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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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Washington, D.C. 20536

File: [Redacted]  
LIN 98 176 53110

Office: Nebraska Service Center

Date: MAY - 8 2003

IN RE: Petitioner: [Redacted]  
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)

IN 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 (AAO) on appeal. The appeal will be dismissed.

The petition in this matter, LIN 98 176 53110, was filed on June 30, 1998. It is noted that the petitioner was initially represented by [REDACTED] Mr [REDACTED] will be referred to herein as the petitioner's former counsel, or previous counsel. References simply to "counsel" will refer to the petitioner's current attorney of record, who submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, on July 13, 2001.

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 research scientist at BioNebraska, Inc., a biotechnology company. 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.

The petitioner holds a Master of Science degree in Biochemistry from the University of Nebraska-Lincoln (1997). 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 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 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.

Along with documentation pertaining to his field of research, the petitioner submitted several witness letters. Dr. [REDACTED] President, BioNebraska, Inc. states:

[BioNebraska] produces natural peptide hormones and is developing their use for human

therapies in the aging. In particular, the company is focusing on therapies for osteoporosis, congenital heart failure, and Type II diabetes. [The petitioner's] research on recombinant peptide drugs for diseases such as diabetes and osteoporosis is vitally important to medical science and in the U.S. and around the world.

\* \* \*

[The petitioner] has worked as a geneticist and protein chemist for two years at BioNebraska. He is personally responsible for break-through discoveries in recombinant gene technology that have allowed the company to develop recombinant organisms capable of producing peptide hormones in large enough quantities to meet global markets. Within the next six to nine months BioNebraska will file some patent applications worldwide concerning technology that [the petitioner] played a critical role in developing.

\* \* \*

[The petitioner] is engaged in pioneering research to develop promising therapies for many diseases including osteoporosis and diabetes. He is working with GLP, GRF, and PTH, which are recombinant peptide drugs, to develop new low cost and efficient treatments for these illnesses.... BioNebraska is in the process of evaluating peptide hormones produced using organisms which [the petitioner] was influential in developing. These evaluations will be performed in humans and if approved by the regulatory authorities...

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate 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 Bureau held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Dr. [REDACTED] Professor of Biochemistry, University of Nebraska-Lincoln, was the petitioner's research supervisor during his graduate studies there. Dr. [REDACTED] states: "[The petitioner] has developed clever and innovative proprietary cloning schemes unique to BioNebraska's recombinant processes."

The petitioner may have benefited projects undertaken by his employer, but his ability to impact the field beyond his company's projects has not been demonstrated. In this case, the petitioner has not shown that he was listed as a lead inventor on any of BioNebraska's patents. Even if the petitioner's work were to have resulted in an approved patent, the granting of a patent documents only that an innovation is original. Not every patented technological innovation constitutes a significant contribution to one's field of endeavor. According to statistics released by the U.S. Patent and Trademark Office, which are available on its website at [www.uspto.gov](http://www.uspto.gov), the U.S. Patent and Trademark Office has approved over one hundred thousand patents per year since 1991. In 2001, for example, it received 345,732 applications and granted 183,975 patents. In determining the petitioner's eligibility

for a national interest waiver, we must consider the significance, not just the originality, of the petitioner's work. There is no indication that the petitioner's research has already had a substantial impact on the overall field. Prior counsel contends that the petitioner has made such a showing but offers no support except for the statements from individuals having direct ties to the petitioner. These statements, while valuable in describing the petitioner's accomplishments, do not establish that biomedical researchers in the field share similar opinions regarding the significance of his work, as one might expect if the petitioner had already significantly impacted his field.

The record establishes that the petitioner has co-written a published article and a conference presentation, but the record contains no objective evidence (such as citations) to establish the extent to which this research has affected the work of other scientists.

On September 17, 1998, the director requested evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional witness letters.

Dr. [REDACTED] Senior Vice President, Research and Development, BioNebraska, Inc., states:

[The petitioner] was involved in the design and cloning of the bacteria that are used in [the production of GRF and GLP-1], using many of his skills and inventiveness in the field of Molecular Biology. He is also an accomplished chemist with knowledge in isolation and characterization, necessary components for success. These skills led us recently to choose him to apply his skills in transferring technology from our colleagues in Denmark to us by his working in that city for a month applying his many talents. He successfully brought back techniques that will enable or enhance production of GRF.

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.

With regard to the witnesses of record, many of them discuss what may, might, or could one day result from the petitioner's work, rather than how the petitioner's past efforts have already had a discernable impact beyond the contributions that are expected of a competent biochemist/researcher working at a biotechnology company. Other witnesses devote significant portions of their letters to the overall importance of the petitioner's research in providing potential treatments for diseases such as diabetes and osteoporosis. Pursuant to *Matter of New York State Dept. of Transportation*, arguments about the overall importance of a given occupation may establish the intrinsic merit of that occupation, but such general arguments cannot suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement. 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 (5<sup>th</sup> Cir. 1987). Witness statements and documentation pertaining to the undoubted importance of developing gene and enzyme technology fail to distinguish the petitioner from other competent researchers in his field.

Dr. [REDACTED] states that the petitioner is trained in recombinant gene technology, protein chemistry, and enzymology, and that few researchers are “trained in all these areas.” It cannot suffice, however, to state that the petitioner possesses specialized training or a unique combination of skills. At issue is whether this petitioner’s contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. Objective qualifications such as those described by Dr. [REDACTED] would be amenable to the labor certification process. Dr. [REDACTED] also claims that the petitioner “holds expertise that is nearly impossible to replace.” We note here that the record contains a newspaper article appearing in the Business Section of the *Lincoln Journal Star* in which Dr. [REDACTED] seems to contradict his preceding statements. The article states:

[REDACTED] said he hasn’t had any trouble – as have other state businesses – hiring enough qualified people in a tight job market with less than 2 percent unemployment.

‘We cherry-pick that place,’ he said of the University [of Nebraska-Lincoln] from which about 60 percent of his staff was hired.

In a statement accompanying the petitioner’s response to the director’s request for evidence, prior counsel argues that requiring BioNebraska “to go through a labor certification process would adversely affect the national interest.” Prior counsel further states: “Moreover, the time constraints are an issue in that the labor certification process is currently taking two or more years and is an expensive process that [the petitioner’s] employer may not be willing or able to do.”

The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

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 there was “no evidence that the petitioner is impacting or influencing the field above and beyond his peers.” The director also noted:

Although the record contains statements which make reference to how [BioNebraska]

would be hurt if the petitioner does not continue his research and the fact that it would be difficult to replace him, the record fails to establish why the labor certification process is inappropriate in this case.

On appeal, the petitioner states:

There may not be sufficient time for [the petitioner] to get an immigration approval by the end of his current visa if a new application such as Labor Certification is required. Moreover, if an American worker challenges this position successfully during the labor certification process, it will represent a great loss to BioNebraska's pharmaceutical efforts...

The petitioner indicated that he would submit a brief and/or evidence to the AAO within thirty days. He dated the appeal July 1, 1999. As of this date, more than three years later the AAO has received nothing further.

Bureau records now indicate that the petitioner in this matter is the beneficiary of both an approved labor certification and an approved employment based immigrant visa petition filed in his behalf by BioNebraska, Inc. (LIN 01 149 55006). This renders moot the petitioner's argument that he needs an exemption from the requirement of a job offer because of insufficient time to obtain a labor certification.

It is also noted that the petitioner is no longer working for BioNebraska, Inc. Information provided to the Bureau from the petitioner's current employer, LI-COR, Inc., indicates that he commenced employment with that company on June 10, 2002. Therefore, witness assertions (such as those of Dr. [REDACTED] that the loss of the petitioner's services would "severely undermine [BioNebraska's] research in its clinical trial phase" or "impede [BioNebraska's] development of new therapies" are also moot.

In this case, the petitioner has not provided evidence that his research has consistently attracted significant attention from independent biomedical researchers. The petitioner must show not only that his individual work is important to the companies that employ him, but throughout the greater biomedical research field. The petitioner may have contributed to a research article, conference presentation, and a patent application, but the record does not contain citation records or other evidence to establish that independent researchers throughout the biomedical research community regard the petitioner's work as particularly significant.

We note that the petitioner's witnesses consist entirely of individuals with direct ties to the petitioner or projects undertaken by BioNebraska. Their letters describe the petitioner's expertise and value to his company, but they do not demonstrate the petitioner's influence on the field beyond his employer. 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 advances 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.

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.