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U.S. Citizenship
and Immigration
Services

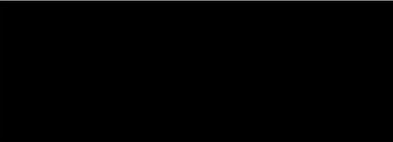


FILE: LIN 02 243 51924 Office: NEBRASKA SERVICE CENTER Date: **MAR 31 2004**

IN RE: Petitioner:
Beneficiary:

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, 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. At the time she filed the petition, the petitioner was a doctoral student and research assistant at Purdue University. The petitioner has since received her doctorate. 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 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 states that the petitioner "is a recognized expert" whose "breakthrough discoveries on methods to ensure a safe drinking water supply for the United States have earned her the stature of being among the few percent to reach the top of the field." The petitioner asserts that her "research is to determine whether or not ClO₂ [chlorine dioxide] is a safe alternative disinfectant." Several witnesses, whom counsel deems "eminent authorities in the field," offer letters in support of the petition.

Several faculty members of Purdue University and the University of Southern Florida (where the petitioner earned her master's degree in Industrial Chemistry) praise the petitioner's "substantial achievements," "outstanding research abilities," and "breakthrough discoveries," but offer no specific details. Dr. [REDACTED] senior research investigator at Bristol-Myers Squibb Company, was the petitioner's classmate at Peking University from 1980 to 1984. Dr. Li states:

[The petitioner] has pioneered a new vital field. She has discovered the pathways that water contamination can occur through chemical reactions in the water. That is especially vital now because of the possibility that water can be intentionally contaminated with chemical[s] that are harmless by themselves but in synergistic combinations are highly toxic. [The petitioner] has attained a status that only the top few percent in the field reach. She has accomplished this as a result of her breakthrough discoveries, which have been seminal in her field. They are too arcane to present to people not in the field. For example: Both ozone and chlorine dioxide are commonly used as disinfectants, and they are strong oxidizing agents. [The petitioner] discovered that if ozone is used in water containing the bromine ion, the microorganisms will be destroyed but a carcinogen, the bromine ion, will be formed. However, she discovered that the use of chlorine dioxide avoids the formation of [the] bromide ion. More importantly by discovering the mechanisms by which the bromide ion is formed, she also found a method for prevention.

Yun Pan of the Air Resources Board of the California Environmental Protection Agency states:

To maintain a safe water supply in a sophisticated dangerous time, it is necessary to make precise measurements on minute concentrations of material. That is easier said than done. It is a daunting task in which [the petitioner] has had pioneering success that is widely

acclaimed. Just one example: She discovered the capillary electrophoretic method as a method to separate and quantitate in the micromolar concentration region. And she showed its great advance over previous methods on the very complex Br^- , OBr^- , BrO_2^- , BrO_3^- , OCl^- and ClO_3^- at M concentration. She is credited with discovering how to separate oxyhalogens that include OCl^- and OBr^- as the detectable species. These breakthrough discoveries have been indispensable to the maintenance of a safe water supply.

The director requested further evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. In response, counsel asserts that the petitioner "played a key role" in securing grant funding for various projects, and has continued to produce published articles. It is the norm, rather than the rare exception, for university research to be grant-funded and its results published. The impact of the petitioner's published work could be demonstrated objectively, for instance through documentation of heavy independent citation, but the petitioner has not claimed any such citations. She has merely shown that her own articles exist.

The petitioner submits two additional letters. Dr. [REDACTED] president and chairman of NovaCal Pharmaceuticals, Inc., states that the petitioner "has a unique knowledge of inorganic compounds, such as chlorine dioxide . . . , hypohalites . . . , and many analytical techniques. . . . [The petitioner] has enquired deeply into the reaction mechanisms involved. . . . [The petitioner] has made groundbreaking contributions in this field." Once again, the "groundbreaking contributions" are not specified or explained.

Dr. [REDACTED], principal scientist with the Southern California Coastal Water Research Project Authority, discusses the petitioner's work in more detail:

[C]hlorine dioxide . . . has been shown to be highly efficient at killing anthrax. However, without a deep understanding of its chemical properties, the use of chlorine dioxide might not be safe and efficient. For instance, it is known that chlorine dioxide is not stable under certain conditions. The instability of ClO_2 diminishes its power. Moreover, its decomposition products (ClO_2^- and ClO_3^-) are harmful. Therefore, the study of chlorine dioxide reactions is extremely important. . . .

[The petitioner] has found that chlorine dioxide is stable under acidic condition[s], but it decomposes rapidly into ClO_2^- and ClO_3^- in the presence of BrO_2^- , OBr^- and OCl^- in the basic solution. Her discoveries on chlorine dioxide are of major importance. She is a recognized authority in the field, and it would be impossible to replace her.

The director denied the petition, stating that the petitioner has failed to demonstrate that the standard job offer/labor certification process would be inadequate. The director questioned the extent to which the petitioner has been responsible for the research projects she has undertaken. The director also observed that there is no evidence "that the petitioner is widely cited by other researchers or that she is otherwise widely recognized," as could reasonably be expected of a researcher claiming important breakthroughs in a vital field. Regarding whether the petitioner is "irreplaceable," she filed her petition as a graduate student, only months before completing her studies and receiving her degree. In the absence of evidence that Purdue seeks to employ the petitioner permanently, the presumption is that the laboratory would have to replace the petitioner anyway. The director observed that nonimmigrant classifications are available for student and postdoctoral researchers, and the fact that the petitioner is already working at Purdue proves that the petitioner's lack of permanent resident status does not automatically preclude her from conducting research in the United States.

On appeal, counsel states that the director arbitrarily and capriciously based the denial on the finding that the petitioner does not work independently. Counsel observes that scientific research is routinely a collaborative endeavor, and because “[i]t is not disputed that [the petitioner] has played a key role” in her projects at Purdue, the director should have approved the petition. This is the only argument counsel makes on appeal.

Only one paragraph of the director’s seven-page decision discusses the question of whether the petitioner is “an independent researcher.” The director placed greater weight on the finding that “the evidence presented does not establish that the petitioner is the primary motivator behind the various research projects.” The director offered several observations as well, which counsel does not address in the appellate brief. By focusing on a single paragraph, which could be excised from the director’s decision without significantly altering the tone of that decision, counsel has, on appeal, ignored almost all of the director’s stated grounds for denial.

The record amply demonstrates the petitioner’s involvement in important research, which the director has not contested. As discussed above, however, the record is at times quite vague in its descriptions of what the petitioner’s “breakthroughs” have been. Counsel has claimed that the petitioner’s published work is especially important in the field, but there has been no objective demonstration of the importance of those articles. The evidence presented is not sufficient to show that the petitioner’s contributions to her specialty have substantially exceeded those of other talented and productive researchers.

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.