancers.

then discusses the petitioner's work with alcohol dependency, which causes a variety of immunological disorders, one of the most serious of which is the damage in nature killer (NK) cells. continues:

Using functional genomic technology, [the petitioner] has already found that the expression of certain genes modulated by alcohol consumption is associated with the inhibition of NK cell function. . . . Recently, [the petitioner] discovered that chronic alcohol consumption causes NK cell fragile and further induce[s] NK cell apoptosis. He demonstrated that a cell death receptor Fas and its legand LasL play an important role in this process. This novel finding leads to the further and new understanding of the effects of alcohol consumption on NK cell functions at gene expression and signal transduction aspects.

asserts that the petitioner's melanoma and NK cell gene expression profiles have become cornerstones in the petitioner's field, used by scientists to study tumor metastasis and alcohol dependency at the gene expression and regulation level. further predicts that the petitioner's work on cancer will lead to new drugs to target genes to control and cure cancer. Finally asserts that the petitioner's accomplishments could not have been predicted based on the petitioner's academic credentials and that the work at Washington State University hinges on the petitioner's abilities to continue identifying the functions of new genes.

of the Korea Advanced Institute of Science and Technology, who worked with the petitioner in laboratory, provides similar information to that quoted above. He asserts that the petitioner has demonstrated that gene expression patterns are changed after tumor cells are deprived of tyrosine and phenylalanine. The petitioner "identified 18 genes related to tumor cell invasion in melanoma cells that are differently regulated by the dietary factors" and "constructed a gene expression system in which he can transfect the genes he identified and study the function of these genes." explains that these accomplishments are important because they establish an effective approach to find disease-related genes and study their function and will lead to new treatments for melanoma. does not provide examples of independent laboratories that have adopted the petitioner's approach.

a professor at Louisiana State University Medical Center, indicates that he is a long time collaborator of. He provides information similar to that quoted above. another long time collaborator with working at Marshall University, also reiterates much of the information quoted above. Neither nor however, asserts that they have adopted the petitioner's techniques to find disease related genes.

The above letters are all from the petitioner's collaborators and their long time collaborators. We concur with the director's implication that while such letters 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.

On appeal, counsel asserts:

The director failed to analyze and consider expert testimony from individuals from a vast area of geography detailing the petitioner's past and current substantial contribution to this field. These experts are not from Washington State University who are rendering a local opinion to the third prong issue raised by the NYSDOT case.

While [REDACTED] may be currently working in Korea, he worked with the petitioner in [REDACTED] laboratory at Washington State. [REDACTED] and [REDACTED] are both long time collaborators of [REDACTED]. While we do not doubt their credibility, their accolades are not evidence that the petitioner has influenced the field beyond his supervisor's collaborators. Even [REDACTED] and [REDACTED] fail to provide examples of research at independent laboratories that have been influenced by the petitioner's techniques and approaches. The record lacks letters from independent researchers whose own projects have been influenced by the petitioner.

In addition, the petitioner provides evidence that he has authored several publications and presented his work at several conferences. 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." This report reinforces the Bureau's position that publication of scholarly articles is not automatically evidence of influence; 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. Thus, the petitioner has not established the influence of these articles.

Finally, the record contains evidence that the petitioner has contributed several gene sequences to GenBank. It can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. The petitioner has not demonstrated that in the field of genetics it is remarkable to publish gene sequences.

In summary, while the petitioner's research is no doubt of value, it can be argued that any research must be shown to present some benefit if it is to receive funding and attention from the

scientific community. The record, however, does not establish that the petitioner's work represented a groundbreaking advance in genomic technology or immunology. While the petitioner's research clearly has practical applications, it can be argued that any research in order to receive funding or selected for publication must offer new and useful information to the pool of knowledge.

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, 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.