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

B5

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

[REDACTED]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **NOV 06 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)

ON BEHALF OF PETITIONER:
[REDACTED]

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 Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner.
Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate at Purdue University. 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 has 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 did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now CIS] 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.

Counsel states that the petitioner "is one of the very big names in protein chemistry." Counsel describes the petitioner's work:

Counsel observes that the petitioner has written several scientific articles. Counsel contends "[i]t should be obvious that with 10 major publications, [the petitioner] is UNIQUELY qualified in his field." Counsel does not elaborate on this point.

Along with copies of his published work, the petitioner submits several witness letters. Professor Michael Laskowski states:

[The petitioner] became an expert in measurement of reactivity of protease inhibitors. His departure would set our research back enormously. . . .

Most of the currently employed drugs [against HIV] are enzyme inhibitors and many are protease inhibitors. Two well-known examples are ACE inhibitors, which . . . while they do not provide a cure, make living with HIV virus manageable. . . .

At Purdue, we have developed a method of prediction that differs from all others by allowing us to predict the reactivity of all possible inhibitors of a given type. Theoretically at least, and very likely practically this method allows a researcher to know when he has achieved optimum results. . . .

[The petitioner] is critical to the success of this research. I believe it is safe to say that he is one of the top young people in the world of reactivity chemistry. This reputation began in China, and I specifically recruited him because of it. I do believe that there are only a few young chemists that can come close to his expertise in the field.

Dr. Jacob Lebowitz, staff scientist at the Molecular Interactions Resource at the National Institutes of Health, states that Prof. Laskowski, his “former Ph.D. mentor,” introduced him to the petitioner at a professional symposium. Dr. Lebowitz states:

[The petitioner] is a key member of his research group in [sic] Department of Chemistry of Purdue University, which has excellent reputation [sic] in chemistry research. The group leader, Professor Michael Laskowski, is a distinguished world authority on enzyme inhibitors. The current project [the petitioner] is working on is entitled “Predicting protein reactivity from the amino acid sequence alone.” . . .

Proteins determine biological processes, and are composed of some combination of 20 standard amino acids. While the number of amino acids is limited, the number of unique sequences is huge. Only for a small portion of the proteins do we have structural information.

[The petitioner] and his group are doing research to develop the sequence to reactivity algorithms, SRA, which quantitatively predict the reactivity of members of a protein family from their sequence alone. The SRA allows one to predict the strongest possible, most specific possible and least specific possible sequences for the selected enzymes. This information is extremely useful for the design of drugs.

. . .

The finalization of this algorithm will be a monumental event in the history of pharmaceutical medicine. The algorithm will enable a pharmaceutical company to know that they have the best of all possible drugs for a specific reactivity before putting a drug on the market.

Dr. Lebowitz asserts that “[m]any experts in [the petitioner’s] field from different countries have cited [the petitioner’s] work in top international journals.” A letter by Professor emeritus Leonard Price of Xavier University of Louisiana contains very similar assertions, such as the claim that the petitioner’s “work has been cited many times by other scientists from different countries in top international journals,” and that “the algorithm will enable a pharmaceutical company to know prior to putting a drug on the market that it actually has the best of all possible drugs for a specific reactivity.” Dr. Wojciech Ardelt, director of Biochemistry at Alfacell Corporation, states “[t]he algorithm will enable a pharmaceutical company to optimize potency and specificity of certain drugs before putting them on the market.”

Several witnesses have stated that scientists around the world are citing the petitioner's published work. The petitioner has documented the citation history of only one of his articles. This documentation establishes six citations, one of which is a self-citation by the petitioner. Of the remaining five citations, two are by the same research group, indicating that only four research groups have independently cited the petitioner's work. The witnesses who refer to the petitioner's work as widely cited do not specify the number of citations, nor do they identify the source or sources from which they learned of these citations.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, counsel protests that the director's notice lacks specificity. Counsel asserts that the petitioner's witnesses are "some of the top research scientists in this field," but offers no support for this blanket characterization.

The petitioner submits documentation relating to his patented invention of a waterproof bandage. The significance of this invention to his current work in protein chemistry is unexplained. Counsel states "we are providing additional letters from research scientists around the world in support of the petition." Nearly all of these new letters are from individuals who had already provided letters with the initial filing. Prof. Laskowski states that the petitioner's project "is of fundamental importance to the understanding of how reactivity of proteins can be controlled and predicted." Prof. John L. Markley of the University of Wisconsin-Madison states that the petitioner's project "is of fundamental importance to the understanding of how reactivity of proteins can be predicted and controlled." The letters all offer similar assessments of the importance of the petitioner's research.

All of the witnesses emphasize the potential importance of the petitioner's work to the pharmaceutical industry, although only two witnesses actually work in that industry. Zhi-Yi Zhang, a senior scientist at NeoPharm, Inc., a firm that specializes in anti-cancer drugs, states that the petitioner's "research will revolutionize the drug design." Dr. Zhang does not indicate that NeoPharm itself has begun implementing the petitioner's work, or that the petitioner's work is directly relevant with respect to anti-cancer drugs.

Dr. Shan-Ming Kuang, research investigator at Bristol-Myers Squibb Pharmaceutical Research Institute, repeats the claim that "[m]any experts around the world have cited [the petitioner's] work in top scientific journals." Bristol-Myers Squibb is without a doubt one of the nation's biggest pharmaceutical companies, but there is no indication that anyone at the company besides Dr. Kuang has taken notice of the petitioner's efforts.

In sum, the petitioner's response to the director's request for information amounts to little more than a repetition of the basic claims set forth in the initial filing.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner's own contribution has not been shown to have national scope, and does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek.

On appeal, counsel protests the director's finding regarding national scope. The petitioner's field of endeavor, pharmaceutical research, has no inherent geographical restrictions. The petitioner's findings have been disseminated internationally via scholarly journals, and any drugs discovered through the petitioner's methods would have equally broad availability. Therefore, we withdraw the director's finding that the petitioner's work lacks national scope.

Counsel devotes much of the appeal brief to a critique of *Matter of New York State Dept. of Transportation*. By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. § 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.²

Counsel speculates "the Service [is] punishing petitioner because petitioner's attorney pointed out the obvious, that the Service sends out RFE's [requests for evidence] on cases without even reading what is submitted." Counsel offers no evidence to support the implied claim that the reviewing officer in fact considered the petitioner to be eligible, but instead denied the petition to "punish" him because his "attorney pointed out the obvious." Counsel adds "one hopes that the AAO will resist the temptation to sustain this ridiculous denial solely to protect the status quo and to 'prove' that the examiner was right after all." At the appellate level, every type of decision requires a written explanation; it is no easier to dismiss an appeal than to sustain it. The dismissal of this particular appeal rests not on "bureaucratic inertia" or some imagined vested interest in the "status quo," but on the failure of the evidence of record to stand up to numerous hyperbolic and exaggerated claims. Counsel's interpretation of the significance of the evidence is demonstrably unreliable, and it is in this light that we must view counsel's baseless claim that the denial cannot

¹ Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

² We note that a federal court has upheld *Matter of New York State Dept. of Transportation* against claims that the precedent decision constitutes rulemaking in violation of the Administrative Procedures Act:

Plaintiff also argues that the adoption of *NYDOT* as a precedent decision is a violation of the APA's notice and comment requirement. See 5 U.S.C. § 553(b) & (c). However, notice and comment proceedings are not required when an agency adopts an interpretive rule. See 5 U.S.C. § 553(b)(A). *NYDOT* is clearly interpretive because it does not create new rights or duties, but rather "provides a reasonable and predictable interpretation" of the statute. See *Mejia-Ruiz v. INS*, 51 F.3d 358, 364 (2d Cir.1995). Thus, Plaintiff's claim of a violation of the APA's notice and comment requirement fails as well.

Talwar v. INS, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). While this district court decision does not have the force of precedent, it serves to demonstrate that *Matter of New York State Dept. of Transportation* has thus far survived judicial review.

be logically explained except as the result of the adjudicator's personal animosity toward the petitioner and/or counsel.

As an example of counsel's exaggeration of the evidence, counsel has previously indicated "we have accumulated so much evidence that [the petitioner] is extraordinary that he would most certainly" qualify for the higher classification of alien of extraordinary ability. Counsel cites "evidence that [the petitioner] is asked to referee the works of others." This evidence consists of a "form" letter with the petitioner's name and other specific information handwritten into blank spaces. The existence of such a "fill-in-the-blanks" letter suggests that this referee work is common enough to justify the creation of such a letter.

Counsel asserts, correctly, that we "cannot simply ignore" the witness letters in the record. This is clearly true, but at the same time we are not required to regard the letters in a vacuum without reference to the record as a whole. Counsel has repeatedly claimed that the petitioner's witnesses are the top figures in their field, but the record is devoid of evidence to support this assertion. We have already noted some of the many similarities between the supposedly independent letters. As the record now stands, the witnesses who claim heavy citation of the petitioner's work outnumber the citations themselves. The petitioner's citation record is readily amenable to empirical verification, and in the absence of first-hand evidence showing heavy independent citation of the petitioner's work, we are not obliged to consider the witnesses' vague claims as evidence of such citation.

When viewed as a whole, the record demonstrates that the petitioner has earned the respect and endorsement of some established figures in his field, and is in the early stages of a promising career. We cannot conclude, however, that the petitioner stands out from his peers to such an extent that he merits a national interest waiver of the statutory job offer requirement.

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.