

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

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5
MAY 11 2004



FILE: WAC 03 146 53547 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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, 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 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 research associate at Lawrence Berkeley National Laboratory (LBNL). 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 director found that the petitioner qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability, as requested by the petitioner, would serve no useful purpose within this proceeding; the two classifications are essentially equal. 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.

The petitioner conducts genetic research, specializing in factors relating to cardiovascular diseases such as atherosclerosis. The petitioner asserts that the significance of his work is evident from numerous witness letters submitted with the petition. Dr. [REDACTED] director of the Joint Genome Institute at LBNL, states:

Research in the Rubin Lab . . . is currently focused on leveraging the sequences of genomes of multiple organisms to annotate the human genome. We have recently developed and validated an approach that makes use of the sequence of multiple non-human primates to derive insights unattainable by comparisons with more distant organisms, such as the mouse. [The petitioner's] work has contributed significantly to the rapid progress we have made to date. . . .

Specifically, [the petitioner] has analyzed the functional role of a set of DNA sequence elements identified by comparative genomics methods and generated 25 deletion constructs in a luciferase reporter vector in an effort to study the effects on gene expression of regions that are either conserved or non-conserved in the genomic DNA sequence of a panel of 18 primates. . . . He was consistently able to generate very reproducible data in a timely manner and his efforts have contributed to the culmination of this work in an article in *Science*.

The *Science* article, "Phylogenetic Shadowing of Primate Sequences to Find Functional Regions of the Human Genome," appeared in February 2003. The petitioner is the third of seven authors; Dr. [REDACTED] is the corresponding author. The record shows that the publication of this article attracted some degree of notice in other scientific publications.

Dr. [REDACTED] director of the International Tomography Center of the Russian Academy of Sciences in the petitioner's home city of Novosibirsk, states that the petitioner "has established himself as a leading research authority in molecular biology and genetics," and "one of the top young researchers in his field." Dr. [REDACTED] states that the petitioner co-discovered "a novel approach . . . called 'Phylogenetic Shadowing' [which] enables scientists to make meaningful comparisons between DNA sequences in the human genome and sequences in the genomes of apes, monkeys, and other nonhuman primates."

Most of the witnesses have supervised or collaborated with the petitioner. A number of these witnesses, while praising the petitioner's abilities, stress his promising future rather than his existing body of work. One common factor in many of the letters is a discussion of the aforementioned *Science* article that reported the innovation of phylogenetic shadowing.

The director instructed the petitioner to submit additional evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted copies of previously submitted materials, background documents about LBNL, and new letters. The petitioner makes some unsubstantiated claims about his evidence. For example, the petitioner states that he is submitting "[a] letter from Lawrence Berkeley National Laboratories indicating that [the petitioner] has a full-time, permanent position." The letter in question refers to the petitioner's "on-going appointment" in Dr. [REDACTED] laboratory, but the letter does not indicate that the position is full-time or permanent.

Dr. [REDACTED] in his second letter, states "[t]he role of [the petitioner] in my laboratory is a critical one. He is providing the main biochemical and computer data expertise to our PGA effort. . . . [H]is leadership qualities and scientific drive make the projects under his responsibility progress at a very high speed." Prof. [REDACTED] in his second letter, reiterates the importance of phylogenetic shadowing and asserts that the petitioner possesses rare and valuable skills. Professor [REDACTED] of the Max Planck Institut für Polymerforschung asserts that the petitioner "is making key and critical contributions to developing genetic applications for future therapies and an eventual cure for atherosclerosis," by "identifying the two genes that cause low cholesterol levels." Prof. [REDACTED] adds that the petitioner "has published scientific articles of an extremely important value for genetics and medicine. The methods developed by [the petitioner] may have great impact on the scientific community and on our ability to cure such diseases as atherosclerosis and cardiovascular disease in the nearest future."

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's occupation, but finding that the petitioner has not established that his individual contributions are at a level that warrants a national interest waiver. The director's decision contains several misplaced references to "national acclaim" and unspecified "regulatory criteria," which appear to derive from a mistaken reliance on the regulations at 8 C.F.R. § 204.5(h)(3). Those regulations pertain to a separate immigrant classification. The regulations regarding the national interest waiver list no specific criteria, and national acclaim is not a prerequisite for the waiver (although, obviously, such acclaim would be a strong positive factor). This mistaken reliance on inapplicable criteria appears, in this instance, to have contributed to the adverse finding. The director also stated "[i]t cannot be ignored that most of the witnesses have worked or collaborated directly with the self-petitioner."

On appeal, the petitioner asserts that "14 different experts in the field" have attested to the significance of phylogenetic shadowing, the discovery that resulted in the *Science* article discussed above. The petitioner contends that the director did not lend sufficient weight to this discovery.

The director is correct that most of the witnesses of record are the petitioner's past or present collaborators. Such witness statements, by themselves, cannot establish the significance of phylogenetic shadowing. These collaborators are, however, in a position to assert that the petitioner played a significant role in that discovery, even if the petitioner was not the leader of the research team. Other witnesses, with no demonstrated link to the petitioner, have attested to the importance of phylogenetic shadowing, and trade publication articles show that the findings within the *Science* article have attracted attention within the field. The lack of evidence of formal citations can be attributed, at least in part, to the timing of the filing of the petition. The *Science* article is dated February 28, 2003; the petitioner filed the petition only weeks later, on April 10, 2003. Given the

nature of scientific research, peer review, and the publication process, there simply was not enough time for new articles citing the petitioner's work to appear prior to the filing date. The petitioner has shown, nevertheless, that the article attracted attention immediately upon publication. The petitioner has, therefore, through a combination of different materials, demonstrated that he played a significant role in an important scientific finding. The petitioner's evidence is sufficient to warrant approval of the petition; whether the petitioner could have submitted even stronger evidence is, essentially, a moot question.

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 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.