

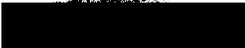
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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

FILE:  Office: NEBRASKA SERVICE CENTER Date: **MAY 11 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.


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 he filed the petition, the petitioner was a research scientist at the University of North Dakota (UND). The petitioner has since begun working at the University of Wyoming. 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 "has a long history of producing research finding[s] of impact to the field of biotechnology." Most of counsel's introductory letter consists of excerpts from witness letters in the record. UND Professor Kevin D. Young describes the petitioner's work as of the petition's filing date:

[The petitioner is] an expert in the biochemistry of carbohydrate polymers produced by microorganisms. This is a field of expanding interest for several reasons, including applications for commercial and medical uses, and for understanding how these chemicals affect the ecology of biological populations. . . .

Research into the chemistry and biology of bacterial cell walls has become intensely important because of the emergence of bacteria that are resistant to many of our currently useful antibiotics. The carbohydrate walls that bacteria build around themselves are their primary protection; and this wall is the target of the world's most widely used antibiotics, penicillin and its many derivatives. As bacteria have become resistant to these compounds, they have exposed great gaps in our knowledge about the structure and function of these walls. Therefore, the goal of my laboratory is to describe and characterize the basic mechanisms used to construct these protective barriers, so that we might be able to attack pathogenic bacteria more rationally.

One of the important but (amazingly enough) least understood aspects of bacterial cell walls is the two- and three-dimensional structure of the chemical that constitutes their backbone, peptidoglycan. . . . One of the major problems in studying the biological functions of peptidoglycan is that the current techniques for analyzing its structure are complicated and time-consuming. . . .

Since joining my laboratory, [the petitioner] has exerted heroic efforts in the development of a simplified new technique to address this problem. . . . [T]he "FACE" technique . . . is easier, more rapid, and more sensitive than currently available techniques. In particular, he has compared this technique to reverse-phase high liquid chromatography (the current "gold standard") and has shown that FACE gives rapid results with almost the same level of quantitation. . . .

Because he has been in my laboratory barely a year, he has no publications from this work as yet. However, a manuscript . . . is now in preparation. . . . In addition, two other manuscripts composed of his work are likely to be submitted next year. . . . All three will add important data to the world's understanding of this area.

Other researchers who have supervised or worked with the petitioner state that the petitioner has participated in numerous projects that revealed useful new information regarding bacterial cell wall structure. The only initial witness who has not collaborated with the petitioner, either in the United States or in Israel (where the petitioner earned his doctorate), is Professor Roberto De Philippis of the University of Florence. Prof. De Philippis states that he and the petitioner met at a 1998 symposium and have corresponded frequently since that time. Prof. De Philippis asserts that the petitioner's earlier published work have been "widely cited in the scientific literature," and lists two example articles by journal title, issue number, and page. These two articles are not articles by others, containing citations of the petitioner's work. Rather, the information corresponds to two articles written by the petitioner herself. Prof. De Philippis, therefore, has claimed that those two articles are "widely cited," but has provided no corroboration nor any means of corroboration.

The director requested additional evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. The director specifically asked for copies of citing articles, and evidence that "experts . . . beyond [the petitioner's] circle of acquaintances" find the petitioner's contributions to be especially influential. In response, the petitioner has submitted new letters and additional remarks from counsel. Counsel clarifies that the petitioner did not invent the FACE technique, but rather "generated [a] new use for the FACE technique."

Counsel states "[a]s evidence that [the petitioner's] work has been cited by other researchers, we have enclosed a copy of a citation index listing those citations." The petitioner has submitted a printout from an Internet search using <http://search.msn.com>. The search returned one result, a link to a 2001 issue of the Ukrainian journal *Algological Newsletter*, which mentions the title of one of the petitioner's articles. The link is <http://www.herba.msu.ru/journals/av/data/AV-6.doc>. This site does not contain any "citation" of the petitioner's work. Instead, it simply reproduces the entire table of contents of the April 2001 issue of the *Journal of Phycology*, which originally carried the petitioner's article. The *Algological Newsletter* also reproduces the tables of contents of other issues of that same journal. This is not a citation, and it certainly does not establish the impact or importance of the petitioner's work. The director had specifically requested "copies of those published articles" that contain citations of the petitioner's work. The petitioner did not submit these copies, and counsel did not even acknowledge this request, let alone explain why the copies were not available.

The petitioner has also submitted a printout labeled "Science Citation Index – Multiple Databases." It indicates that a 2000 article in *Phycologia* has been cited once. The citation index provides no information about the article containing the citation, and there is no indication that any of the petitioner's other articles have ever been cited. The "Science Citation Index," if comprehensive, would represent strong evidence that the petitioner's work has not, in fact, been "widely cited" as claimed.

To answer the director's request for independent witness statements, the petitioner has submitted several new letters. Professor Bruce Culver of the University of Wyoming states that the petitioner "joined Dr. Jun Ren's group [at the] University of Wyoming School of Pharmacy in November, 2002." The petitioner filed his petition in November 2002, stating that he intended to work at the University of North Dakota. The initial filing was predicated, in part, on the assertion that his contributions at UND were indispensable; yet the petitioner obviously left UND almost immediately after submitting the letters that contained that assertion. Prof. Culver describes the

petitioner's work at the University of Wyoming, stating that the petitioner "has made important contributions to our understanding of the mechanisms underlying the benefit and risk of exercise on diabetic heart function."

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. This case law is relevant because, as of the date of filing, the petitioner had never worked at the University of Wyoming and had not conducted research pertaining to diabetic heart function. Therefore, the petitioner's work at that university, in that subject area, cannot demonstrate that the petition was approvable as of the date of filing (although we acknowledge that there is a connection between the petitioner's past and present work).

Regarding the other witnesses, counsel states that "Dr. Paul Epstein, of the University of Louisville, is also completely independent from [the petitioner] and outside his circle of acquaintances." Professor Epstein states that he has "never met [the petitioner] in person," but knows of the petitioner's work because he has collaborated with Dr. Jun Ren, the petitioner's supervisor. Prof. Epstein also indicates that he used to be on the faculty of the University of North Dakota (as was Dr. Ren). Prof. Epstein discusses the importance of the petitioner's work to "diabetes, aging disease and alcohol abuse," all subjects that the petitioner did not begin to study until after moving to the University of Wyoming. The other new witness letters also focus on the petitioner's use of the FACE in relation to diabetes, alcohol metabolism, and other areas that the petitioner has only just begun to study. There is no mention at all of resistant strains of bacteria, just as the initial filing contained no mention at all of diabetes or alcoholism. The fact that all this research involves the FACE technique, which the petitioner did not originate, does not definitively establish the petitioner's eligibility.

The director denied the petition, acknowledging the witness letters but observing the lack of "first-hand documentary evidence" to establish the impact of the petitioner's past work (as opposed to the "promise" of his ongoing and future work). With regard to such evidence, the director noted that the petitioner "did not comply with a Service request for copies of the published articles which cited his work."

On appeal, the petitioner submits a brief from counsel. Counsel states "it is the quality of a scientist's research results and publications and not just the quantity of publications that determines the significance and impact of a scientist's research." Certainly, one high-quality paper can often have more impact than a dozen less important articles. A critical issue, however, is how one measures that impact. Citations are an objective means of doing so, as counsel appears to have acknowledged. Counsel, on appeal, does not address or acknowledge the director's finding that the petitioner had failed to comply with the director's request for copies of the citing articles. The petitioner has documented exactly one citation of his work, in a context that provides no information at all about the circumstances under which it was cited.

Counsel asserts that evidence from "months after the filing date" should not be disregarded, but counsel fails to explain how such evidence could possibly establish that the petition was already amenable to approval on the day that it was filed. If the petitioner seeks to have his work at the University of Wyoming considered in the context of an immigrant visa petition, the proper course of action is for the petitioner or the university to file a new petition on his behalf.¹

¹ Computerized records show that the University of Wyoming did, in fact, file a new petition on December 11, 2003. That petition is still pending.

Counsel then observes that the original submission contained letters “discussing research work performed by [the petitioner] prior to the filing date.” As the director had noted previously, most of these letters are not independent, coming from the petitioner’s supervisors and others who worked with him. The most independent letter is questionable, containing as it does the claim that the petitioner’s work is “widely cited,” a claim that the petitioner has been either unwilling or unable to verify despite the director’s explicit requests for such corroboration. The remainder of counsel’s brief is devoted primarily to quotations from previously submitted letters.

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.