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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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MAY 06 2003

File: WAC-01-245-58329 Office: California Service Center Date:

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. § 153(b)(2)

PUBLIC COPY

ON BEHALF OF PETITIONER:



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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner 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 used the standard for a higher classification, aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. We acknowledge that the director's decision includes several troublesome references to the regulatory requirements for aliens of extraordinary ability. We concur that such analysis was in error. Nevertheless, on page 10, the director acknowledges that national or international acclaim is not required for this classification and that the petitioner need not demonstrate that he is one of the very few at the top of his field. The remaining analysis uses the correct standard. Further, the director raised legitimate concerns, which will be discussed below, that counsel has not addressed on appeal. Thus, while we withdraw any inference from the director's decision that a petitioner need demonstrate national or international acclaim, we find that, in light of the remaining discussion, the director's use of such language is not reversible error.

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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in Endocrinology from the Shanghai Second Medical 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 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, endocrinology, and that the proposed benefits of his work, improved treatment for multiple sclerosis, 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, n. 6.

At the time of filing, the petitioner was a postdoctoral researcher at the University of California, Los Angeles (UCLA). He worked under the supervision of Dr. [REDACTED] who has written review articles on Multiple Sclerosis (MS), including one published in *Science*. Further, *Inside MS* magazine published a cover story on her work. Dr. [REDACTED] asserts that the petitioner plays a key role in three projects at her laboratory. First, the petitioner has been investigating the role of myelin basic protein (MBP) in thymi in the animal model of MS, experimental autoimmune encephalomyelitis (EAE). Dr. [REDACTED] asserts that the petitioner "is the first researcher to discover that MBP expression in thymi is inversely correlated with EAE disease susceptibility," and that he was "the first to discover that MBP expression in lymph node and spleen occurs primarily in macrophages and that this expression is increased late in disease." Dr. [REDACTED] explains that the results of this project "may someday lead to novel therapies." The articles reporting these results were in press at the time of filing the petition. In a subsequent letter, Dr. [REDACTED] indicates that the articles had been published in *Nature Immunology* and had generated reprint requests and a single citation by German immunologists.

Second, Dr. [REDACTED] asserts that the petitioner has obtained "promising preliminary data" that the Golli MBP gene may be involved in MS relapses. Dr. [REDACTED] asserts that confirmation of this data "would be a breakthrough in the field of MS." In her subsequent letter, Dr. [REDACTED] does not identify any additional accomplishments on this project, but asserts that it would be slowed down without the petitioner's involvement.

Third, Dr. [REDACTED] asserts that the petitioner was a key researcher in a six-month old project to identify the best candidate for gene therapy for MS. While Dr. [REDACTED] discusses the important implications for this project, she does not identify any significant results obtained by the petitioner. In a subsequent letter, Dr. [REDACTED] asserts that the petitioner, with the laboratory's collaborator, "discovered that after the neonatal [central nervous system (CNS)] murine stem cells were transplanted into spinal cords of EAE mice, the EAE mice had less severe EAE." Dr. [REDACTED] notes that central nervous system damage is an important consequence of MS and is normally irreversible.

In her subsequent letter, Dr. [REDACTED] describes a fourth project on which the petitioner began working after the petition was filed. Dr. [REDACTED] describes the previous work of other researchers in the laboratory regarding sex hormones and the alleviation of MS symptoms. While these results were reported in the major media, Dr. [REDACTED] does not indicate that the petitioner played a role in the prior accomplishments of this project. Rather, the petitioner recently expanded on this work when he "discovered that estrogen receptors are expressed in mouse immune cells."

Finally, Dr. [REDACTED] discusses a national shortage of qualified researchers in this area. As stated by the director, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

While Dr. [REDACTED] expertise in the field is well established and her opinion cannot be simply dismissed, merely working for an esteemed expert in the field is insufficient. While Dr. [REDACTED] discusses the importance of the projects on which the petitioner is working and the potential significance of any results from these projects, these comments alone cannot establish that the petitioner's research has already had an influence on the field of MS research as a whole. The record must include some objective evidence of the petitioner's influence on the field.

Initially, the petitioner submitted a letter from another colleague at UCLA, Dr. [REDACTED] who provides general praise of the petitioner's work and information similar to that provided by Dr. [REDACTED]. In addition, the petitioner provided two letters from endocrinologists at the Southwestern Medical School in Dallas, Texas. Dr. [REDACTED] Director of the Center for Diabetes Research at the school and a member of the National Academy of Sciences, asserts that "Dr. [REDACTED] at UCLA has recently made me aware of the work [of the petitioner]." While Dr. [REDACTED] asserts that the petitioner's skills are "extremely valuable" and that his work is funded by a government grant, he does not discuss the petitioner's track record or explain the significance of results already produced by the petitioner's research. Dr. [REDACTED] an assistant professor at the Southwestern Medical Center, asserts that he has known the petitioner for five years, but does not explain the nature of that relationship. Dr. [REDACTED] provides the following discussion of the petitioner's research in China.

[The petitioner] used [a] genetic immunization to establish Graves' animal model, [and] found [that an] idiotypic[-]anti[-]idiotypic immune network was involved in the pathogenesis of Graves' disease. This finding led to the new understanding of Graves' disease and other autoimmune disease[s] and maybe leads to new treatment of Graves' disease. [The petitioner] also invented [a] method to test [for an] anti-galactose antibody among Graves' disease patients, which is a new clinical biomarker associating [sic] to the development of Graves' disease.

These assertions are not supported by experts on Graves' disease confirming the petitioner's influence on research into this disease or hospital administrators confirming that the petitioner's antibody test is commonly used for testing Graves' patients.

Subsequently, the petitioner submitted several letters from colleagues at UCLA, including Dr. [REDACTED] who, in addition to being an associate professor at UCLA, is also associate director of the Molecular Genetics Laboratory at Cedars-Sinai Medical Center. All of the references provide information similar to that provided by Dr. [REDACTED]. Dr. [REDACTED] also reiterates Dr. [REDACTED] discussion of the petitioner's work on Graves' disease.

We agree with the director that the above letters are all from the petitioner's collaborators and immediate colleagues. The director then states that such letters are not evidence of "general acclaim." While the use of the word "acclaim" is unfortunate, the director then states that the

letters “do not show that the petitioner’s work has gained significant notice in the field among individuals who have not worked directly with the petitioner.” While counsel is correct on appeal that the petitioner need not demonstrate “acclaim,” he must still demonstrate an influence over the field as a whole. While the letters of record, all but two of which are from UCLA, 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.

Counsel asserts that the reference letters should not have been dismissed and argues that the director improperly compared the petitioner to others “making contributions” instead of others “having the same minimum qualifications.” We do not find these arguments persuasive. First, the director compares the petitioner’s impact to “others in the field” several times without reference to whether they are making contributions. Regardless, it is not imposing an impermissible standard to suggest that most if not all minimally qualified researchers are contributing original data to the general pool of knowledge. More specifically, research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. Thus, the petitioner must demonstrate that his original contributions go beyond those normally associated with qualified researchers. The record does not establish that the petitioner’s work represented a groundbreaking advance in endocrinology.

The petitioner also submitted documentation alleged to demonstrate his exceptional ability in the field. While the issue is moot since the petitioner is an advanced degree professional, we note that the regulation at 204.5(k)(2) defines ‘exceptional ability’ as ‘a degree of expertise significantly above that ordinarily encountered.’ Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate ‘a degree of expertise significantly above that ordinarily encountered.’

Thus, the evidence of the petitioner’s degree, license, and salary are not evidence of exceptional ability without evidence that the degree and license are not required for the position and that the salary is particularly notable for a postdoctoral researcher. Regarding the petitioner’s membership in the Clinical Society of Immunology, while the petitioner’s references assert that the society requires an M.D. or Ph.D. and significant contributions to the study of clinical immunology, the record does not establish that these are exclusive requirements. A degree is essential for anyone practicing in the field and it is not clear how the society evaluates contributions. If a candidate need only show publications in the field, this is not a remarkable accomplishment for a researcher. Finally, the petitioner did not submit independent evidence to support his assertions regarding the significance of his 1997 Chinese Natural Scientific Grant and 2001 travel award to attend a conference. Regardless, by statute, the exceptional ability classification normally requires an approved labor certification. We cannot conclude that meeting some or even the requisite three requirements for that classification warrants a waiver of the labor certification requirement.

In response to the director’s request for additional documentation, the petitioner submitted letters from the International Biographical Centre (IBC) in Cambridge inviting the petitioner to be included in the

center's publications *2000 Outstanding Scientists of the 21st Century – First Edition* and *One Thousand Great Americans*. Scientists included in the first book may obtain an "Outstanding Scientist of the 21st Century Diploma." Having received the petitioner's biography, the IBC advised the petitioner that he had been granted IBC's "21st Century Award for Achievement" in recognition for his contributions. Similarly, the American Biographical Institute, Inc. (ABI) invites the petitioner to be included in its *Great Minds of the 21st Century*.

The director stated, "the burden is on the petitioner to show that inclusion in this volume is a nationally prestigious honor, restricted only to the scientists of exceptional ability." The petitioner did not submit any evidence regarding the significance of IBC or ABI initially or on appeal. We concur that the petitioner must demonstrate the significance of inclusion in these publications. In many fields, there are for-profit publishing companies that "invite" members of a given profession to have their biographies published in a volume of thousands of biographies for a fee. As an inducement to pay for inclusion in the volume, the publishing companies offer "awards" and other accolades. Without the order form, the petitioner cannot establish that IBC and ABI are not charging a fee for inclusion in the volume and the "award." The record contains no evidence regarding how these companies select their invitees. We note that IBC addresses the petitioner as an M.D. and a Ph.D. although he does not have a medical degree. The use of this title reflects that IBC knows little about the petitioner's actual credentials. Whatever the selection criteria, appearing as one of thousands, or even hundreds of other successful individuals in a frequently published directory is not evidence of the petitioner's influence on the field.

The petitioner also submits an e-mail from *NeuroImage* requesting the petitioner's "cooperation in identifying [his] area of expertise" to assist them with the creation of a database of expertise from which they can select potential reviewers. This e-mail appears to be part of a general search for reviewers, and not based on the petitioner's particular abilities. We note that the publication is asking for the petitioner's area of expertise, suggesting that they are unfamiliar with his work. We note that the message concludes, "please also forward this e-mail to any of your colleagues you think could be good reviewers," suggesting that the e-mail is part of a massive reviewer recruitment effort and not an individual appeal to the petitioner.

Finally, the petitioner has authored 14 journal articles, six abstracts, and attended 12 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.

In response to the director's request for additional documentation, the petitioner submitted seven requests for reprints for his 2001 article in the *Journal of Neuroimmunology*. The petitioner also submitted an additional five postcards addressed to him or Dr. [REDACTED] alleged to be reprint requests. Dr. [REDACTED] asserts that a German research team has cited the article. We do not agree with the director's implication on page five that citation of one's work is typical. While citations are not published material about the cited author as required for extraordinary ability under 8 C.F.R. § 204.5(h)(iii), frequent citation is an indication that the cited article is influential. Nevertheless, while requests for reprints reflect interest in the article, they are not as persuasive as citations, which reflect that the citing author is not only interested in but has relied upon the petitioner's work. A single citation of a single article is not evidence of the petitioner's influence on the field as a whole.

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. While we acknowledge that the petitioner works for a distinguished researcher in his field and has generated some interest in his work outside of Los Angeles, at best the petition was filed prematurely, before the influence of his work could be gauged.

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.

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