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FILE: LIN 02 198 51115 Office: NEBRASKA SERVICE CENTER

Date: **FEB 10 2004**

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 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.

*Mani Jansari*

for 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. At the time of filing, the petitioner was working as a research associate in the Molecular Oncology Program at Loyola University, Chicago. 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) Subject to clause (ii), 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 found 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 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 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.

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 sought. 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 note 6.

In a letter accompanying the petition, counsel argues that *Matter of New York State Dept. of Transportation* “is simply inapplicable to [the petitioner's] request for a national interest waiver and thus should not impede (or have any bearing on) the adjudication of this petition.” By law, Citizenship and Immigration Services (CIS) 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 CIS officers. To date, neither Congress 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.

Along with copies of his published and presented research, the petitioner initially submitted several witness letters.

[REDACTED] Chicago, is the petitioner's current research supervisor. She indicates that the petitioner joined her laboratory in 2000. [REDACTED] further states:

[The petitioner] has proven himself to be an exceptionally valuable member of our laboratory through a number of pioneering contributions. He has conducted in-depth investigations of the repression domain of Mixed Lineage Leukemia (MLL). He has found that the full length, first half and second half of the repression domain interact with Histone Deacetylases (HDAC) 1 and 2 but not HDAC3 and HDAC4. The second half of repressive activity is relieved by TSA, a HDAC inhibitor. This research was

presented at a 2000 meeting of the American Society of Hematology, where it received very favorable attention from other leading experts. [The petitioner] also discovered that Cyp33, a protein which interacts with the PHD domain of MLL, makes HDAC1 bind more strongly to the repression domain of MLL. Cyp33 may be involved in the regulation of the MLL repression domain. Although [the petitioner] discovered that the second half of MLL repression domain activity is relieved by TSA, the process that occurs in the first half is still unknown. [The petitioner] found that CtBP, a co-repressor, and HCP2, a member of the polycomb group of proteins, interacts with the first half of the MLL repression domain but not the second half. BMI-1, another member of the polycomb group of proteins, also interacts with the MLL repression domain. BMI-1 enhances the first half of repressive activity. This work was presented at the 2001 meeting of the American Society of Hematology.

Li Lu, Senior Scientist, Department of Microbiology and Immunology, Indiana University, states:

[The petitioner] worked as a postdoctoral fellow in my laboratory at the Indiana University School of Medicine for a year and a half. During this period [from 1998 to 2000], [the petitioner] proved himself to be an extremely valued member of my research team. Upon joining my laboratory, he immediately became involved in one of our key projects. This project demonstrated that the transduction of a human erythropoietin (Epo) receptor (hEpoR) gene into mouse embryonic stem (ES) cells induced erythroid differentiation by Epo. In order to understand the molecular mechanisms involved in this action, [the petitioner] developed a...method, independently, to determine differentially expressed genes involved in proliferation and differentiation in the EpoR transduced ES cells. [The petitioner] identified two genes in these cells.... All these genes are in the process of being evaluated for further determination of their biological functions and tissue distribution. His exciting results for these genes, which have been implicated in neurology, and have opened new research areas in hematopoietic stem cell development. Furthermore, [the petitioner] found that a known gene, Surf 6, not only is highly expressed in ES cells, but also is high[ly] expressed in [the] hematopoietic cell line. This suggests that Surf 6 has a new function in differentiation of hematopoietic cells. This work will allow researchers to investigate the mechanisms mediating proliferation and differentiation of hematopoietic cells *in vitro* and *in vivo* in animal models. Most significantly, his findings provide further information on possible links between the fields of Neurology and Hematology. His research has been published in cutting-edge international hematology journals.

Raymond Reaves, Professor of Biochemistry and Biophysics, Washington State University, states:

[The petitioner's] research has been featured in prestigious national and international journals. He has been invited to present his work at meetings of the American Society of Hematology, the Chinese Society of Experimental Hematology, the Chinese Society of Radiation Medicine and Protection, and at the Chinese-Japan Medical Conference.

 Department of Microbiology and Immunology, Indiana University states that he collaborated with the petitioner and Dr. Lu "on four studies which resulted in publications in the peer-reviewed journals *Blood*, *Journal of Hematotherapy and Stem Cell Research*, *Experimental Hematology*, *Biology of Blood and Marrow Transportation*." Dr. Bronxmeyer expresses his belief that the petitioner "will continue to produce new and clinically relevant work that has the potential to benefit our citizens."

The petitioner's authorship of published materials and conference abstracts may demonstrate that his research efforts yielded some useful and valid results; however, it is apparent that any article, in order to be accepted in

for publication, or for presentation at a conference, must offer new and useful information to the pool of knowledge. It does not follow that every researcher whose work is accepted for publication or presentation has made a significant contribution to his field. Moreover, the record contains no evidence showing that the presentation or publication of one's work is unusual in the petitioner's field, nor does the record sufficiently demonstrate that independent U.S. researchers have heavily cited or often relied upon the petitioner's findings in their research. The petitioner's initial submission included citation search results from "ISI Web of Science," however, according to the documentation presented, the greatest number of times one of the petitioner's published articles had been cited was three times.

[REDACTED] further states:

While at Indiana University, [the petitioner] performed difficult and complicated technology of differential gene expression to characterize new and important genes that are expressed in mouse embryonic stem cells after insection of the gene that codes for the receptor of the physiological cytokine/hormone, erythropoietin. This time-consuming and well-done effort of [the petitioner] has now led us in new and clinically useful research directions.

In the same manner as [REDACTED] other witnesses emphasize the petitioner's technical expertise in differential gene expression and his educational background. For example [REDACTED] Professor of [REDACTED] states that the petitioner's "exceptional background and extensive experience" will allow him to make significant contributions as a research scientist. Andrew Vaughn, Professor and Director of Research, Department of Radiation Oncology, Loyola University, Chicago, states:

[The petitioner] has extensive experience in molecular and cellular biology and is skilled at culturing cells, gene cloning and sequencing, radioimmunoassay, PCR and RT-PCR analysis, electrophoresis techniques, chromatography techniques, the analysis of DNA sequencing and at the application of research on animal models. The petitioner's background enables him to carry out projects from basic research to the application of that research within animal model systems.

Qualifications such as those discussed [REDACTED] and [REDACTED] amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation, supra*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of technical training or research experience that could be articulated on an application for a labor certification.

In addition to the witness letters, the petitioner provided evidence of the petitioner's membership in the Beijing Branch of the Chinese Society of Medicine. Aside from not providing the society's specific membership requirements, we note that professional memberships relate to the criteria for classification as an alien of exceptional ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for this classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest. At issue here is whether the petitioner's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted further letters, publications, and additional supporting evidence.

In her second letter [REDACTED] states that the petitioner's "unique expertise and exceptional qualities are a rare commodity and will be extremely difficult to replace." A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. See *Matter of New York State Dept. of Transportation, supra*.

[REDACTED] of Hematologic Oncology, Memorial Sloan-Kettering Cancer Center, states that he met the petitioner at a conference of the American Society of Hematology in 2001 [REDACTED] notes that the petitioner was among a "small percentage of speakers that are chosen to present their material at this conference." This statement is somewhat contradicted by [REDACTED] Education and Communications Department, American Society of Hematology, who states that the petitioner was among 861 scientists who gave oral presentations. While we acknowledge that this conference is well attended, no information has been provided regarding the total number of scientists whose work was considered for oral presentation.

[REDACTED] notes that he himself first discovered the polycomb group protein. [REDACTED] credits the petitioner with "produc[ing] additional evidence of a new protein that interacts with the domain of MLL, called Cyp33. In addition to these findings, [the petitioner] was able to discover that the polycomb group proteins also interact with the MLL expression domain *in vitro* and *in vivo*." The fact that the petitioner was among the first to present these novel findings carries little weight. Of far greater significance in this proceeding is the importance to the overall field of the petitioner's discovery. Without further objective evidence (such as heavy independent citation), the statements from witnesses selected by the petitioner fall short in demonstrating that the greater scientific community views the petitioner's discovery as unusually significant.

In his February 27, 2003 letter [REDACTED] notes that the petitioner recently submitted a paper for publication in *Proceedings of the National Academy of Sciences of the United States of America*. A letter from Pamela Witte, Associate Professor, Department of Cell Biology, Neurobiology and Anatomy, Loyola University of Chicago, offers the same observation. A petitioner, however, must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Immigration and Naturalization Service (legacy INS) held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

The letters from [REDACTED] contain several similar passages, including the statement: "[The petitioner's] pioneering abilities within the field of hematology has led the scientific community and medical community closer to how Leukemia develops." Other letters follow a similar pattern. For example, the letters from [REDACTED] of the *Chinese Journal of Radiological Medicine and Protection* and Dr. Denis English of the *Journal of Hematotherapy and Stem Cell Research* are highly similar in format and have the same concluding paragraph. Both letters state: "The significance of [the petitioner's] work cannot be

overstated in terms of the impact it will have.... He was one of numerous accomplished scientists selected to publish his work in our very prestigious journal.... His original contributions make him an irreplaceable asset....” While Drs. Nimer, Witte, Wei, and English, in signing their letters, are clearly supportive of the petitioner, it appears that, based on the identical wording, some of them did not independently formulate the wording of their letters, thus detracting from the weight of the evidence.

Also submitted was a second cited reference search from “Thomson ISI” showing that an article co-authored by the petitioner appearing in *Blood* in 2000 was cited a total of seven times. Additional information from the “Thomson ISI” search results showed that the most citation hits received by any of the petitioner’s other published articles was three. Such a limited number of citations suggests that the petitioner’s work has gone largely unnoticed by the greater research field. While we do not dispute the overall prestige of the journals in which the petitioner’s work has been published, we do not find that publication of the petitioner’s work in scholarly journals is presumptive evidence of eligibility for the national interest waiver. Such publication does not necessarily reflect the overall field’s reaction to the petitioner’s work. While heavy citation of the petitioner’s past articles would carry considerable weight, the petitioner in this case has presented only a small number of citations for each of his articles. Witness statements to the effect that researchers from throughout the field rely on his published findings cannot suffice to establish such influence, when the limited citation history presented by the petitioner fails to support these claims.

The petitioner’s response also included two letters from former colleagues of the petitioner at the Beijing Institute of Radiation Medicine. Both of their letters emphasize the petitioner’s expertise in his field. As has been observed in *Matter of New York State Dept. of Transportation*, a plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one’s field of endeavor does not, by itself, compel CIS to grant a national interest waiver of the job offer requirement. Similarly, arguments about the overall importance of hematology and gene expression research may establish the intrinsic merit of the petitioner’s work, but such general arguments cannot suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement.

Also submitted in response to the director’s request was a “Medical Health Scientific Articles Citation Report” from the “Medical Library of the Chinese People’s Liberation Army.” It has not been explained how these Chinese citations from the petitioner’s work during the 1990’s at the Beijing Institute of Radiation Medicine demonstrate a significant benefit to the national interest of the United States. We note here that the petitioner was cited in journals such as *Chinese Traditional and Herbal Drugs* and the *Chinese Journal of Experimental Traditional Medical Formulae*. The petitioner, however, must be held to the same objective, scientific standards as “Western” medicine. Subsequent to his arrival in the U.S. in 1998, there is little evidence to demonstrate that the petitioner has had a measurable impact on the U.S. scientific community beyond the two universities where he has worked. Moreover, in light of the evidence from the “ISI Web of Science” and “Thomson ISI” citation searches, we find no evidence to substantiate the claim that the petitioner’s impact in the U.S. is in anyway comparable to his impact in China.

Some of the letters submitted in response to the director’s request for evidence mention the petitioner’s involvement in the peer review process. Peer review of manuscripts is a routine element of the process by which articles are selected for publication in scholarly journals. Occasional participation in peer review of this

kind does not significantly distinguish the petitioner from other capable researchers active in the hematology field.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director discussed the evidence presented and concluded that the petitioner had failed to establish that he would serve the national interest to a substantially greater degree than others in his field. The director noted the lack of articles published by the petitioner from December 2000 through the petition's filing date of May 31, 2002.

On appeal, the petitioner submits evidence of an article published in *Blood* with [REDACTED] on November 16, 2001. A citation index for this article from "Thomson ISI" shows that the article has been cited only twice. In light of this evidence presented on appeal, we withdraw the director's statement that "[t]he evidence does not establish that the petitioner has even co-authored a peer-reviewed article which has been published since 2000."

Also submitted was a fax, dated June 24, 2003, addressed to [REDACTED] (rather than the petitioner), stating: "Following are the final revised pages for your article to be published in PNAS [*Proceedings of the National Academy of Sciences of the U.S.A.*]. Please indicate your approval by signing this form and faxing it back..." The form was dated and signed by Dr. Nancy Zeleznik-Le. We accept that the PNAS article was co-authored by the petitioner, but it remains that the article had not been published as of the petition's filing date, nor as of the filing date of the appeal. *See Matter of Katigbak, supra.*

In a letter accompanying the appeal, counsel states: "Along with submitting many of [the petitioner's] numerous publications, counsel provided additional evidence to substantiate that [the petitioner's] work has been published numerous times in high profile, internationally circulated journals. This evidence confirmed his worldwide acclaim for his research findings."

Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner himself has cited sources in his own articles. Numerous independent citations of a particular article would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research here in the United States. In this case, we find that the number of independent citations presented is insufficient to demonstrate that the petitioner's work has had unusual level of impact in his research field.

Counsel also argues that the director failed to consider the opinions from individuals who offered letters in support of the decision. The director's decision did, however, directly address several of the witnesses' comments. Clearly, the petitioner's current and former colleagues have a high opinion of the petitioner and his work, as do individuals who know the petitioner from encounters at scientific conferences (such as Dr. Nimer). The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent researchers. While the high expectations of the petitioner's colleagues may yet come to fruition, at this time the waiver application appears premature.

In sum, the available evidence does not establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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 project, 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.

**ORDER:** The appeal is dismissed.