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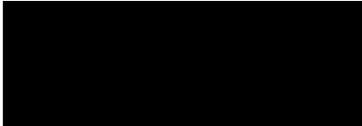
U.S. Department of Homeland Security

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Bureau of Citizenship and Immigration Services

B5

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



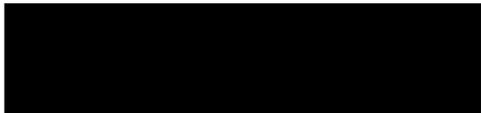
File: WAC 02 139 51406 Office: CALIFORNIA SERVICE CENTER

Date: **MAY 29 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:



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 F. 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 (AAO) on appeal. The appeal will be sustained and the petition will be approved.

We note that the petitioner simultaneously filed an appeal and a motion to reopen. The two filings appear to be identical except for the substitution of the terms “appeal” and “motion to reopen.” The petitioner may not simultaneously file an appeal and a motion on the same decision. By appealing the director’s decision, the petitioner has placed the matter under the jurisdiction of the AAO, and the petitioner’s identical motion to reopen is superfluous.

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. The petitioner seeks employment as a research scientist at Johnson and Johnson Pharmaceutical Research and Development, LLC. 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) . . . 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 director found that the petitioner, who holds a Ph.D. from the University of Southern California, qualifies as a member of the professions holding an advanced degree. On appeal, counsel argues that the petitioner is “clearly an alien of exceptional ability.” This distinction has no effect on the petitioner’s eligibility for the national interest waiver, and either way the petitioner receives the same immigrant classification. Because the petitioner’s eligibility as an advanced degree professional is

immediately obvious from even a cursory review of the record, it would be of no further benefit to the petitioner to analyze an additional claim of exceptional ability.

The sole issue in contention 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 the 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 [now the Bureau] 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.

The petitioner describes his work:

I am an internationally acclaimed researcher in the field of Bioinformatics and Molecular Biology. I have made significant scientific discoveries in biomedical and pharmaceutical research, especially in cancer research and embryonic development. I have also made important technological innovations to help the US pharmaceutical industry to develop better drugs faster and cheaper.

The petitioner asserts that his contributions include the development of "one of the largest DNA chip database systems in the nation for gene expression profile," cloning a gene that may be tied to colon cancer, and identifying new drug targets to combat strains of bacteria that are resistant to current antibiotics.

Along with copies of his articles and presentations, and background documentation establishing the intrinsic merit and national scope of his occupation, the petitioner submits several witness letters. Most of the witnesses have taught, supervised, or collaborated with the petitioner. Dr. [REDACTED] research assistant professor at USC and the petitioner's doctoral advisor, states that the petitioner's "scientific endeavors had profound importance and significant impact on biological and pharmaceutical research," and that his "publications have been cited more than 100 times by other research scientists." The record corroborates this assertion; an article that the petitioner co-authored with Dr. [REDACTED] and other collaborators has been cited 114 times since its publication in 1995. Such an unusually high volume of citations is strong objective evidence of the article's impact and significance.

[REDACTED] director of Bioinformatics at Johnson and Johnson Pharmaceutical Research and Development (described as "the world's largest and most comprehensive manufacturer of health care and pharmaceutical product[s]"), states:

[When the petitioner] joined our company as a research scientist . . . I was impressed by his excellent work in the Transforming Growth Factor (TGF) signal transduction area from his previous research, which has helped scientists around the world better understand the mechanisms of both cancer and embryonic development. . . .

After joining our company, [the petitioner] has contributed enormously to our group. He has developed an automated system for bio-molecular sequence matching and annotation. This unique approach has proved extremely valuable in helping us integrate our proprietary data with those from the public efforts in human genome sequence annotation. Furthermore, his algorithm can help scientists around the world share their research knowledge. . . .

Without doubt, [the petitioner's] work will help speed up the drug discovery process in Johnson and Johnson and will eventually lead to cheaper drugs to all Americans.

Among the apparently more independent witnesses is Dr. [REDACTED] director of the Genomics Lab at Purdue Pharmaceutical, Ltd., whose only apparent connection with the petitioner is his assertion that "I know [the petitioner] from conferences in Bioinformatics." Dr. [REDACTED] asserts that the petitioner "is an expert and leader in the field of Bioinformatics" who "has done outstanding research in traditional molecular biology in the signal transduction field."

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted additional evidence and letters. A number of these witnesses are not the petitioner's mentors or collaborators; their contact with the petitioner has been largely limited to contact at professional conferences. One such witness is Dr. [REDACTED] vice president of Research and Development at BIOBASE GmbH, Wolfenbüttel, Germany, who states:

[The petitioner] is an outstanding research scientist with unique expertise in Molecular Biology, Bioinformatics, and Computer Engineering. As an outstanding molecular biologist, he made groundbreaking contributions to research in Transforming Growth Factor (TGF) signal transduction pathway. He was the first scientist to clone and characterize the schnurri gene, a very important TGF beta pathway component. This has helped scientists to better understand embryonic development and cancer mechanisms. . . . Now, as a senior bioinformaticist at Johnson and Johnson, he is transforming traditional pharmaceutical research by developing and incorporating advanced bioinformatics software tools and high-throughput Genomic technologies. . .

[The petitioner] is clearly an extraordinary asset to [the] U.S. in vital areas of biomedical sciences, pharmaceutical and public health research. He can be counted among the top scientists in the area . . . [and is] irreplaceable at his areas of research.

[REDACTED] group leader for Cancer Genomics Informatics at the Whitehead Institute/MIT Center for Genome Research, states:

As a major architect [of the] DNA Microarray Database and Gene Annotation Database, [the petitioner] has helped Johnson & Johnson to significantly reduce drug discovery and development cost, [and has] thus brought new drugs to the public cheaper and faster. His recent innovations on microarray automatic annotation integration system[s] provide research scientists more accurate and comprehensive information at [the] genomics level. This is essential to improve the efficiency of high-throughput DNA chip array analysis.

[The petitioner's] work has significantly added to the body of scientific knowledge and has also accelerated the research process for others in the bioinformatics field.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding 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's decision contains numerous references to standards that apply to another immigrant classification, specifically the classification of alien of extraordinary ability, codified at section 203(b)(1)(A) of the Act, with implementing regulations at 8 C.F.R. § 204.5(h). The

director erred by holding the petitioner to the stringent extraordinary ability standards set forth at 8 C.F.R. § 204.5(h)(3), whereas the petitioner does not seek classification as an alien of extraordinary ability.

On appeal, counsel argues that the director's denial rests on "unfounded" conclusions and contests the director's dismissal of the heavy citation of the petitioner's work. Counsel observes that most articles are rarely, if ever, cited, and therefore a heavily cited article stands out in the field. Counsel also argues that the director did not give sufficient weight to independent witness letters in the record.

Upon careful consideration of the record, we concur with counsel's general allegation that the director ignored or minimized key evidence of eligibility. The record establishes that the petitioner's work has attracted substantial attention outside of his own research group, and even among the petitioner's own employers and professors there are established experts whose assertions carry significant weight.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.