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U.S. Citizenship  
and Immigration  
Services

[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: FEB 10 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:

[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.

*Robert P. Wiemann*

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 seeks employment as an assistant professor of Pediatrics at Case Western Reserve University (CWRU). 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.

Several witness letters accompany the petition. Professor [REDACTED] co-director of the Division of Neonatology, Department of Pediatrics, at CWRU's Rainbow Babies & Children's Hospital, describes the petitioner's work at that facility:

[The petitioner] has worked very extensively in the laboratory of Dr. [REDACTED] Director of Neonatology. His general area of research is centered around Sudden Infant Death Syndrome (SIDS), neonatal apnea, and control of breathing. More specifically, he is studying maturation of the carbon dioxide response, a very important area of investigation in Neonatology, since it relates directly to the maturation of the respiratory system and neural control of breathing, both of which are important contributors to neonatal disease. . . .

[The petitioner] is considered an expert in our division in the areas of neonatal apnea and respiratory control. Using rats, [the petitioner] has developed an animal model for the impaired hypercapnic response in preterm infants. His research resulted in the finding that newborn rats respond to CO<sub>2</sub> by a relatively lower breathing response than adults, a response that is similar to that of premature infants. Using this model he was able to further study the biological mechanisms relative to the underlying this response [sic] at the cell level.

Professor [REDACTED] director of Neonatology at the University of Alabama at Birmingham, states:

[The petitioner's] research is very important because it evaluates the maturational effect of CO<sub>2</sub> unresponsiveness, a major reason for the inability of infants to maintain regular breathing. . . . I have reviewed [the petitioner's] recent presentations at national meetings and am impressed that his research is among the best. . . . [The petitioner's] research is essential to fully understanding the developmental aspects of control of breathing.

Other medical researchers offer similar descriptions of the petitioner's work. Most of these witnesses are in the Cleveland area, although one witness, Dr. [REDACTED] is director of the Neonatal/Perinatal Fellowship Training Program at Johns Hopkins University School of Medicine, Baltimore. The remainder of the initial submission consists of documentation of the petitioner's educational credentials, abstracts of research presentations, and so on. That submission contained no documentary evidence to establish the extent of the impact that the petitioner's work has had in the petitioner's research specialty.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's occupation, but finding that the petitioner has not "demonstrated why the labor certification process is inappropriate in this case." The director stated that the petitioner's "achievements at this stage of his career appear to fall within the norm expected of successful physician[s] and academic researchers in medicine."

On appeal, counsel asserts "the Service has already concluded that [the petitioner] is an individual of extraordinary ability through the approval of his O-1 [nonimmigrant] Visa Petition." The record of proceeding relating to that petition is not before the AAO, and therefore we cannot comment on how it may differ from the record now under appellate review. Furthermore, O-1 nonimmigrant visa petitions are judged by different standards than national interest waiver immigrant petitions; approval of the one does not imply eligibility for the other. Also, the petitioner did not yet hold this O-1 visa at the time he filed the petition in April 1999. Pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), an alien must be eligible at the time a petition is filed; if the alien is ineligible at that time, subsequent developments cannot retroactively establish eligibility.

On the subject of approved petitions, we note that the petitioner, subsequent to filing the instant appeal, has since filed a second petition on his own behalf (receipt number LIN 01 133 53426), again seeking a national interest waiver. This second petition was approved in 2001, and the petitioner has applied for adjustment of status (Form I-485, receipt number LIN 01 274 55784). Again, lacking the record of proceeding for the approved petition, we cannot comment on any similarities or differences that may exist between that record and the one now before the AAO. Because the two petitions were adjudicated independently, the outcome of this proceeding has no direct effect on the status of the approved petition.

The petitioner submits documentation of further projects and presentations, and copies of several letters that were originally prepared for the aforementioned O-1 nonimmigrant visa petition. Most of the letters are from individuals who had also provided letters with the petition now on appeal. The two new witnesses are Dr. [REDACTED] vice chair of Pediatrics at Johns Hopkins University School of Medicine, and Professor [REDACTED] director of Neonatology at Rainbow Babies & Children's Hospital.

Prof. [REDACTED] states that the petitioner "has initiated pioneering work in the area of control of breathing that shows great promise." Dr. [REDACTED] states that the petitioner's "research on the development of central neurotransmitters that affect control of breathing in the newborn is unique and important for the field in general."

Clearly, the petitioner's witnesses consider the petitioner's work, particularly his improved animal model, to represent an important advance in the field. That being said, the findings said to be most significant appear to be largely preliminary. While the witnesses expect the new model to be useful in future experiments, there is no evidence that this model has been widely adopted, or that, in practical terms, it has significantly improved the quality of data gathered in neonatal breathing control experiments. The record is devoid of evidence that independent researchers have cited the petitioner's work. The volume of independent citations is generally a reliable indicator of impact in the field.

It is possible that these issues were addressed in greater detail in the petitioner's subsequent petition, which was filed nearly two years after this one, allowing for considerable progress in the state of the petitioner's research during the intervening period. In the context of the present petition, however, this issue is not fully resolved, and the materials favoring approval of the petition are limited at best. The petition must be decided on its own merits; we cannot conclude that the approval of a later petition proves that the director should have approved this petition as well. Upon consideration, the record of proceeding before the AAO generally

supports the director's finding with regard to this petition, without prejudice to the ongoing adjustment proceedings arising from the petitioner's later, approved petition.

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.