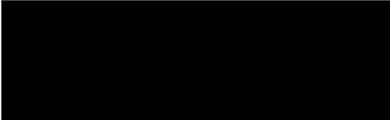


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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 041 51845 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



MAR 22 2004

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.

*for Mai Johnson*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**

**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 sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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. The petitioner seeks employment as a postdoctoral researcher at the University of California, Irvine (UCI). 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 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 exceptional ability. The director found that the petitioner qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would serve no practical purpose in 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 the 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 asserts that the petitioner's contributions to the field of genetics, documented in several journal publications, are of a caliber that warrants a national interest waiver. Counsel states that the petitioner's "important work will make critical contributions to mankind's fight to cure schizophrenia, congenital heart diseases, muscular dystrophy, and phenylketonuria." Counsel claims that the petitioner's "publications have been cited many times by other top researchers," but the record contains no documentation to establish the petitioner's citation record. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the record is effectively silent regarding citation of the petitioner's work.

The petitioner's initial submission includes several witness letters discussing her work. Witnesses who knew the petitioner as a graduate student in China state that the petitioner's work on the genetics of congenital diseases and birth defects won her national awards and international recognition. Most of the witnesses in the United States are researchers at UCI, where the petitioner now works. UCI associate professor Dr. [REDACTED] who supervises the petitioner's work, states that the petitioner's analysis of a gene linked to schizophrenia "might ultimately prove useful in the diagnosis or discovery of treatment for heritable neurological diseases." Professor [REDACTED] adds that the petitioner also works with him on a part-time basis, "attempting to identify and characterize human genes encoding proteins involved in the biogenesis of iron-sulfur proteins. Mutations in these proteins may be linked to a variety of mitochondrial myopathies, and their identification could aid in diagnosis and treatment of a range of important diseases." The only initial witness who does not specifically claim prior collaboration or acquaintance with the petitioner is Dr. [REDACTED] director of the Molecular Genetics Laboratory at Harvard University School of Public Health. Like the other witnesses, Dr. [REDACTED] summarizes the petitioner's past work and asserts that the petitioner's current studies "might prove important" for the diagnosis and treatment of genetic diseases.

The director requested further evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. The director noted that the petitioner's witnesses have demonstrable ties to the petitioner, and thus their letters do not show that the petitioner's work has been "acknowledged by independent experts in the field." In response, the petitioner has submitted additional documentation of her recent work, as well as new letters.

The director, in denying the petition, stated that the letters were from the petitioner's colleagues and collaborators. Several of the witnesses, however, claimed no such relationship with the petitioner. Researchers from the National Institutes of Health who deny personal acquaintance with the petitioner attest to the importance of the petitioner's work and describe the present, rather than potential future, importance of the petitioner's research.

Counsel argues on appeal that the director has relied largely on inappropriate criteria, drawn from regulations concerning a different immigrant classification. Specifically, the director devotes several pages to a discussion of regulatory criteria set forth at 8 C.F.R. § 204.5(h)(3). These regulations pertain not to the classification that the petitioner seeks, but to the classification of alien of extraordinary ability. As counsel correctly observes, an alien seeking a national interest waiver need not satisfy the more stringent extraordinary ability criteria. The ten criteria listed at 8 C.F.R. § 204.5(h)(3), pertaining to extraordinary ability, are not applicable here, and should not under any circumstances be relied upon as a basis for denying national interest waiver petitions.

In some instances, decisions that erroneously use the extraordinary ability criteria nevertheless contain other elements, which, by themselves, are defensible grounds for denial. In this instance, however, the director's other main argument, the absence of independent evaluation of the petitioner's work, is contradicted by the presence in the record of such evaluations. As such, errors pervade the very framework of the director's decision to a point where it cannot be upheld.

We add that, while the petitioner's current position is a temporary postdoctoral assignment, the waiver request is predicated not on the petitioner's current work, so much as her overall history of genetic research.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes recognition of the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained and the petition is approved.