

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B5

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



File:  Office: Nebraska Service Center

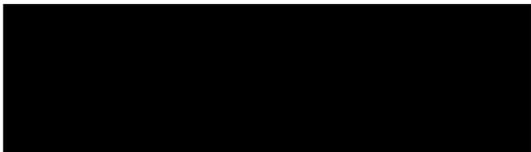
Date: **SEP 29 2003**

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 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 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 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. degree in Plant Pathology from Oklahoma State 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 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, plant biology, and that the proposed benefits of his work, improved agriculture, 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.

Dr. [REDACTED] Regents Professor at Oklahoma State University (OSU), discusses the petitioner's doctoral work at that university. Specifically, the petitioner demonstrated that a bacterial disease of crucifers was caused by a variety of bacteria and identified two crucifer lines resistant to the bacteria. Dr. [REDACTED] asserts that the petitioner's "results are very exciting to the agricultural community, as he has obviously identified sources of disease resistance that can be

used in plant improvement.” Dr. [REDACTED] further states that during his studies, the petitioner performed research in New Zealand, where he “developed a sophisticated method for detecting the phytotoxin coronatine in the infected plant tissue,” as well as “a second detection method for coronatine using the highly sophisticated polymerase chain reaction.” Dr. [REDACTED] asserts that her laboratory subsequently adopted the second method. Finally, Dr. [REDACTED] discusses the petitioner’s work upon return to OSU as follows:

In a break-through discovery, [the petitioner] successfully cloned the entire biosynthetic pathway for coronatine production. This has made it possible to engineer the polyketide pathway to produce improved and more effective pharmaceuticals. As a result of his pioneering research, we filed an invention disclosure for this discovery I am currently negotiating with several biotechnology companies that are interested in licensing [the petitioner’s] technology.

The petitioner did not submit letters from the biotechnology companies explaining the significance of the petitioner’s work and their interest in it or even confirming that they are currently negotiating to license the petitioner’s technology. In a subsequent letter, Dr. [REDACTED] asserts that she is in negotiation with a biotechnology company in California and that the petitioner’s eventual patent “will contribute to healthcare via the generation of recombinant antibiotic compounds.” As before, the petitioner did not submit a letter from the California biotechnology company regarding the significance of the petitioner’s invention. Moreover, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *Matter of New York State Dep’t. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm. 1998). In this case, the petitioner has only applied for a patent and the record does not contain objective evidence of the impact of the petitioner’s innovation.

The petitioner also submitted letters from other professors at OSU and former postdoctoral researchers in Dr. [REDACTED] laboratory during the petitioner’s time there who also provide praise of the petitioner’s work at OSU. Dr. [REDACTED] an associate professor at Michigan State University, asserts that the petitioner’s technique for detecting bacterial pathogens developed at OSU “has now been adopted and widely used in disease diagnosis in the U.S.” The record, however, contains no letters from farmers or state agricultural agencies confirming this assertion.

Dr. [REDACTED] an assistant professor at Michigan State University (MSU), discusses the petitioner’s postdoctoral work at that university. He asserts that the petitioner accomplished in four months what Dr. [REDACTED] had assumed would take a year. Specifically, the petitioner’s work allowed Dr. [REDACTED] laboratory to progress from examining gene expression patterns of one gene at a time to examining thousands of genes in a single experiment. The results of the petitioner’s research demonstrated that jasmonic acid plays a key role in plant protection against a broad spectrum of insect pests because it is essential for defense gene activation in response to insects, opening up a whole new area of research in Dr. [REDACTED] laboratory. Dr. [REDACTED] asserts that he intends to file an invention disclosure “to pursue the possibility of patenting these genes for

practical use in crop protection.” Other professors at MSU provide similar praise of the petitioner’s work there.

The petitioner submitted a local newspaper article regarding a state grant to Dr. [REDACTED] to continue his research on tomatoes’ resistance to insects. The article is dated prior to the petitioner’s arrival at Dr. [REDACTED] laboratory. Another article discusses Dr. [REDACTED] work with jasmonic acid. While the article is undated, it credits students [REDACTED] and [REDACTED] as working on the project but does not mention the petitioner by name.

In a subsequent letter, Dr. [REDACTED] asserts that the petitioner’s findings have been submitted to the *Proceedings of the National Academy of Sciences*. There is no evidence that this prestigious publication accepted the petitioner’s article. Regardless, the petitioner would still need to demonstrate the article’s actual impact.

In his request for additional documentation, the director requested evidence regarding “how many products/procedures are currently being utilized by U.S. companies to aid in plant development and production.” In response, the petitioner submitted letters from his immediate circle of colleagues and a collaborator of Dr. [REDACTED]. Some of those letters have been addressed above. Insofar as they respond to the director’s specific request, we will address them here. Dr. [REDACTED] a collaborator of Dr. [REDACTED] asserts that the petitioner’s work at OSU has “already had significant impact on future research, as well as on the development of pathogen detection and disease management strategies used by United States growers.” Dr. [REDACTED] a professor at MSU, provides a similar statement. Dr. [REDACTED] however, does not provide any examples of this impact. Dr. [REDACTED] asserts only that due to the petitioner’s research “crucifer vegetable growers throughout the US have greatly reduced the occurrence of bacterial diseases through the management of crop residues.” Dr. [REDACTED] does not, however, identify specific growers or state agricultural agencies that have adopted the petitioner’s methods or ideas. The record contains no letters from these growers crediting the petitioner for a reduction in diseased plants on their farms.

The letters in the record are all from the petitioner’s collaborators and immediate colleagues. While such letters 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 initially asserted that prior to moving to the United States, the petitioner was elected as a committee member of the Plant Quarantine Diseases in the China Society of Plant Pathology and served as a contact person for the International Working Group on Fire Blight Research. Further, according to counsel, in 1995 the petitioner was invited by the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture (USDA) to survey citrus pests in Florida, Texas, Arizona, and California. The only support for these assertions is the aforementioned letter from Dr. [REDACTED] a professor at MSU who, while he has known the petitioner since 1986, has been conducting research and teaching in New York and Kentucky since at least 1990. Dr. [REDACTED] does not assert that he has first hand knowledge of the petitioner’s work for the China Society of Plant Pathology, the International Working Group on Fire Blight, or the USDA.

The record contains no confirmation letters from those organizations. While the petitioner reiterates these claims on appeal, the petitioner submits no new evidence to support them.

Beyond the letters discussed above, the petitioner also submitted evidence that OSU recognized his thesis at graduation with a Research Excellence Award. In addition, the Southern Division of the American Phytopathological Society presented the petitioner with a third place Graduate Student Award at their annual meeting. In China, the petitioner received a Science Development Award from the China Plant and Animal Inspection Bureau, third prize in the annual thesis report of research competition from the Beijing Plant and Animal Inspection Bureau, the Beijing Scientific Progressive Award from the committee of the same name, and the best thesis of academic research achievement award from the China Plant Inspection Bureau. Also, he was recognized as the "best employee" of China Science Development Achievement by the China Trade and Transaction Bureau. The petitioner is a member of the Phi Kappa Phi honor society, OSU Chapter; the American Phytopathological Society; and the China Plant Protection Committee. Clearly, the petitioner has received recognition from his peers and the Chinese government. However, recognition from peers and government agencies and membership in professional organizations are two criteria for exceptional ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting two, or even the requisite three, criteria for this classification warrants a waiver of the labor certification requirement.

The petitioner submitted evidence that he had authored nine published articles and three abstracts. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, sets forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are 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 CIS's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

Initially, counsel asserted that the petitioner "has been cited frequently by other scientists around the world." The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In support of that assertion, the petitioner submitted two requests for reprints of his articles. The director concluded that the petitioner had not submitted evidence that his articles had been frequently cited. On appeal, the petitioner asserts that the director erred in not considering the two requests for reprints. The petitioner submits evidence that one of his articles in an issue of *Plant Disease* was cited five times, twice by independent researchers; another of his articles in the same issue was cited twice by the petitioner himself; and his article in *Physiological and Molecular Plant Pathology* was cited twice by independent researchers, one of whom also cited the petitioner's first article in *Plant Disease*. Thus, the total number of articles by independent researchers that cite the petitioner's work is three.

Requests for reprints, which demonstrate an interest in the author's work, are not as persuasive as citations, which demonstrate reliance upon the author's work. Thus, we do not find that the director erred in failing to consider the requests for reprints as evidence supporting counsel's claim that the petitioner had been "cited frequently." Moreover, we do not find that three independent citations constitute being "cited frequently."

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding and be accepted for publication, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant who has published research inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record does not adequately demonstrate the petitioner's influence in his field beyond his immediate circle of colleagues.

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.