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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: LIN-02-230-53096 Office: NEBRASKA SERVICE CENTER

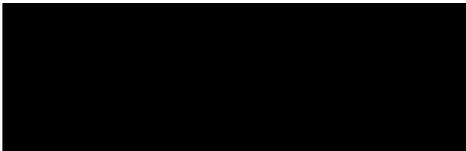
Date:

MAR 31 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.

Mari Johnson
for Robert P. Wiemann, Director
Administrative Appeals Office

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) 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), a member of the professions holding an advanced degree. 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 director acknowledged that the petitioner 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, statistics, and that the proposed benefits of his work, accurate analysis of clinical medical trials, 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.

The director concluded that the record did not establish that the petitioner's achievements outweighed the national interest inherent in the labor certification process. On appeal, counsel asserts that the record establishes that the petitioner has more than "an average success record."

The petitioner is a statistical analyst/programmer at Northwestern University. In this position, he has provided programming and statistical support for studies at Northwestern, including collaborations with the Mayo Foundation, Children's Memorial Hospital in Chicago, and Baxter Healthcare Corporation in Round Lake, Illinois. The petitioner obtained a Master's degree in applied probability and statistics in 1996 and another Master's degree in management information systems in 1998. He obtained both degrees at Northern Illinois University. In support of the petition, the petitioner submitted reference letters from researchers at these institutions.

An overview of the petitioner's work is provided by Dr. Alfred Rademaker, Director of the Biostatistics Core Facility of the Robert H. Lurie Comprehensive Cancer Center at Northwestern University. Dr. Rademaker asserts that the petitioner has analyzed complex data in studies involving swallowing ability in stroke victims and throat cancer survivors and the best "cut-point" for a serum marker for ovarian cancer screening. The

petitioner also customized a statistical method of survival analysis for cancer projects involving the treatment of childhood cancer with unrelated donated umbilical cord blood, treatments for neuroblastoma (brain cancer), and radiotherapy treatment for endometrial cancer.

In a subsequent letter, Dr. Rademaker explains the nature of the petitioner's position and the skills he brings to the position.

An incumbent in the position that [the petitioner] currently occupies is required to perform complex manipulations with medical research data, in the course of performing statistical analyses of these data. These complex manipulations require, among other things, data manipulation, use of statistical analysis programs written by the incumbent, and decision making regarding the appropriate analytic methods that will generate the most effective and accurate results for the medical research at hand. [The petitioner] possesses a unique background; he has advanced degrees in both probability and statistical analysis, as well as in the area of information systems. This unique combination of talents and knowledge brings a very specific expertise to the process of statistical analysis in the following way.

The other references attest to the petitioner's contributions to their specific projects, the importance of the projects, and the adverse consequences to the projects if the petitioner were not permitted to continue working on the projects. Dr. Howard M. Katzenstein, an assistant professor at Northwestern University, discusses the petitioner's work on his neuroblastoma studies at Children's Memorial Hospital. Dr. Katzenstein explains that the analysis of clinical studies of cancer treatments "is dependent upon a detailed and complex statistical review to verify the validity and reliability of the data collected." Dr. Katzenstein then asserts: "Unfortunately, there is a shortage of qualified individuals in this country who can perform such tasks." He elaborates that one of his studies was delayed for six months "because there were no trained statisticians at the national level who could perform these tasks." Dr. Katzenstein concludes: "[C]ancer research data is highly complex due to the interaction of multiple variables" and analysis of this complex data requires "the use of very sophisticated technical software programs."

The petitioner's advisor at Northern Illinois University, Dr. Dianne M. Cearlock, asserts that the petitioner designed and managed program assessment databases as a graduate assistant at the university. Dr. Cearlock asserts that the petitioner's current position at Northwestern University "is a position for which [the petitioner] is educationally and experientially uniquely capable of fulfilling." This statement strongly implies that anyone with the petitioner's degree who has completed a graduate assistantship would also be "uniquely" able to perform the statistical analyses performed by the petitioner.

The above letters attest to the petitioner's unique education and experiences and a shortage of statisticians with these credentials. As stated in *Matter of New York State Dep't. of Transp., supra*, at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background." In addition, when discussing claims that an alien possessed specialized design techniques, the AAO asserted that such expertise:

would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Id. at 220-221.

The petitioner did provide letters with more specific claims of his expertise. Dr. Andre Baron, an assistant professor at the Mayo Foundation, discusses the petitioner's work on the effectiveness of sEGFR and other biomarkers in the early detection of epithelial ovarian cancer. Dr. Baron explains that the petitioner "has shown the ability to understand rapidly the scientific/medical questions under examination and to conceive and conduct critical statistical analyses of the data."

Dr. Susana Rodriguez-Marino, Director of the Histocompatibility and Immunogenetics Laboratory at Children's Memorial Hospital, asserts that the petitioner has "superior talent" and that his use of the statistical programming language SAS, a language that "is not so easy to master for [a] majority of people," results in "concise, error free" programs that save time and effort.

Dr. Edward Vonesh, a senior research scientist at Baxter Healthcare Corporation, explains that his study involving swallowing ability involved the complex issue of patient dropout. Since patients may be more predisposed to drop out if their swallowing does not improve, simply ignoring those patients would lead to inflated success results of the tested treatment. Thus, "[t]o overcome the potential bias associated by ignoring patient dropout, advanced statistical models were needed for the analysis of the data." Dr. Vonesh asserts that the petitioner was "instrumental in developing and applying special statistical programs that implemented these advanced models thereby providing analyses that addressed these very real concerns."

Assuming the SAS programming language is complex, we are not persuaded that the petitioner's abilities in this language warrant a waiver of the job offer/labor certification requirement. Simple exposure to advanced technology, without evidence of the alien's development of that technology, is insufficient as it can be expressed on an application for labor certification. *See id.* at 221, including n. 7.

Finally, we acknowledge that the petitioner is a co-author of articles published after the date of filing. The director concluded that these articles were not evidence of the petitioner's eligibility as of the date of filing and noted that publication of articles is not remarkable in the petitioner's field. In response, counsel asserted that they were submitted in response to the director's request for additional documentation because the director did not specify what evidence was lacking. Counsel further noted that the articles were submitted initially in their unpublished state. Finally, counsel asserts that many academicians fail to live up to the high standards expected of them.

We concur with the director that the petitioner's publication history is not evidence of his eligibility, especially as of the date of filing. The record contains no evidence that the studies whose results appear in these articles are remarkable due to their statistical analysis as opposed to the results reported. The record contains no evidence that other clinical researchers have taken notice of and/or adopted the statistical methods used in these studies.

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.