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U.S. Citizenship
and Immigration
Services

BS

APR 20 2004

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER Date:

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 of the Administrative Appeals Office 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.

for Mari Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 laboratory director at Kinetic BioSystems, Inc. (KBI), which is located on the campus of Georgia Institute of Technology. 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 Citizenship and Immigration Services] 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 intrinsic merit and national scope of the petitioner's occupation (biological research) are not in question. At issue is whether the benefit arising from this petitioner's work exceeds that of others in the field to such an extent that it is in the national interest to waive the job offer/labor certification requirement that, by law, normally attaches to the classification sought.

The petitioner submits several witness letters. [REDACTED] CEO of KBI, describes the petitioner's work there:

[The petitioner's] work experience here at KBI has centered on bioremediation of various wastes including denitrification of municipal and industrial wastewater by *Pseudomonas putida* in both column and centrifugal bioreactors (CBR), and the degradation of cheese whey by *Trichoderma reesei*,¹ methyl tertiary butyl ether (MTBE) which is classified by the Environmental Protection Agency (EPA) as a possible human carcinogen by *P. Putida*, as well as radioactive contaminated water by yeasts. Her current research is based on production of bioactive compounds for the pharmaceutical industry from mammalian cells using a CBR.

Professor [REDACTED] of the Georgia Institute of Technology, who has acted as a consultant for KBI, describes the petitioner's work with centrifugal bioreactors:

The CBR technology permits precise control of oxygen and nutrient levels in a high density cell culture system, and continuous removal of waste material. This continuous removal is a key element in the effective operation of a bioreactor, as a build-up of wastes would otherwise reduce useful cell output and compromise the health of the cell bed. The breakthrough represented by KBI's patented Centrifugal Bio-Reactor has significant commercial implications. The density of cells produced by the CBR technology will permit industrial-capacity bio-production in a space several times smaller than that required by competing processes. And because the Centrifugal Bio-Reactor is scalable, it will make

¹ There appears to be an inadvertent omission at this point in the letter. MTBE is a gasoline additive, with no evident connection to "the degradation of cheese whey."

large-scale bio-production practical and affordable. In fact, no competing process can match the productive capacity of the CBR system. [The petitioner] is playing an essential role in the advancement of our knowledge of the CBR technology and of the biology of the cells in the CBR system.

Dr. [REDACTED] KBI's chief technical officer, asserts that the petitioner "has contributed to the design and instrumentation of three successive generations of CBR units and is co-author of several U.S. patent applications on this technology." [REDACTED] one of the founders of KBI, states that the petitioner "has anchored the laboratory research effort ever since her arrival and has been instrumental in successful proof of concept studies in both pharmaceutical and environmental applications. As a direct result of this work, Kinetic BioSystems now has collaborative research and development programs under discussion with several major pharmaceutical companies." With the exception of one of the petitioner's former professors at Georgia State University, all of the petitioner's initial witnesses are employed by or closely connected with KBI. A number of witnesses have speculated about potential applications of CBR technology, but they do not identify any specific, significant innovations that arose only because of the petitioner's work.

The director denied the petition, stating, "the record does not clearly establish that the alien has any past achievements which are more significant and noteworthy than other researchers working in the field and performing similar duties. Nor does it establish that any of her contributions/discoveries have already been utilized in any type of industry." The director added that the national interest waiver is not "simply . . . a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process."

On appeal, counsel states "[the] petitioner's employer is not attempting to avoid the labor certification process and in fact, already has obtained an approved labor certification for the position in question. We believe a second labor certification in this situation would clearly not be in the national interest."

The petitioner had previously acknowledged that KBI had previously filed an immigrant visa petition, with a labor certification, on behalf of the alien. The petitioner has also acknowledged that KBI had actually obtained the labor certification on behalf of a different alien [REDACTED]. At some point, Mr. [REDACTED] left KBI and the petitioner sought to transfer the approved labor certification to the present petitioner. The director denied KBI's petition on January 31, 2002, because, at the time of filing, the alien did not meet the requirements specified on that labor certification. The filing date (the date that the Department of Labor accepted the application for labor certification) was March 19, 1997; the present petitioner did not even begin studying for her master's degree until April 1997. She obtained the required master's degree in August 1999.

Counsel, on appeal, criticizes the "bizarre requirement that [the petitioner] would have had to have had her qualifications before the labor certification for Mr. [REDACTED] was filed" (emphasis in original). This is an argument that the employer or counsel could have raised in an appeal or motion to reopen regarding the 2002 decision, but no such appeal or motion was filed. Counsel merely stated, in a letter, "[w]e believe you should withdraw the Denial and review this case again." An informal request of this kind secures no rights or administrative review. KBI's denied petition is not before AAO on review, and there is nothing in the statute, regulations, or case law to indicate that the national interest waiver is intended as an alternative remedy for perceived errors in an earlier, never-appealed Service Center decision. We note, also, that the 1997 labor certification was issued for the \$26,000 per year position "Lab. Tech. I." KBI now seeks to employ the petitioner in the higher-ranking position of laboratory director, at the substantially higher salary of \$35,000 per year. The labor certification, therefore, does not pertain to the petitioner's current position at KBI.

The January 2002 denial of KBI's petition has nothing to do with the entirely separate question of whether the petitioner merits a national interest waiver, and the argument that the director should not have denied KBI's petition does not establish that the current petition ought to be approved. The existence of a prior labor certification, for a lower-level, lower-paying position than the one the petitioner now holds, does not supersede the guidelines published in *Matter of New York State Dept. of Transportation*.

Counsel argues that the petitioner "has clearly brought new technology and processes to the table that will be extremely useful in her current position." The petitioner has established that it is in KBI's interest to continue employing the petitioner, but the crucial issue is the national interest, not the employer's interest. The petitioner has not shown that her work with the CBR system has had a significant impact on a national scale. The technology appears, from descriptions offered, to be unfinished. Witnesses working for, or with, KBI have listed various functions to which CBR technology could be adapted, but there is no indication that the technology is already in use in those ways, or that the company has proven that the technology will work for those functions (as opposed to entirely hypothetical, conjectural predictions that the technology may be of use in those areas). The record is devoid of evidence that CBR, much less the petitioner's role therein, has attracted significant notice outside of the petitioner's collaborators who are working on the system.

The record shows only that KBI values the petitioner's contributions to a project which, in turn, is described primarily in terms of what could eventually be achieved rather than what has already been accomplished and recognized. We are not persuaded by counsel's contention that, having obtained a labor certification for [REDACTED] work as a "Lab. Tech. I," KBI should not have to obtain a second labor certification for the petitioner to work as a laboratory director.

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.