



U.S. Citizenship
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Services

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Office: NEBRASKA 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:



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. 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 petitioner holds a Medical degree obtained in 1985 and a Master's degree in Medical Microbiology and Immunology obtained in 1991, both from Qingdao Medical College. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus 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, immunology, and that the proposed benefits of his work, yeast-based vaccines for lung cancer and HIV, 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.

In October 1999, the petitioner joined the laboratory of [REDACTED] at the University of Colorado Health Sciences Center. At that time [REDACTED] had already patented four innovations related to yeast and yeast-based vaccine delivery vehicles. He formed the company GlobeImmune for the purpose of developing and marketing yeast-based vaccines for HIV and cancer. GlobeImmune received \$8 million in private venture capital in 2003. The references discuss the importance of developing vaccines for HIV and noninfectious diseases such as cancer. They also stress the petitioner's qualifications to work on these projects.

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.

General statements that the petitioner has made important contributions to the project are not useful. Rather, we look for specific achievements and examples of how those achievements have influenced the field as a whole. [REDACTED] Director of Aids Research at Brigham and Women's Hospital and a former faculty member at the University of Colorado Health Sciences Center, discusses the specifics of the petitioner's work on an HIV vaccine as follows:

The first GlobeImmune produce candidate, HIVAX-GS, is an AIDS vaccine encoding the *gag* protein of HIVB. The current consensus of the HIV research community is that HIV vaccine candidates encoding the *gag* antigen should provide the broadest single antigen therapeutic value. Pre-clinical studies have shown that this vaccine system elicits a strong cellular immune response and is harmless when injected into healthy or immuno-compromised mice. GlobeImmune is preparing HIVAX-GS for initiation of human Phase I trials within the next 12 months, which will be conducted and funded by the HIV Vaccine Trials Network (HVTN) of the National Institutes of Health (NIH). After this initial clinical trial run, a Phase IB trial in stable HIV-infected patients on anti-retroviral therapy is expected to begin shortly thereafter to be conducted and funded by the AIDS Clinical Trail Group (ACTG). [The petitioner] is currently a key member of the research team carrying out this critically important project. [The petitioner] has developed innovative techniques in the development of this vaccine, including the novel technique known as FIAsh-EDT2 that is used to screen and quantity [sic] HIV *gag* protein expression in yeast and transfected cells. [The petitioner] also developed a novel method to titer the HIV *gag* plasmid copies in the yeast used in the vaccine using the PCR technique, a necessary precursor to the NIH mandated Phase I clinical trials.

██████████ Vice Chair of Clinical Affairs in the Department of Neurosurgery at the University of Colorado Health Sciences Center, asserts that while working on a vaccine for brain tumors, the petitioner "became the first scientist to use human epidermal growth factor receptor (EGFR), which is over expressed in malignant brain tumors, as a treatment target." Achieving a high expression clone of EGFR, the petitioner used Flow Cytometry to establish a highly expressed yeast vaccine strain that showed positive results in animal experiments. ██████████ an associate professor of medicine at the University of Colorado Health Sciences Center, asserts that the petitioner used similar methods to construct and transfect a novel mutant K-ras cDNA for vaccination against lung cancer. Several references predicted human trials for the lung cancer vaccine in 2003. Letters submitted in response to the director's request for additional documentation explain that routine delays made that timetable unrealistic.

In his second letter ██████████ asserts that the petitioner took the yeast vaccine technology, developed for HIV and patented by ██████████ and "successfully expanded it to cancer." ██████████ continues that the petitioner is "the scientist who got the technique to work." (Emphasis in original.) ██████████ does not explain, however, why the only published articles on using this technique for cancer, published in *Nature Medicine* and reviewed in *Science* in 2001 do not include the petitioner as a coauthor. The list of grants on Dr. ██████████ curriculum vitae includes brain and lung cancer vaccine grants covering periods from November 2000 to May 2003. The petitioner, however, did not submit the grant applications for these projects. Thus, the petitioner has not demonstrated that he was included among the key personnel for the projects. While ██████████ references the confidential and proprietary nature of the petitioner's work, the petitioner has also failed to submit patents or even patent applications listing him as an inventor.

The above letters are all from the petitioner's immediate circle of colleagues. Contrary to counsel's assertion on appeal, the director did not conclude that the petitioner's colleagues "are conspiring to lie to the U.S. government in order to procure the Petitioner's immigrant visa approval." Rather, the director's decision acknowledges the principle often articulated by this office: while letters from the petitioner's collaborators are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole.

The petitioner did submit a letter from [REDACTED] Senior Scientist at the Henry Jackson Foundation and former program officer in the Targeted Interventions Branch, Division of AIDS, National Institute of Allergy and Infectious Diseases (NIAID). In his former position with NIAID, [REDACTED] coordinated and oversaw the institute's commitment to therapeutic vaccines for HIV. [REDACTED] confirms that the HIV vaccine developed by GlobeImmune is heading into clinical trials. [REDACTED] further asserts that, based on information provided to him by GlobeImmune, he can confirm the petitioner's role in the development of that vaccine.

The director expressed concern that [REDACTED] was not speaking from personal experience. On appeal, counsel notes that the petitioner submitted several letters from collaborators who base their assertions on their own personal experience. What is relevant is not simply that the petitioner obtained a letter from an independent source, but the information provided in that letter. Obviously, a letter from an independent source will not provide a personal account of the petitioner's work. Some personal knowledge of the specific achievements of the petitioner beyond the opinions of his colleagues already in the record, however, is generally preferred. For example, an independent expert could have observed the petitioner presenting his work or read his published articles. The record in this case lacks not only citations of the petitioner's work, but evidence that, as of the date of filing, he had presented or published his findings. While we acknowledge that work subject to property interests is less likely to be published, we look for other evidence in such cases, such as patented innovations with significant interest in licensing or marketing. In this case, the record contains no evidence that the petitioner has applied for a patent or that his name appeared as a key member of the research team that has secured significant private funding. Thus, it is not clear how the petitioner's research achievements could have influenced the field as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is working with a government grant or with a team that secures significant private venture capital inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. While the petitioner may be working on a project derived from groundbreaking and patented work on using yeast to deliver vaccines, the record does not establish that the petitioner's work on this project itself represented a groundbreaking advance in vaccine development.

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.