

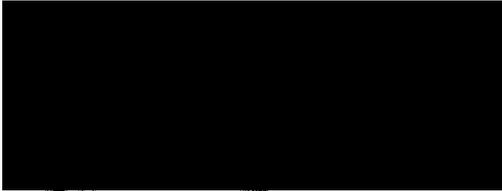


U.S. Citizenship
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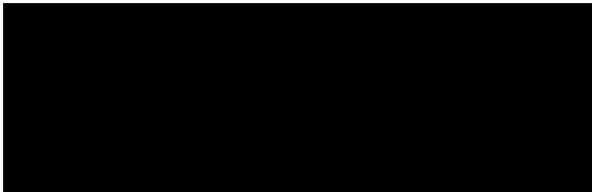
Office: VERMONT SERVICE CENTER

Date: **AUG 31 2005**

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 is a chemical and pharmaceutical manufacturing company that seeks to employ the beneficiary as a senior analyst. 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 beneficiary 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 discusses the petitioning company and the beneficiary's role therein:

[The petitioner] is a contract manufacturer of bulk active pharmaceutical ingredients (APIs) and advanced intermediates for use in the development, clinical testing, and manufacture of pharmaceutical products. . . .

A senior research and development analyst, such as [the beneficiary], has overall responsibility for testing procedures: establishing test protocols, carrying on or supervising actual testing procedures, and validating results. His duties also include developing analytical methods to monitor drug reactions for producing the anti-cancer drug Taxane, a highly toxic material, which calls upon his expertise in handling toxic materials. . . .

[The beneficiary] has overall responsibility for the projects. He is the lead person. In addition, he supervises and trains others to participate in the work. . . .

[The beneficiary] won honors as a graduate student; his papers, published in peer-reviewed journals, are widely cited; he is a member of two prestigious professional societies; and he mentors and supervises the work of others. He also serves as a referee for technical journals. In addition, other people prominent in his field think highly of his work.

Regarding counsel's claim that the beneficiary's "papers . . . are widely cited," the petitioner submits copies of five articles that cite the beneficiary's work. The petitioner is a co-author of three of the five citing articles. Another co-author of those three articles, as well as the fourth citing article, is Professor Sirasani Satyanarayana, who supervised the beneficiary's doctoral studies at Osmania University. We cannot reasonably conclude the petitioner's work to be "widely cited," when all but one of the citations of his work are by the beneficiary himself and/or his former mentor.

The petitioner submits seven witness letters with the petition; we shall discuss examples of these letters. One of the seven witnesses is Prof. Satyanarayana, identified above. Another witness studied alongside the beneficiary at Osmania University. Three others are employees of the petitioning company. The remaining two witnesses do not specify exactly how they first came to know of the beneficiary's work.

Prof. Satyanarayana states:

In 1996, [the beneficiary] joined my lab for his PhD and selected to work on the synthesis, kinetics and stabilities of axial ligation of vitamin B₁₂ model compounds with various biologically important ligands. The axial ligation is the key step involved in the activity of vitamin B₁₂ and its deficiency caused diseases such as anemia, depression and color blindness, these class of model compounds are sensitive to light. Consequently, a method of quantification for measuring low concentrations to study the key step mechanism was needed. [The beneficiary] has developed Ultra-Violet spectrophotometer solution methods in which he demonstrated the axial base release mechanism of vitamin B₁₂ and the behavior of vitamin B₁₂ in biological systems.

After he was awarded [a] Senior Research Fellowship in 1998, he extended these concepts to the reaction mechanism and structural elucidation of these vitamin B₁₂ model compounds with the help of modern instrumentation. He elaborately established a comparative study between cyanide and imidazole by studying their speeds and stabilities of the association and dissociation with the vitamin B₁₂ model compounds, he also demonstrated substituents effect of the incoming ligands on the mechanism, these two presentations at American Chemical Society national meetings has brought recognition to [the beneficiary]. During his PhD, [the beneficiary] has made major contributions for the better understanding of vitamin B₁₂ chemistry and published articles in international journals, his work is being cited and discussed by others within his field. . . .

[The beneficiary's] area of capability is such that there are very few people who possess his background and expertise. This is because there are only few centers of academic learning in the world where the research is on the stabilities and kinetics of biologically important compounds in solutions by different modern scientific instrumentation.

Regarding Prof. Satyanarayana's last statement (that the beneficiary possesses hard-to-obtain training), we note that special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

Dr. [REDACTED], a senior research chemist at the petitioning company, states:

[The beneficiary] has developed very critical HPLC methods to separate, identify and quantify related diastereomers making his expertise very important to the manufacturing process. . . . [The beneficiary] has demonstrated his unique qualities by developing methods using Head Space Gas Chromatography to reliably identify and quantify minute amounts of residual solvents.

Most of [the beneficiary's] projects are in the phase II/III clinical stages for cancer treatment. At present, his two projects are under the class of targeted Taxane therapy, which is the latest and most effective chemotherapy for targeting only the cancer cells. . . . [The beneficiary] has accomplished technical tasks that have eluded many more-experienced researchers around the world.

Dr. [REDACTED] a group leader at Novartis Pharmaceuticals Corporation, states:

I know [the beneficiary] for the past several years through his outstanding publications and also through his graduate research advisor, Prof. [REDACTED]. . . I found his work interesting and very useful from both an academic and an industrial point of view. . . .

He has developed methods to study the interaction of biological molecules with metal ions under physiological conditions. These studies are extremely useful in understanding the drug interactions with receptors related to targeted diseases. . . .

[The beneficiary] has developed High Performance Liquid Chromatography (HPLC) methods to identify and quantify the impurities during the scale up and production of several important anticancer drugs. These studies are very valuable to the development of anticancer drugs and addresses [sic] many issues related to the purity and potency of the molecules. [The beneficiary's] past experience in the area of reaction kinetics helped him to make significant contributions to understanding the degradation pathways of drug molecules under various conditions. In addition, [the beneficiary] utilized his research expertise in developing methods for the quantification of volatile organic compounds and residual solvents in drug molecules using headspace Gas Chromatography (GC). These studies would help in eliminating any traces of toxic material from the drug molecules thus increasing the safety for using the drugs during the treatment of cancer.

Dr. [REDACTED] CEO of Psyche Pharmaceuticals, Inc., states that the beneficiary "has developed a critical HPLC method to identify and quantify diastereomers of potentially important cancer drugs," and "has completed significant studies that place him in the upper ranks of bio-analytical chemists." Dr. [REDACTED] does not specify how he knows of the beneficiary's work, but he states that the beneficiary "is an avid fisherman [who] has many non-Asian friends among his co-workers . . . and neighbors in Rensselaer." Psyche Pharmaceuticals is based in Rensselaer.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary's work, but finding that the petitioner had not shown the beneficiary's accomplishments to be of a caliber that would merit a national interest waiver. The director noted that the witnesses were primarily the beneficiary's personal acquaintances, and that the record does not establish significant independent citation of the beneficiary's published work.

On appeal, counsel argues that the standards set forth in *Matter of New York State Dept. of Transportation* are "excessively high." Counsel (who was also the attorney of record for the petitioner in *Matter of New York State Dept. of Transportation*) does not show that any federal court has invalidated that precedent decision in whole or in part. As long as *Matter of New York State Dept. of Transportation* remains standing precedent, the director is required to follow that decision, pursuant to 8 C.F.R. § 103.3(c). The director's mandatory adherence to published precedent cannot reasonably be construed as error requiring reversal on appeal.

Counsel asserts that the director's decision "completely ignores the realities of the labor certification process. A labor certification application filed in New York State takes approximately three years to be adjudicated." Complaints about the labor certification process itself, however justified they might be, are not persuasive arguments in favor of granting a national interest waiver. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the

inconvenience of the labor certification process. *Matter of New York State Dept. of Transportation* at 223. Counsel's complaint implies either that a lengthy backlog should qualify every alien in that locality for a waiver; or that the petitioner would happily apply for a labor certification if the waiting time were shorter. Neither of these implied arguments rests on the merits of the individual alien.

Counsel states that three of the initial seven letters "are from scientists who are neither [the beneficiary's] colleagues nor his mentors. They know of his work from his publications and his reputation in his field." One of those three witnesses states that, in 1996, he and the beneficiary "were both in the Department of Chemistry [at] Osmania University." Another witness, writing from a Rensselaer address, mentions the beneficiary's compatibility with his neighbors in Rensselaer as well as his proclivity for fishing, details which are unlikely to surface from a review of the beneficiary's scholarly writings. We must rely on review of the evidence itself, rather than on counsel's claims and assertions regarding that evidence.

The appeal submission includes two new letters. One is from Professor [REDACTED] of the State University of New York (SUNY) at Albany. Prof. [REDACTED] states:

[The beneficiary's] major expertise is in various types of modern chromatography. Chromatography is one of the key techniques used widely in pharmaceutical industry, both on research-and-development stage and during the manufacturing process. Specialists with background and expertise of [the beneficiary] are very valuable for further advancement of pharmaceutical industry in the U.S. . . .

A high level of [the beneficiary's] background is evidence from his publication record in top Indian scientific journals. In addition, he was a recipient of several awards during his graduate study.

While Prof. [REDACTED] endorses the beneficiary as a highly skilled researcher, he appears to lay greater emphasis on the overall importance of expertise in chromatography within the pharmaceutical industry. Counsel states of Prof. [REDACTED] and the beneficiary, "it is not clear that they have even met," the implication being that Prof. [REDACTED] knows the beneficiary only through the beneficiary's work. In this context, it is not a trivial detail that Psyche Pharmaceuticals (whose CEO knows personal details of the beneficiary's life) is located on a campus of SUNY Albany. Prof. [REDACTED] letter does not dispel the impression that the beneficiary's reputation in the United States is very heavily concentrated in the Albany area.

The other new letter is from [REDACTED] a senior research scientist at [REDACTED]. She identifies the petitioning corporation is a subsidiary of [REDACTED]; both companies share the same street address, telephone number, and fax number. She states:

Given that our business is as a contract research organization supporting projects for pharmaceutical clients it is difficult for [the beneficiary] to frequently and extensively publish the results of his research he does because of the confidentiality policy of our company and our clients. . . .

[The beneficiary] has developed many Analytical methods in the areas of HPLC, GC, Spectrophotometry and ICP-AES that helped the very success of the projects he was involved with variety of pharmaceutical products [sic].

We acknowledge that work undertaken for private industry will sometimes involve confidentiality agreements that preclude publication. Because the beneficiary cannot disseminate his findings through publication, the petitioner must establish some alternative means by which the beneficiary's work is in the national interest, as opposed to the more limited interest of the petitioner's clients. The record contains no objective, documentary evidence to show that the beneficiary is responsible for a nationally significant improvement in the quality or quantity of pharmaceutical products, or for ensuring that such drugs reach the market substantially sooner than they would have done if a different qualified worker had been in the beneficiary's place. The record contains only one letter from a witness at a pharmaceutical company (Dr. [REDACTED] at [REDACTED]), and Dr. [REDACTED] never even indicates that Novartis is one of the petitioner's client companies.

It is not fully clear that the beneficiary's current activities constitute research *per se*, as opposed to quality control testing on products devised and manufactured by others. Therefore, his past work as a researcher appears to be of diminished relevance.

The argument that the beneficiary possesses the necessary skills to perform his job is not sufficient because Congress has created no blanket waiver for aliens in the beneficiary's occupation. If such blanket waivers were simply implied by the very existence of the national interest waiver, then section 203(b)(2)(B)(ii) of the Act (pertaining to certain physicians) would arguably be redundant.

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.