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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[Redacted]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date **MAR 11 2004**

IN RE:

Petitioner:

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]

**Identifying data deleted to
prevent disclosure of ungranted
invasion of personal privacy**

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, 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 a research program coordinator at the University of Chicago Hospital. The petitioner's I-140 petition form indicates that the position is not permanent. 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 petitioner claims exceptional ability in the sciences, but because the petitioner readily qualifies as a member of the professions holding an advanced degree, a further finding of exceptional ability would have no substantive effect on the outcome of the 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.

An unsigned statement, submitted with the petition, describes the petitioner's work:

[The petitioner] is an internationally recognized scientist. . . . As a leading researcher in clinical pathology and molecular biology of cancer, [the petitioner's] investigations have led to major scientific advancements in Europe, as well as abroad. . . .

[The petitioner's] research has resulted in very promising breakthroughs. [The petitioner's] work has potential for enhancing cancer detection and diagnosis outcome, monitoring and treatment of cancer morphologic changes, immune diagnostic and cell expression pattern characterization, novel cancer research techniques and treatments, and methods for diagnosis of other genetic diseases and pathologies such as different types of cancers and pre-neoplastic diseases.

Along with copies of the petitioner's published articles, grant documentation, and other evidence, the petitioner's initial submission includes several witness letters. More than half of the initial witnesses are on the faculty of the University of Chicago. Professor [REDACTED] chair of that university's Department of Pathology, states that the petitioner "is an outstanding molecular pathologist whom we were fortunate to recruit in December of 2000. She manages the Human Tissue Resource Center (HTRC), an integrated facility . . . designed to uncover the molecular basis of human diseases. Within the past 18 months, [the petitioner] has become pivotal in the use of the facility for research." Prof. [REDACTED] then lists 20 projects in which the petitioner has participated, and states "[t]his is a remarkable accomplishment in a relatively short period. It is fair to say that, to a very large extent, the cancer genomics effort at The University of Chicago depends on the expertise of [the petitioner]. Should we not be able to retain her, it would cause a serious setback in cancer research at the university." Given the petitioner's own assertion that her position at the university is not permanent, it is not clear how long the university intends "to retain her."

Professor [REDACTED] states:

[The petitioner] is a highly skillful surgical and molecular pathologist with profound expertise in the areas of cancer cell growth, environmental oncology, neuroendocrine and thyroid pathology, immunohistochemistry and electron microscopy. . . .

[S]he has been the key person in developing the most advanced research core in the UCCRC, namely Laser Capture Microdissection (LCM) and high throughput tissue microarrays. . . . Because this instrument is expensive and requires special expertise for optimal utility, [the petitioner's] role, as technical director of these state-of-the-art medical research facilities, is the essential part of our cancer research here at the University. She is very experienced in the use of the Arcturus LCM instrument and in performing downstream analyses on samples procured with the instrument. She is responsible for the critical day to day operation of the Core Facility, including the training of investigators who wish to operate the instrument independently. She performs all the quality control measures, orders supplies, maintains the instruments of the laboratory, and will implement new methodologies for the Core facility.

Other witnesses, who have collaborated with the petitioner in various capacities, offer general praise for the petitioner's skill and assert that the petitioner is an asset to cancer research because of her expertise in advanced laboratory techniques. There is little discussion, however, of specific contributions that the petitioner has made. The petitioner's most valued trait appears to be her mastery of complicated laboratory equipment.

One witness to discuss the petitioner's work in specific detail is Dr. [REDACTED] assistant professor at the University of Chicago, who describes some collaborations with the petitioner, for example:

We analyzed an enzyme named "human a-methylacyl-CoA racemase (P504S)" in prostate cancer and its precursor lesions. This enzyme has been shown recently to be the best prostate cancer marker ever identified. We found the expression of P504S in both prostate cancer cells and pre-malignant lesions of the prostate, which indicates its significant role in prostate cancer development. . . .

[The petitioner] has completed a study of kidney cancer using an advanced technique called "high-throughput tissue array." In this study, [the petitioner] and I were able to analyze approximately 100 renal tumors by performing a number of immunohistochemical studies. This study provides essential information for advanced classification of renal cancers.

All of the witnesses have some connection with the petitioner, either in the United States or in Russia. The initial submission does not establish the extent of the petitioner's impact outside of the facilities where she has worked or studied.

The director instructed the petitioner to submit evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. The director noted that, according to that precedent decision, specialized training on equipment invented by others does not establish eligibility for the waiver. In response, counsel states that the director "erroneously" stated that the petitioner "perform[s] quality control measures, order[s] supplies and maintain[s] the instruments of the laboratory," whereas those "duties are actually performed by three research technologists." The director's finding was taken directly from Professor [REDACTED] letter, which offered no indication that the petitioner delegated those responsibilities. Instead, as quoted above, he specifically stated that the petitioner "performs all the quality control measures, orders supplies, maintains the instruments of the laboratory." Even if Prof. [REDACTED] was mistaken, and has less knowledge of the petitioner's day-to-day work than counsel does, the director cannot be faulted for presuming Prof. [REDACTED] description to be accurate. Counsel's letter in response to the director's notice quotes other portions of this same letter, and the response includes a copy of the letter.

The director had asked whether the petitioner's published work has "ever been cited in the published work of other researchers." The director also instructed the petitioner to submit evidence of such citations. In response, the petitioner claims a total of 21 citations. The petitioner only documents nine of these citations, for two articles cited once each, and a third article cited seven times, including four self-citations by co-authors. The petitioner has thus documented five independent citations, a citation volume that does not readily indicate that the petitioner's work is generally considered to be especially important in comparison to that of others in the specialty.

The director instructed the petitioner to submit letters from "experts . . . beyond [the petitioner's] circle of acquaintances," to establish that the petitioner's work is recognized beyond her own group of mentors and collaborators. In response, the petitioner has submitted four new letters, all of which are from officials or faculty members of the University of Chicago. [REDACTED] director of the university's Office of Shared Research Facilities, describes the role of the university's shared research facilities, and states "the Director of each of the facilities within the BSD [Biological Sciences Division] is considered to be an outstanding expert in their field." This use of the passive voice fails to specify by whom the petitioner "is considered to be an outstanding expert." Ms. [REDACTED] indicates that the position requires a "unique combination of scientific, technical and managerial expertise." Ms. [REDACTED] and other witnesses contend that the progress of numerous projects at the University of Chicago depends on the petitioner's continued availability. No witness has indicated that the university intends to employ the petitioner on a permanent basis, and the petition form itself indicates that the position is not permanent. Considering that the petitioner's existing nonimmigrant status already allows her to work temporarily for the university, it is not clear why her continuation in a temporary position requires permanent immigration benefits. This issue is a central one, considering the number of witnesses who argue that the petitioner's service to the national interest is contingent on her position as a research program coordinator and facility director at the University of Chicago.

The witnesses agree that the petitioner is an important part of the university's research program, but there has been no showing that the petitioner's research accomplishments stand out among those of her peers, or that the petitioner's accomplishments as a facility director stand out from the achievements of individuals similarly employed at other universities. Assertions about the inherent importance of the occupation cannot suffice to establish eligibility because there is no blanket waiver for facility directors or research program coordinators.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's occupation, but finding that the evidence does not distinguish the petitioner from other researchers to an extent that warrants the special additional benefit of a national interest waiver.

On appeal, the petitioner submits new letters from officials of the University of Chicago, indicating that the petitioner's duties "are not primarily managerial duties relating to the running of the Laser Capture Microdissection Facility." Rather, they indicate, the petitioner is an active researcher, participating in numerous ongoing projects. Prof. [REDACTED] in a new letter, states that his earlier letter was "misconstrued" and that he had never indicated that administrative functions accounted for the petitioner's *primary* duties. These letters serve to clarify the nature of the petitioner's work at the facility, but they do not answer the director's observation that objective measures of the petitioner's impact, such as her citation record, do not indicate that the petitioner has, thus far, been an especially influential researcher in her field. Similarly, the letters offer no rebuttal to the director's observation that there is no evidence that the university seeks to retain the petitioner's services permanently. When the waiver request is tied intimately to a specific position with an individual employer, as is the case here, it is quite relevant to note whether or not the appointment is a permanent one.

Counsel argues that the petitioner's mastery of "laser capture microdissection and other advanced technologies" qualifies her for the waiver. The director had already noted that, pursuant to *Matter of New York State Dept. of Transportation, supra*, it is not a strong argument in favor of a waiver to observe that an alien has received training in an advanced technology that the alien did not invent; this represents an attempt to tie the waiver to the technology rather than to the specific alien, and the question of who receives the waiver would then become merely an issue of who applies for one first.

Combining observations from the above two paragraphs, we observe that if the position is permanent, and the University of Chicago has been unable to locate other workers qualified to operate its complicated equipment, then the situation appears to be quite compatible with the labor certification process. If, on the other hand, the position is not permanent, then the issue of locating a qualified replacement for the petitioner will confront the university regardless of the outcome of this petition.

Counsel, on appeal, maintains "[t]here is no evidence in the record that the position . . . is not a permanent one," but, significantly, counsel does not state that the position is, in fact, permanent. On the Form I-140 itself, when asked "is this a permanent position" and offered the choices of "yes" or "no," the petitioner checked "no" and signed the petition form under penalty of perjury. The witnesses from the University of Chicago have been silent on the question. Therefore, the record apparently contains only one reference to the duration of the petitioner's employment, specifically the petitioner's own assertion that the position is not permanent. Given the apparent absence of anything in the record to contradict this statement, and thereby shift the preponderance of evidence away from it, the director did not err in relying on what little information the record offers on the subject.

In response to the observation that the petitioner's reputation lies largely within the University of Chicago, the petitioner has responded with additional materials regarding her reputation at the University of Chicago. While that employer clearly places high value on the petitioner's productive research work, the record lacks empirical evidence that the petitioner, as a researcher, stands out from others in her field to such an extent that she qualifies for an exemption from a statutory requirement that typically applies to workers in her occupation, seeking the same immigrant classification. Her influence on researchers outside of the University of Chicago is minimally documented. The issue of the petitioner's technical expertise with laboratory equipment is an issue within the purview of the labor certification process.

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.