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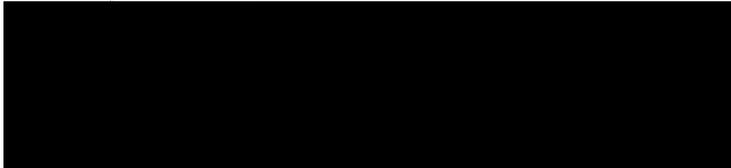
U.S. Department of Homeland Security
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U.S. Citizenship
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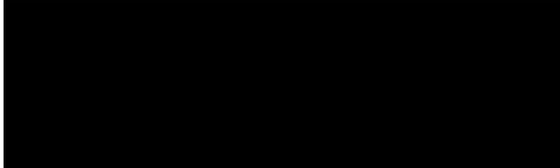
FILE: [REDACTED]
SRC 02 038 50331

Office: TEXAS SERVICE CENTER Date: DEC 22 2004

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:



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.

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 to classify the beneficiary 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 or as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a research associate. 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 beneficiary 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 beneficiary holds a Master's degree in Molecular Biology from the University of Brazil. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary 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 beneficiary works in an area of intrinsic merit, diabetes research, and that the proposed benefits of her work, increasing the number of pancreas islets available for transplant into diabetic patients, would be national in scope. It remains, then, to determine whether the beneficiary 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 beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Scientific Director and Chief Academic Officer at the Diabetes Research Institute of the petitioning university, asserts that the institute recruited the beneficiary to perform the experimental part of her Master's degree with a new polymer patented by [REDACTED] asserts that the beneficiary adapted techniques for making perfectly spherical micro beads with this polymer, fundamental for transplant, and determined the permeability characteristics of this polymer to different proteins. The beneficiary also demonstrated that creating micro beads of the polymer does not affect the permeability of the microcapsules that produce insulin. [REDACTED] explains that these results "differ a bit from the literature findings and should soon produce a significant scientific paper." Finally, [REDACTED] asserts that the beneficiary participated in the process of obtaining human islets from cadaver pancreases for transplant. [REDACTED] explains that these islets "are a very promising cure for diabetes."

explains that his company, Biomm, Inc., has a research agreement with the Diabetes Research Institute and asserts that the beneficiary contributed significantly to a Biomm project. Specifically, the beneficiary clarified the permeability mechanism of proteins in gel microcapsules. asserts that the published results of this work will list the beneficiary as the first author. Finally, asserts that are insufficient researchers in the United States trained in the methods used by the beneficiary.

a professor at the University of São Paulo, met the beneficiary during a visit to the Diabetes Research Institute and subsequently participated in the beneficiary's thesis defense committee. Dr. Sogayer asserts that the beneficiary's work with "is likely to make major breakthroughs in the cure of life-threatening diseases like diabetes."

In a subsequent letter, lists the techniques mastered by the beneficiary and notes that the beneficiary's work is funded by the National Institutes of Health and other entities. further asserts that the beneficiary's work with islet transplants was one of the 200 highest scoring abstracts at a Congress of the Transplantation Society in August 2002, after the date of filing. Without evidence to establish the total number of abstracts, we cannot determine whether that ranking is significant. Also states that this work will be published in *Transplantation*. Finally, discusses the prestige of the Diabetes Research Institute, asserting that the beneficiary's fluency in Portuguese facilitates the institute's collaborations with institutions in Brazil. concludes that the labor certification process would be lengthy and unlikely to produce a qualified worker.

Upon graduating with her Master's degree, the beneficiary returned to the Diabetes Research Institute to work as a research associate for. asserts that transplanting insulin-producing islets from the pancreas is already being utilized, but that the loss of islet cells during isolation prevents a single pancreas from providing sufficient islets. According to the beneficiary is working on enhancing insulin producing islet viability during transplantation by transferring protective proteins to the islets. concludes that the beneficiary is playing an instrumental role in this project, which, if perfected, could produce better islets and reduce the time a patient must wait for a donor. does not identify a specific contribution achieved by the beneficiary on this project as of yet.

In addition to the above letters, the petitioner submitted grant applications listing the beneficiary's status as a research associate for the project in addition to the principal investigator, co-investigators, assistant scientists, postdoctoral associates and senior research associates whose names are also listed. The petitioner also submitted copies of the beneficiary's two published articles and five abstracts. Finally, the petitioner submitted copies of the advertisements for the beneficiary's position and the resumes of those who applied.

The director noted that the record contained only two published articles and letters from only the beneficiary's immediate circle of colleagues. The director concluded that while the beneficiary's colleagues predict that the beneficiary will produce important results, the petitioner has not established that the beneficiary has prior achievements that would justify future projections of benefits in the national interest.

On appeal, counsel cites brief phrases from several non-precedent cases issued by this office. First, while precedent decisions are binding on us pursuant to 8 C.F.R. § 103.4(c), non-precedent decisions are not similarly binding. Moreover, brief phrases that include general conclusions without a discussion of the evidence are not useful.

More specifically, counsel asserts that while published material is a regulatory consideration for outstanding researchers pursuant to section 203(b)(1)(B) of the Act, the director "exceeded the statutory guidelines" for the classification sought by considering the beneficiary's publication record. Counsel further asserts that the beneficiary's articles and references "from well known scientists in the field" establish the significance of the beneficiary's projects and her role in those projects. Finally, counsel asserts that the labor certification process would be "superfluous because of the severe shortage of available personnel in [the beneficiary's] area of expertise." Counsel asserts that the petitioner has undertaken a competitive recruitment process already, with no results.

While neither the statute or the regulations relating to the classification sought discuss publications, *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219 states that an alien must demonstrate a track record of success with some degree of influence on the field as a whole. In the beneficiary's field, the most persuasive evidence of such a track record is a history of widely cited published articles. The record contains no evidence that independent researchers have cited the petitioner's work, and most of the work discussed in the reference letters has yet to be published. While letters from independent researchers who have been influenced by the petitioner's work can also be persuasive, the letters submitted are all from the beneficiary's immediate circle of colleagues. While such letters are useful in describing the beneficiary's role on various projects, they cannot, by themselves, establish that the beneficiary has influenced the field beyond her colleagues. Moreover, we concur with the director that the letters attest to the promise of the beneficiary's research more than they identify specific past achievements that have influenced the field.

Finally, counsel and many of the references assert that the labor certification process is too lengthy and is unnecessary, as the petitioner has already advertised the position without luck. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 221. Moreover, the assertion of a labor shortage should be tested through the labor certification process. We cannot consider whether similarly trained workers are available in the U.S. because the issue is under the jurisdiction of the Department of Labor. *Id.* at 220-221.

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.