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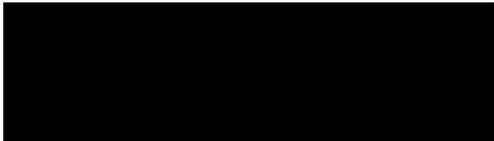
FEB 24 2004

FILE: WAC 03 044 50075 Office: CALIFORNIA 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:



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, California 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 an alien of exceptional ability in the sciences. The petitioner seeks employment as an assistant researcher/assistant specialist at the University of California, Berkeley (UCB). 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 petitioner claims eligibility as an alien of exceptional ability. The petitioner holds a master's degree from Yunnan University, and thus readily qualifies as a member of the professions holding an advanced degree. Further discussion of whether the petitioner also qualifies as an alien of exceptional ability would serve no useful purpose in terms of this proceeding. 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.

Counsel describes some of the petitioner's past achievements:

Heavy metal pollution is a particularly difficult problem. . . .

Unfortunately, the presence of heavy metals inhibits the growth of the very plants and microbes that might be able to accomplish the phytoremediation. Therefore, one trait of great significance to phytoremediation is the ability of plants and microbes to tolerate and accumulate the toxic metals extracted from the contaminated soils and waters. Genetic engineering offers a powerful means to improve the capacity of plants to remediate heavy metal pollution, but the key problem is to find sources of resistance to heavy metals.

To overcome this obstacle, [the petitioner] developed "super microbes" with extremely high resistance to heavy metals. She was able to clone the genes responsible for the resistance and use them to genetically engineer highly resistant, hyper-accumulating plants for use in phytoremediation. The microbes would also be useful in direct approaches aimed at phytoremediation of waters because they can thrive on and around plant roots, which grow in contaminated marshes. . . .

[The petitioner conducted research] focusing her experimentation on characterizing the physical and molecular characteristics of cereal tissue culture materials, in an attempt to understand the basis of their totipotency, that is the ability to undergo sustained division and regenerate entire plants. . . . [The petitioner] identified molecular markers, genes, which can be used to prove the biological basis of the morphogenetic state of the tissue. [The petitioner's] successful results provided fascinating insights into the nature of different types of *in vitro* cultured tissue and these insights allowed her to begin the dissection of the process, aimed at developing a molecular understanding of plant cell totipotency and improving the process of cereal transformation. . . .

Transgene silencing is thought to be an ancient host-defense mechanism that mitigates an organism's defense against a virus. During evolution, some viruses evolved relevant mechanisms to fight back against the host-defense system. This is thought to involve some

viral proteins involved in cleaning up small molecular weight RNA, a trigger for gene silencing. . . . The phenomenon of transgene silencing plagues the application of new methods of genetic modification to improve crops and results in extraordinarily large increases in production cost of these crops.

[The petitioner] has identified the critical triggering molecular mechanisms. . . . This finding has provided a new clue to solve the long-standing problem of transgene silencing in the current commercial transgenic crops. . . . It is also important in addressing human health problems, such as growth and development, aging and diseases such as cancer, diabetes and heart attacks because they share the same molecular mechanism as the one in transgene silencing.

Counsel asserts that the evidence of record demonstrates that the petitioner “is the most qualified person in her field.”

The petitioner submits several witness letters. Dr. [REDACTED] who supervises the petitioner’s work at UCB, states:

During her tenure in the laboratory, [the petitioner] has worked at the level or above the level of most postdoctoral scholars I have met. . . . There is no question in my mind that [the petitioner] is fully capable of fulfilling the requirements of a doctoral degree in any of the institutions at which I have studied or worked.

[The petitioner] has worked on a number of projects in the lab and admittedly the most technically and intellectually challenging ones! . . . Her work has demonstrated to the first time that certain genetic elements that were added to the expression cassettes of plant transgenes to boost expression actually serve as beacons to the silencing machinery. This work will cause scientific colleagues to rethink their approaches to the construction of gene expression cassettes, if they wish to achieve gene expression stability. In addition, she has established that the very *in vitro* process used to create transgenic plants causes genetic instability and results in events that in many cases lead to transgene silencing. Aware [of] this knowledge, researchers will rethink the methods they utilize to create the new GM [genetically modified] crops and attempt to minimize the effects that have been so beautifully demonstrated by [the petitioner].

Dr. [REDACTED] does not indicate that the petitioner has already had any significant impact on her field. Instead, she states that the petitioner’s work “will lead to insights,” and (as shown above) speculates that other researchers will, one day, alter their methods as they become aware of the petitioner’s findings.

The remaining letters in the initial submission are all from UCB researchers or individuals who have collaborated with the petitioner and/or Dr. [REDACTED]. The letters contain no discussion of the petitioner’s earlier work with plant remediation of heavy metal pollution. Two witnesses briefly and generally speculate that the petitioner’s work “might” have implications for human medicine, but otherwise the initial letters do not mention the possible medical significance of the petitioner’s work. The witnesses indicate that the petitioner has mastered difficult laboratory techniques, and they state that the beneficiary’s lack of a doctoral degree has not been a handicap to her competence in the laboratory. Several of the witnesses contend that the petitioner is responsible for important discoveries, but they do not show that this opinion is shared outside of

UCB and Dr. [REDACTED] research group. Instead, like Dr. [REDACTED] they assert that other researchers will, at some future time, adopt the petitioner's findings.

The petitioner submits copies of her published articles, and indicates that eight researchers have requested copies of her work. There is no evidence that these researchers went on to cite the articles that they had requested. The initial submission is silent as to the beneficiary's citation history.

The director instructed the petitioner to submit further evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. The director requested information to distinguish the petitioner from other qualified researchers in her field. The director noted that the initial witnesses all have demonstrable, close ties to the petitioner.

In response, counsel refers to the petitioner's work "in the field of Plant Biology, specifically, the mechanisms of Heart, diabetes and cancer Disease Research [sic]." Counsel does not explain how research into heart disease, diabetes and cancer fall under the heading of "Plant Biology." Of the many descriptions of the petitioner's work contained in the initial submission, only counsel's introductory statement contained any specific mention of these disorders. Two initial witnesses made vague, passing references to medical applications of the petitioner's work, and the record contains nothing from any specialist in heart disease, diabetes, or cancer research to indicate that such researchers have taken special notice of the petitioner's work.

Counsel asserts that the petitioner's initial letters were "not from a current/prospective employer, low-level supervisor, professor or colleague, but rather from highly accomplished experts" at a variety of institutions. The petitioner's own submissions clearly show that all the initial witnesses are on the UCB faculty or have otherwise collaborated with the petitioner and/or his supervisor, Dr. [REDACTED]. The fact that some of these collaborators are visiting from other universities does not broaden the petitioner's documented impact on her field of endeavor.

The petitioner submits new letters. Once again, all of the letters are from individuals with connections to the petitioner and to institutions where she has worked or studied. Professor [REDACTED] offers a letter on the letterhead of the American Society of Plant Biologists, Rockville, Maryland. Prof. [REDACTED] was formerly president of that organization, but did not hold that position when he wrote this letter. Prof. [REDACTED] is on the UCB faculty, and the petitioner "works in a nearby laboratory" to his own. Prof. [REDACTED]'s impressive credentials establish that he is a national authority in the field of plant biology, and we do not deny the weight that his statements carry, but we must still consider the contents of this letter and how they compare with the rest of the record. Prof. [REDACTED] asserts that the petitioner has published "a series of high impact, high quality publications," but does not elaborate or explain how he has been able to measure the "high impact" of the petitioner's published work. Generally, scholarly journals measure "impact" in terms of citation rate. The more often a given article is cited, the higher its impact. The record, however, contains no evidence at all regarding the petitioner's citation record, which would allow for an empirical measure of the impact of the petitioner's work.

Dr. [REDACTED] in her second letter, again discusses the petitioner's "potential for success" and speculates as to what other researchers "will" do with the petitioner's findings. Dr. [REDACTED] whom counsel identifies only as the vice president at Byotix, Inc., also works in the Department of Plant and Microbial Biology at UCB and thus has had frequent contact with the petitioner in Dr. [REDACTED] laboratory. Dr. [REDACTED] states that the petitioner "brings together the many skills necessary to accelerate progress in manipulating gene expression and understanding mechanisms of transgene silencing in transgenic plants." Dr. [REDACTED] states that the petitioner

has "made remarkable contributions to various research projects," but does not specify the nature of these contributions except to state that the petitioner "has developed several assay technologies."

The only letter not from a witness at UCB is from Professor [REDACTED] of Yunnan University, where the petitioner earned her master's degree. Prof. [REDACTED] states that the petitioner "is the person who has brought the advanced molecular biology technology into the research of pollution ecology in my research group [and] reshaped my research group into the molecular level." Prof. [REDACTED] does not indicate the extent to which the petitioner's research in this area has actually been implemented (i.e., the extent to which the petitioner's work has allowed the decontamination of actual sites that would otherwise have been irretrievably polluted), and there is no indication that the petitioner will, in the future, resume research in this particular area of inquiry.

The director denied the petition, stating that the petitioner has failed to provide "independent, competent evidence that [the petitioner's] work has been of substantially greater significance than that of others in his or her field." On appeal, counsel protests the director's "talismanic reliance on 'independent,' non-associated testimonials," and asserts that it is not "mandatory that the letters of support must be from individuals who have had no associations with the petitioner." Counsel had earlier stressed several witnesses' connections to other institutions, going so far as to claim that they were not the petitioner's "colleagues" when in fact they were her collaborators.

The absence of independent letters does not, and should not, automatically result in the denial of a given petition, but the record should then bring other factors to bear to compensate for this shortcoming. Eligibility for a national interest waiver, and thus permanent immigration benefits, cannot be the automatic result of the submission of favorable letters. If a witness claims that the petitioner's research is "high impact," then there ought to be some empirical measure of that impact. Otherwise, not only is the impact unverifiable, but also, it is not clear how the witness was able to arrive at such a conclusion.

Furthermore, the content of the letters bears consideration. In this instance, we see numerous references to the "potential" and "promise" of the petitioner's work, along with what are necessarily conjectural assertions concerning how other researchers are expected to react once they become aware of the petitioner's work. (Counsel's own speculation has extended even further, going so far as to identify specific human diseases without any support from individuals with expertise in those diseases.) Other witnesses focus primarily on the petitioner's technical skills, and state that she is an asset not so much because of her original findings but because of her methodological expertise.

The record leaves no doubt that the petitioner is a valued member of Dr. [REDACTED] research staff, but the record as a whole does not demonstrate that the petitioner's work to date has been of such importance or significance that she stands out from others in her field to an extent that would warrant the special benefit of a national interest waiver. Simply describing the petitioner's work does not differentiate it from the work of other qualified professionals in the field, and in this respect the fact that the petitioner's recognition has come almost entirely from Dr. [REDACTED] laboratory and the UCB faculty is telling.

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.