U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] (EAC-01-227-60495) Office: Vermont Service Center Date: MAR 26 2003

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)

PUBLIC COPY

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.

Elizabeth Hayward

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 an alien of exceptional ability or 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.

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.
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> > > (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 neurophysiology from the University of Aston in Birmingham. 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.

On appeal, the petitioner argues that the director found her to be an alien of exceptional ability and that this finding mandates a waiver of the labor certification in the national interest. The petitioner is incorrect on both counts. First, the director found that the petitioner was an advanced degree professional, and did not even consider whether she had met the regulatory requirements for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The petitioner relies on the following statement by the director:

> The record does not persuasively demonstrate that the beneficiary's achievements and skills are indicative of a prospective national benefit significantly greater than from an alien of exceptional ability.

While the petitioner argues that the director is "estopped"[1] from interpreting this statement to mean anything other than that the petitioner is herself an alien of exceptional ability, we do not find the petitioner's interpretation of the sentence to be a reasonable one. The director's statement in no way implies a finding that the petitioner herself is an alien of exceptional ability. Rather, the director is comparing the petitioner's accomplishments to those of aliens with exceptional ability as a group.

The petitioner is legally wrong that the law and regulations do not require any showing beyond exceptional ability where an alien requests a waiver of the labor certification in the national interest. 8 C.F.R. § 204.5(k)(4)(i) provides that every petition filed under the classification sought by the petitioner, including those seeking classification as aliens of exceptional ability, "must be accompanied by an individual labor certification from the Department of Labor" unless the alien qualifies for Schedule A designation or is applying under the Labor Information Pilot Program. The petitioner did not initially apply for Schedule A designation or under the Labor Information Pilot Program, and, for the reasons discussed below, could not have done so as a self-petitioner. Rather, the petitioner requested a waiver of the labor certification requirement in the national interest pursuant to 8 C.F.R. § 204.5(4)(k)(4)(ii).

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

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[1] As an appellate body, we are not bound by the conclusions of the director, whose decision and underlying conclusions the petitioner has requested us to review by filing an appeal. Pursuant to 8 C.F.R. § 103.4, the director may certify decisions to this office for review, including favorable decisions. Thus, we clearly have the authority to review favorable determinations. The cases cited by the petitioner do not hold otherwise. *Pereira-Barbeira v. INS*, 523 F.2d 503 (2d Cir. 1975) dealt with res judicata arising from a decision to adjust an alien's status to lawful permanent residence. In *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980), the court found that a Service delay estopped the Service from holding an alien accountable for failing to pursue a claim. In *Galvez v. Howerton*, 503 F. Supp. 35 (C.D. Cal. 1980) the court found that affirmative misconduct by the Service estopped the Service from denying an alien a visa number based on unavailability. None of these federal cases found that an appellate body within the Service is bound by favorable findings by the director when reviewing the director's decision on appeal. In fact, even the director is not bound by his own favorable findings. Section 205 of the Act provides that the director may revoke the approval of a petition "for what he deems to be good and sufficient cause." Thus, Congress has afforded the director the discretion to review and reverse his favorable findings on an approved visa petition prior to the beneficiary's entry into the United States or adjustment of status based on that petition.

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.

In accordance with that language, *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), states:

> Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Thus, the director did not err in considering whether the petitioner, regardless of whether she herself is an alien of exceptional ability, had demonstrated a benefit that would exceed the achievements and significant contributions of aliens of exceptional ability in general.

Moreover, any discussion by the director of exceptional ability, one subcategory of the classification sought by the petitioner, in the absence of a request for Schedule A Group II designation, clearly relates to the requirements for exceptional ability set forth in 8 C.F.R. § 204.5(k)(3)(ii). The director's decision does not discuss the petitioner's eligibility for Schedule A Group II designation as the petitioner did not, and as a self-petitioner could not, originally request such designation. As the petitioner concedes, while the phrase "exceptional ability" is used both for a subcategory of the classification sought by the petitioner and for Schedule A Group II designation, the requirements are completely different. Thus, even if the director had concluded that the petitioner was an alien of exceptional ability as defined in 8 C.F.R. § 204.5(k)(3)(ii), and he did not, such a finding would not mandate a finding that the petitioner qualifies for Schedule A Group II under 20 C.F.R. § 656.22, a much stricter standard.

On appeal, the petitioner argues for the first time that she is eligible for Schedule A Group II designation. 20 C.F.R. § 656.22, however, requires that the employer request such designation. 8 C.F.R. § 204.5(k)(1) provides that any *employer* may file a petition for an advanced degree

professional or an alien of exceptional ability. That regulation further provides a single exception to that rule for aliens seeking a waiver of the labor certification requirement in the national interest. Those aliens, and only those aliens, may self-petition. Thus, only employers petitioning on behalf of aliens can seek Schedule A Group II designation. As the petitioner self-petitioned, she must demonstrate that she meets the requirements for a national interest waiver, and may not request designation under Schedule A Group II. Only her employer could request such designation by filing the I-140 on her behalf. Thus, the only issue to be decided in this appeal is whether the petitioner meets the requirements for a national interest waiver.

Matter of New York State Dept. of Transportation, *supra*, has set forth several factors that 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, neurophysiology. Without explanation, the director concluded that the proposed benefits of the petitioner's work would not be national in scope. As noted by the petitioner on appeal, the proposed benefits of her research are improved treatment of neurological disorders such as Parkinson's Disease as well as sleep and attention disorders. Such proposed benefits are clearly national in scope. As such, we reverse the director's finding on that issue. 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.

In her initial cover letter, the petitioner implies that the immigration of experienced researchers into the United States is in the national interest. Congress did not provide a blanket waiver for researchers. Rather, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we do not accept the argument that a given project or area of research 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 she 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, n. 6.

The petitioner provided evidence of her membership in the Society for Neuroscience. While the petitioner asserts on appeal that the society has strict membership requirements, the record contains no evidence to support that assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Regardless, membership in professional associations is simply one factor for classification as an alien of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii), a classification that normally requires a labor certification. We cannot conclude that meeting one, or even the requisite three, of the factors for that classification warrants a waiver of the labor certification process.

On appeal, the petitioner argues that her receipt of three degrees, a medical degree, a Master of Science degree, and a Ph.D. reflects more than exceptional ability and is more significant than a single award for excellence. We do not find this argument persuasive. An academic degree is issued to every student who enrolls and completes certain academic requirements. An academic degree is not akin to an award for an accomplishment in one's career for which the awardee competes against the top professionals in the field.

The petitioner then argues that her possession of a medical degree alone warrants approval of the national interest waiver based on her interpretation of *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). *Buletini* involved a different classification than that sought by the petitioner. Thus, the court did not address the issue of whether, as implied by the petitioner, every alien with a medical degree who performs research serves the national interest to such a degree that the labor certification requirement should be waived. As a medical degree is a requirement that can be listed on an application for a labor certification, we find that the mere possession of such a degree does not warrant the waiver of that requirement.

Finally, the petitioner argues that her work will benefit the United States more than the presence of two hockey players who were able to obtain classification as aliens of extraordinary ability. Again, the petitioner is not persuasive. The hockey players obtained immigrant visas based on a different classification than that sought by the petitioner. Congress specifically created the classification of extraordinary ability for aliens in both the sciences and athletics. Recognizing that the two fields are not comparable, the regulations only require that an extraordinary alien have risen to the small percentage at the top of the alien's field. Nowhere is an athlete required to compare him or herself to a scientist. The issue to be decided in this appeal is not whether this petitioner, a researcher, will benefit the national interest to a greater degree than an athlete. Such an inquiry would be meaningless. Rather, we must determine whether the petitioner will benefit the national interest to a greater degree than an available U.S. worker in her own field with the same minimum qualifications.

The petitioner currently works in the primate research unit within the Center for Neurobiology and Behavior at the University of Pennsylvania. The director of the Center [redacted] provides few specifics about the petitioner's contributions to the group, other than to assert that they are being applied to other research programs inside the center and will be

reflected in future publications. [redacted] leader of the primate research unit, discusses the petitioner's work in that unit, which he categorizes as "outstanding."

> The projects [the petitioner] participated in explored the function of the LC [locus coerulus] in the awake primates during the performance of cognitive tasks using computerized manipulanda. The outcome of this research will result in understanding of the devastating neurological and psychiatric disorders, such as Alzheimer's disease, schizophrenia, depression, attention deficits and memory disorders.
>
> [The petitioner] is well prepared for training animals in behavioral task performance, in-vivo electrophysiological recording in awake animals, telemetric recording of physiological signals for sleep study, the data analysis, and in writing scientific reports and papers. Since she joined the team in May 1999, she has been making significant contributions to the lab's work, and participated in a production of a research paper and of four abstracts. The projects included: 1) Effects of auditory distractors on response criteria and the LC neuronal activity; 2) Effects of Zolpidem on primate sleep pattern; 3) Anatomical projections of the LC to the cingulate cortex and other cortical and subcortical areas in primates.

In a second letter, [redacted] asserts that the petitioner is involved in every aspect of the work in the laboratory, has presented her work at seminars, and will be the first author and co-author of several papers to be submitted to neurophysiological journals.

[redacted] a staff neurologist at the Philadelphia Veterans Affairs Medical Center, asserts that the center is located on the campus of the University of Pennsylvania and that he has discussed the petitioner's work with her on several occasions. [redacted] elaborates on the information provided by [redacted] about the petitioner's work on sleep disorders, funded by Merck. [redacted] notes that zolpidem is "a well-known drug used to treat sleep disorders" and asserts that the petitioner "used zolpidem as a control drug to study the influences of another new drug on sleep." The record does not include any reference letters from high-level officials at Merck to confirm the significance of this work. [redacted] concludes that the petitioner's findings on this project "may be useful for clinical purposes" and will be published soon. Finally [redacted] tates that the petitioner has "made significant progress in computerizing the scoring skills using software," which is "a significant and important technical improvement" over manual scoring. The petitioner has not established that other laboratories have licensed or otherwise utilized the petitioner's software.

[redacted] a professor in the Department of Psychiatry at the University of Pennsylvania, asserts only that the petitioner's work with zolpidem "has the potential to add to our understanding of the pathophysiological mechanisms of insomnia" and other neuropsychiatric disorders. That the petitioner performs work that "may" be useful for clinical purposes or that it has "potential" is not indicative of a track record that has already produced a degree of influence on the field as a whole.

[redacted] a professor at the State University of New York Health Sciences Center at Brooklyn, asserts that the petitioner worked in his laboratory. He states that they had "productive interaction in research." He continues that the petitioner had "been making the efforts to build up the stable conditions for recording tiny electroretinogram signals from both monkey and man and the process is encouraging so far." [redacted] concludes that the work was aimed at understanding dopaminergic mechanisms in Parkinson's Disease and discusses the human and economic costs of that disease. [redacted] does not explain how the petitioner's work actually contributed to a notably improved understanding of Parkinson's Disease. For example, the record contains no evidence that pharmaceutical companies are conducting clinical tests for possible treatments of Parkinson's based on the petitioner's work.

[redacted] in whose laboratory the petitioner worked at the State University of New Jersey, Rutgers, asserts that for six months the petitioner worked on a project reconstructing a single cholinergic neuron, a project requiring very special techniques and a quality researcher. He asserts that the petitioner had prior training in neurophysiology and quickly picked up the necessary anatomical techniques and computer programming knowledge to complete a complicated part of the reconstruction of the neuron. He continues that "her work is appreciated as part of the contributions to the project." [redacted] concludes that he has followed her work since leaving his laboratory and that she has become more independent and is making important progress in her field.

[redacted] a professor of psychology at Rutgers, asserts that the petitioner's work at that institution "was very helpful to bridge the fields of neurophysiology and vision; and definitely benefits the work in clinical neurology, social attention, and behavior disorders." He explains that the combination of visual psychophysics and neurophysiology is demanding and has significance to treating Parkinson's disease, schizophrenia, depression, and Alzheimer's disease.

[redacted] the petitioner's supervisor at the University of Aston at Birmingham, asserts that while studying for her Ph.D., the petitioner "identified a new wave on the pattern ERG which appears to separate the retinal activity represented by P50 from the ganglion activity represented by N95." [redacted] does not explain the significance of this work. [redacted] a consultant Ophthalmic Surgeon who examined the petitioner for her Ph.D., asserts that her thesis was "competent" and reflected a good knowledge of basic electrodiagnostic techniques as applied to the eye. He concludes that her thesis "made an original contribution to the study of the Pattern Electroretinogram."

As noted by the director, the above letters are all from the petitioner's collaborators and immediate colleagues. On appeal, the petitioner asserts that the letters are from internationally recognized neuroscientists from throughout the United States. It remains, the letters are from individuals who have worked with the petitioner. 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. Moreover, as discussed above, many of these

letters contain phrases suggesting that while the petitioner's work has potential, she has yet to influence the field.

The record does contain one independent evaluation of the petitioner's work. [redacted] a professor of psychology at Northeastern University, states that he has known the petitioner since 1997 due to the overlap of her work with his research area, human visual perception. In his first letter [redacted] asserts that the petitioner's resume when applying for a faculty position at Northeastern University in 1998 was "equivalent to those of competent applicants" and that she is "at an appropriate level give[n] her career path." [redacted] summarizes the petitioner's past research projects, concluding that her area of research is "new and exciting, and it illustrates the high quality and importance of her work." As stated above, we do not contest the intrinsic merit of the petitioner's work.

In his second letter, [redacted] provides more specifics about the petitioner's work with auditory distractors in primates, specifically that she has demonstrated that such distractors can enhance the performance of a difficult task. [redacted] asserts that these findings suggest a new direction for LC research. He further asserts that she has "solved a crucial question how behavior is linked with neuronal activities." He concludes that her work is "promising." While [redacted] asserts that the petitioner is contributing to the field, he fails to explain adequately how she has influenced the field. For example, he does not assert that the petitioner has influenced his own research projects or provide examples of other projects influenced by the petitioner's results.

On her resume, the petitioner lists six published articles. In support of the petition, she submitted her thesis, which does not appear to have been published in a peer review journal, two articles submitted for publication, and three published abstracts. 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.

In his decision, the director stated that the petitioner's articles had been cited, but dismissed citations as typical to the field. We disagree with the director's conclusion that citations cannot be evidence of a researcher's authority in the field. A widely cited article is very indicative of that article's influence in the field. The record, however, contains no evidence that any of the petitioner's articles have been cited. In fact, the petitioner has not authored a published article since 1992, prior to receiving her Ph.D. Thus, all of the recent research upon which the petition is based has yet to be subject to peer review.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D., publishes her results, or is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record does not establish that the petitioner's work represents a groundbreaking advance in neurophysiology.

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, 8 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.