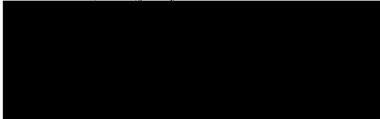


B5

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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



File: EAC-99-053-50941 Office: Vermont Service Center

Date: SEP 14 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:

PUBLIC COPY



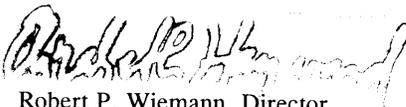
INSTRUCTIONS:

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, 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 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 failed to adequately consider the record, noting that the director did not specifically discuss evidence submitted in response to a request for additional documentation and referred to the petitioner's immigration status as F-1 instead of H-1B. The petitioner submits his H-1B approval notice, dated March 24, 1999. The Form I-140 was submitted on December 2, 1998. On part 3 of the form, the petitioner indicated that his current nonimmigrant status was "F-1 (Practical Trng.)" While the petitioner submitted additional documentation on June 16, 1999, no mention was made of the petitioner's change of status. Thus, we cannot conclude that the director's reliance on information presented on the petition constitutes evidence of his inattentiveness to the record. We will consider all the evidence of record below.

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.

The petitioner holds a Ph.D. in Anatomy and Cell Biology from the University of Iowa. 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 Dep't. of Transp., 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, medical research, and that the proposed benefits of his work, improved understanding of cardiovascular disease, 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 working in the laboratory of Dr. Richard Pratt at Brigham and Women's Hospital at Harvard Medical School. Dr. Pratt indicated that the petitioner was using the Ciphergen ProteinChip Biosystem and had initiated a proteomic studies area in cardiovascular diseases. The petitioner's research focused on "the identification of the genes which are responsible for the development of cardiac hypertrophy and transition to heart failure." Dr. Pratt indicates that he hired the petitioner based on his background in molecular and cell biology and his experience with vascular biology and asserts that the petitioner's research "will enormously further our understanding of molecular mechanisms of heart diseases and prevent and treat cardiovascular diseases eventually." Dr. Pratt does not, however, identify a specific accomplishment that has already influenced the field.

In a subsequent letter, Dr. Pratt discusses the importance of the petitioner's work in his laboratory performed after September 1998. The petitioner filed the petition in December 1998. The record does not reflect that any of his contributions to the field from his work in Dr. Pratt's laboratory was accomplished in the three months he worked there prior to the date of filing. Thus, his work there cannot be considered as evidence of his eligibility as of the date of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Similarly, we cannot consider the discussion of this post-filing work in a letter from Dr. Grace H. W. Wong, Head of the Department of Function Genomics at Ares Advanced Technologies, Inc.

Dr. Ramesh Bhalla, a professor at the University of Iowa, indicates that he supervised the petitioner's doctoral research. Dr. Bhalla indicates that the petitioner worked on a project funded by the National Institutes of Health (NIH) involving the "molecular mechanisms of estrogen receptor regulation of vascular cell functions." According to Dr. Bhalla:

[The petitioner's] study demonstrated that overexpression of estrogen receptor in vascular endothelial cells stimulated endothelial nitric oxide synthase gene expression, inhibited endothelial cell migration, and enhanced endothelial cell survival in response to serum-depletion. These results indicate that estrogen and its receptor mediates cardiovascular function by stimulating endothelial nitric oxide gene expression and maintaining the integrity of vascular endothelium. These studies also provided new implications of gene therapy using [a] replication-deficient adenovirus-mediated approach.

Dr. Bhalla asserts that the petitioner published two papers on this subject and that two manuscripts were under review. In addition, Dr. Bhalla indicates that the petitioner received a travel award from the American Association of Anatomists to present his findings at the Federal Association for Experimental Biology's annual meeting. Two other professors at the University of Iowa, including the Head of the Department of Anatomy and Cell Biology, provide similar information.

Dr. Huai Feng, Director of the Fertility Institute, indicates that he met the petitioner when they were both working at the University of Iowa Hospital and Clinic and that they continue to collaborate. Dr. Feng states that the petitioner's work "is important for understanding how estrogen protects women away from heart diseases." Dr. Feng concludes that the petitioner "has made significant contributions to the molecular mechanisms of estrogen receptor mediation of vascular functions."

The petitioner submitted his travel award from the American Association of Anatomists, which appears to be based on the fact that he is the first author of an article accepted for oral presentation at Experimental Biology 1998. The petitioner also submitted three Chinese awards issued by Shandong Province authorities and a student award from Shandong Medical University. In addition, the petitioner submitted evidence of his membership in the American Heart Association, the American Association for the Advancement of Science (AAAS), the American Association of Anatomists, and the International Society of Lymphology (ISL). The petitioner was offered a complimentary two-year membership in ISL. The petitioner did not submit any evidence of the significance of the awards or memberships other than the assertions of counsel and Dr. Pratt.¹ Regardless, recognition from government entities and membership in professional associations are two criteria for establishing exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for this classification warrants a waiver of the labor certification in the national interest.

Further, in November 1998, the petitioner was invited to an "invitation-only conference" where "national and international medical/scientific professionals will convene to create and develop a strategic plan for future lymphedema/angiodyplasia research." The petitioner has not submitted any evidence reflecting that this invitation was based on anything other than his being a professional in the field of lymphedema/angiodyplasia research.

In response to the director's request for additional documentation, the petitioner submitted an offer to publish his bio in *Who's Who of Professionals*. Appearing as one of thousands, or even hundreds of other successful individuals in a frequently published directory is not evidence that the petitioner has influenced his field.

The petitioner submitted evidence of six articles published prior to the date of filing and several abstracts. In his second letter, Dr. Pratt asserts that the petitioner's articles have "been relied upon by many other researchers as evidenced by the numerous times his work has been cited." The citation evidence in the record reflects that the petitioner's 1996 article has been cited five times and his 1995

¹ According to their websites, the American Heart Association is open to "investigators, clinicians, and healthcare professionals who have completed training within the last five years," AAAS is "open to all individuals who support the goals and objectives of the Association," the American Association of Anatomists is "open to anyone who has a clearly demonstrated interest in the anatomical or related sciences based on professional research activities," and ISL requires certification in the field and two references, one of whom must be an ISL member. These requirements do not indicate that the petitioner's memberships in these organizations are evidence of his excellence in the field as claimed by counsel.

article has been cited once. This number of citations is not indicative of an influence on the field and might be expected of a researcher with the same minimum qualifications.

The petitioner's research is no doubt of value and he is clearly respected by his colleagues. It can be argued, however, 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. It does not follow that every researcher who is working with a government grant or has published articles with minimal citations 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 at the time of filing represented a groundbreaking advance in cardiovascular research.

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.