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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

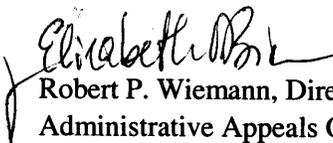
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.


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 analytic chemist. 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) . . . 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 petitioner holds a Ph.D. in Analytical Chemistry from the University of Tokyo. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner 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 petitioner works in an area of intrinsic merit, analytical chemistry, and that the proposed benefits of his work, improved DNA analysis, would be national in scope. It remains, then, to determine whether the petitioner 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 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 he seeks. 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 219, n. 6.

Ultimately, the director determined that the petitioner had not established that, as of the date of filing, the petitioner's work had had a significant impact beyond his immediate circle of colleagues. On appeal, counsel asserts that the director used too high a standard, requiring accomplishments at a higher level than the majority of his or her colleagues instead of simply a record of achievement with some degree of influence on the field as a whole. Counsel further asserts that the director erred by requiring eligibility as of the date of filing. While the director provided no citation for the principle that a petitioner must demonstrate eligibility as of the date of filing, counsel acknowledges that this requirement is found in *Matter of Katigbak*, 14 I&N Dec. 45, (Reg. Comm. 1971). Counsel distinguishes this case and another one on the basis that the cases involved petitions supported by a labor certification. Counsel further argues that the director's request for additional documentation invited the

submission of evidence relating to accomplishments after the date of filing. This office has consistently applied *Matter of Katigbak* to non-labor certification cases. Regardless, 8 C.F.R. § 103.2(b)(12) provides:

Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

This provision is applicable to all applications and petitions, not just labor certification immigrant petitions. Nothing in the director's request specifically invited evidence relating to accomplishments after the date of filing. Regardless, as the above-quoted regulation directly addresses responses to requests for additional documentation, it is clear that such a request does not imply that Citizenship and Immigration Services (CIS) must consider documentation of accomplishments after the date of filing. Counsel's remaining arguments will be discussed below.

Upon graduating from the University of Tokyo in 1999 with his Ph.D., the petitioner went to work as a postdoctoral fellow at the National Institute of Materials and Chemical Research in Japan. Subsequently, he accepted a position as a postdoctoral research associate with the U.S. Department of Energy's Ames Laboratory at Iowa State University.

Dr. [REDACTED] the petitioner's supervisor at Ames Laboratory, explains the petitioner's work at that institution. Dr. [REDACTED] recruited the petitioner to work at Ames Laboratory after meeting him at international conferences. According to Dr. [REDACTED] while at Ames Laboratory, the petitioner researched "the migration behavior of single DNA molecules inside a capillary during capillary electrophoresis." Specifically, the study involved DNA molecules labeled with fluorescent dyes and the application of capillary electrophoresis on DNA separation. The petitioner "reported a new observation, involving discovery of the radial migration of these molecules in capillary electrophoresis in addition to their longitudinal migration." The petitioner then analyzed the forces on DNA molecules, successfully interpreting "an anomalous flow phenomenon in capillary electrophoresis." The petitioner also developed a theory to interpret the aggregation of microbes in CE, "a phenomenon that has been used for high efficiency separation of microbes while its mechanism is still unknown." The petitioner further developed a means to control radial migration and "developed two applications based on this phenomenon." The first application, involving counting single molecules, has a detection efficiency close to 100% with radial migration whereas conventional techniques have an efficiency of only 0.1%. The other application, a new method to separate large DNA molecules, reduces separation time from 10 hours using mobility-based electrophoretic separation to only 20 minutes. Dr. [REDACTED] does not, however, provide any examples of independent laboratories that have adopted or have expressed interest in adopting either new method.

Dr. [REDACTED] Research Director of Ames Laboratory, provides similar information. Dr. [REDACTED] a professor specializing in fluid dynamics at Iowa State University, discusses his collaboration with the petitioner. Dr. [REDACTED] states that the petitioner's discovery of selective anomalous migration of DNA molecules during capillary electrophoresis "allows for rapid separation and identification of DNA molecules." Dr. [REDACTED] affirms that this technique "has great potential for a wide variety of important applications, including rapid detection of DNA for criminological investigations, medical diagnostics, diseases propagation and control, 'fingerprinting' and identifications in national security applications, and so on."

Dr. [REDACTED] Director of Ames Laboratory since 1988, asserts that the petitioner's most important accomplishment is the discovery and interpretation of the radial migration of DNA molecules, reported in *Analytical Chemistry* in 2002. As a result of this discovery, the petitioner was able to control the mass transportation in a capillary in two dimensions instead of one, develop an application for high efficiency single-molecule detection and separate large DNA molecules. Dr. [REDACTED] explains that these results have applications in the preparation of immunoassays, diagnostics, separation and detection, the biotechnology industry and forensic analysis. Dr. [REDACTED] does not indicate that the Ames Laboratory has taken any measures to patent, license, or market the petitioner's techniques or that independent research or diagnostic laboratories or pharmaceutical companies have expressed an interest in licensing or otherwise adopting these techniques.

Dr. [REDACTED] the Endowed Professor of Analytical Chemistry at the University of Washington, provides an independent analysis of the petitioner's work at Ames Laboratory. The petitioner asserts that he met Dr. [REDACTED] at conferences. According to Dr. [REDACTED] the petitioner "is the first in the world to develop a method to monitor single DNA molecules in a capillary with radial focusing." Dr. [REDACTED] asserts that this work, which has implications for disease diagnosis and drug discovery, "has brought about wide interest and recognition in the scientific and industrial communities in the field of ultrasensitive analysis." Dr. [REDACTED] the most independent expert supporting the petition, does not, however, assert that he is adopting the petitioner's techniques at his own laboratory.

In his request for additional documentation, the director followed up on the comments of Dr. [REDACTED] asking whether other independent laboratories had applied the petitioner's method. In response, the petitioner asserted that Dr. [REDACTED] had learned of the work at a conference, but that the results were not published in a full-length article until after the date of filing. Thus, according to the petitioner, independent researchers were only just reading the results of this work. The petitioner further elaborated that his work improving the speed of separation had only been submitted for publication. As such, the petitioner concludes that "evidence that that this technique will replace previous technique is not available at this time."

Professor [REDACTED] the petitioner's advisor at the University of Tokyo, discusses the petitioner's work at that university. He provides:

The objective of his research in my lab was to develop a miniaturized slab gel electrophoresis device to achieve fast genetic analysis. In this work he developed a novel device to cast multiple ultrathin slab gels with good quality and reproducibility. These miniaturized gels include on-line sample concentrating capability so that high sensitivity and high resolution can be obtained. He achieved the separations of DNA markers, genetic diagnosis samples in less than 10 minutes and with migration distances less than 20 mm. He also employed a photothermal lens microscope as the detection method so that no fluorescent labeling was necessary.

Dr. [REDACTED] the petitioner's supervisor at the National Institute of Materials and Chemical Research, asserts that the petitioner focused on interfacial reactions with slab optical waveguide spectroscopy at that institution. According to Dr. [REDACTED] the petitioner was a key member of a project that studied the reaction

at the aqueous/solid interface. Their technique used a slab optical waveguide UV-VIS spectroscopy system, improving sensitivity by 100 times and allowing the group to find an aggregation in a more diluted solution than previously reported.

Professor [REDACTED] of the Himeji Institute of Technology had discussions with the petitioner at two Japanese conferences and one U.S. conference. Professor [REDACTED] asserts that the petitioner had made “invaluable contributions to research work on capillary electrophoresis” and was the first to report the “phenomenon of radial migration of DNA molecules.” Professor [REDACTED] concludes that the petitioner’s work is “of vital importance to future research in electrophoresis and single molecule detection.”

The petitioner’s references assert that the petitioner received competitive scholarships and postdoctoral appointments. The record contains no evidence of the scholarships or their significance. Regardless, while we will consider research accomplishments that have proven influential whether or not they occurred during a period of academic study, scholarships are generally based on academic accomplishments such as grade point average. Such academic accomplishments not considered sufficient to warrant a waiver of the job offer in the national interest. *Matter of New York State Dep’t of Trans., supra.*

The petitioner has also submitted evidence that he has served as a referee for peer-reviewed scientific journals at the request of his supervisor. Counsel asserts on appeal that these requests should not be “tainted” simply because they were from his supervisor. While the requests from the petitioner’s supervisor establish confidence in the petitioner’s work, we concur that requests to referee articles from one’s own supervisor is not evidence that the petitioner has influenced his field beyond his circle of colleagues. Moreover, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer has a track record of influence in the field. Without evidence that sets the petitioner apart from others in his field, such as evidence that he has reviewed an unusually large number of articles or has received independent requests from different journals, we cannot conclude that his referee experience is significant.

The petitioner’s references assert that the petitioner’s contributions are apparent from his publication record. As of the date of filing, the petitioner had authored eight published articles. The Association of American Universities’ Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, sets forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that “the appointment is viewed as preparatory for a full-time academic and/or research career,” and that “the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.” Thus, this national organization considers publication of one’s work to be “expected,” even among researchers who have not yet begun “a full-time academic and/or research career.” This report reinforces our position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community’s reaction to those articles.

In response to the director’s request for additional documentation, the petitioner submitted evidence that his March 1999 article published in *Analytical Sciences* had been cited a total of seven times, his November 1999 article published in *Analytical Chemistry* had been cited a total of ten times, and his 2002 article in *Analytical Chemistry* had been cited a total of four times. As noted by the director, several of these citations are by the petitioner’s co-authors. Specifically, five of the seven citations were self-citations by co-authors, five of the ten

citations were also by co-authors, and all four of the four citations were by co-authors. On appeal, counsel does not specifically challenge the director's conclusion that the petitioner's citation history is not indicative of an influence outside his immediate circle of colleagues.

Also in response to the director's request for additional documentation, the petitioner submitted evidence that subsequent to the date of filing, the *Australian Journal of Chemistry* published the petitioner's article. Counsel asserts that the article was "the journal's featured article on its cover." Counsel further asserts that being so featured "is an indication of the high regard the editors have for that research." The director acknowledged receipt of the article, but determined that it could not establish the petitioner's eligibility as of the date of filing. For the reasons stated above, we concur with the director's conclusion that a petitioner must establish eligibility as of the date of filing. Counsel also argues on appeal that the journal accepted the petitioner's article as a featured article prior to the date of filing.

We acknowledge that the record establishes that the petitioner is respected by his colleagues and the reviewers who have read his submitted articles. The petitioner's ability to secure a postdoctoral research associate position at a national laboratory and the favorable endorsement of the laboratory's director is certainly consistent with his potential to influence the field. In order to establish eligibility, however, the petitioner must demonstrate that he already has a track record with some degree of influence on the field as a whole. An article that has not been published as of the date of filing, cannot establish such an influence, regardless of how important the editors of the journal feel it will be upon publication. Assuming the petitioner's work, now published, is as influential as the experts in the record predict, the petition was filed prematurely, before independent experts had the opportunity to read, evaluate, confirm and rely upon the petitioner's work in their own published research or adopt (or at least express interest in adopting) the petitioner's techniques at their diagnostic laboratories or pharmaceutical companies.

Finally, on appeal, the petitioner submits evidence that another of his articles was accepted as an accelerated article in *Analytical Chemistry*. Once again, this article cannot establish the petitioner's eligibility as of the date of filing. Rather, such evidence would need to support a new 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.