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FILE: LIN 03 068 52468 Office: NEBRASKA SERVICE CENTER Date: OCT 13 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:

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition; reopened the matter after treating the petitioner's untimely appeal as a motion; and denied the petition a second time. The matter 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 is a postdoctoral research associate at the University of Chicago. 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.

The petitioner's work involves the study of the vestibular system, parts of the inner ear and brain responsible for the sense of balance. Vestibular disorders can cause nausea, dizziness, or falls. The petitioner submits background documentation to establish the intrinsic merit and national scope of vestibular system research. The petitioner also submits copies of his published work.

Several witness letters accompany the petition. Professor [REDACTED] of the University of Chicago describes the petitioner's work:

[The petitioner] is currently a Research Associate in my lab at the University of Chicago, where he is conducting advanced research in vestibular physiology. . . . In the past 2 years, he has initiated 2 projects of immense importance in vestibular physiology: (1) a study of sensitivity of vestibular nucleus neurons to vestibulo-colic reflex (VCR) head movements in different postures; and (2) a comparison of the vestibular nucleus neurons to active and passive head movements in different postures. His work is of extremely high caliber and is notable because he is continually finding new ways to approach problems and to move to the next stage of research. He will be initiating two new projects in the immediate future: 1) a study of the source and characteristics of the head movement efference copy inputs to the vestibular nuclei that cancel or attenuate vestibular signals on secondary vestibulo ocular reflex (VOR) neurons during gaze pursuit; and 2) a study of the contribution of the cerebellar flocculus to viewing distance related changes in the angular and linear VOR during passive and active head movements. . . .

Given his importance to our present and future studies, [the petitioner's] departure from the United States would have a deleterious impact on the research that is ongoing laboratory [sic]. The research in this area is has [sic] important health consequences – particularly for the elderly, who are prone to debilitating falls due to loss of equilibrium during the aging process. The work is also relevant to human interface problems related to piloting airplanes in low visibility and adapting to microgravity during spaceflight.

Dr. [REDACTED] an assistant professor at the University of Rochester Medical Center, states:

[The petitioner] joined Dr. [REDACTED] laboratory at the University of Chicago in 2000 while I was there as a Research Associate (1995-2001). He has become an indispensable member of the research team at the University of Chicago and has played a significant role on several research projects. . . . While I was at the University of Chicago, he developed a new experimental apparatus designed to study eye and head movement reflexes in awake behaving primates. . . . [H]is experimental apparatus have [sic] allowed us to study how eye movement reflexes are modified based on what we are looking at and how far away the object is from our body. These types of experiments are among the most innovative in our field, and are providing new exciting concepts for how we control eye and head movement reflexes. . . . I am confident that these latest experiments will not only have an impact on our current knowledge of the neuroscience of vestibular disorders but will also impact the modern technology employed in robotics and imaging.

Professor Hisao Nishijo, who chaired the petitioner's dissertation committee at Toyama Medical and Pharmaceutical University in Japan, states that the petitioner's "findings . . . are very helpful in building our knowledge of balance in space, particularly related to severe dizziness and nausea."

All of the above witnesses have worked directly with the petitioner. The director issued a request for evidence, asking whether other researchers have cited the petitioner's work, and whether the petitioner's work has had a demonstrable impact beyond his own collaborators and professors. In response, the petitioner submits evidence showing that independent researchers have cited his work twice (not counting one self-citation by the petitioner). All of the citations appeared after the petition's filing date. This minimal citation record does not establish that the petitioner's work stands out from the work of other competent researchers in his specialty.

The petitioner also submits four new letters. Dr. [REDACTED] of Washington University School of Medicine states:

I have recently come to know [the petitioner] through his work and presentations at scientific meetings, where I have been impressed with his exceptional insight and skills. [The petitioner] is an excellent scientist whose research has significant interest to my colleagues and myself in the broad field of systems neuroscience and specifically vestibular system function. . . .

[The petitioner] has been working on the very important topic of the role of the cerebellum in balance and motor coordination. His approach is providing valuable and essential basic information regarding how the system responsible for motion detection, balance, and spatial orientation functions. . . . I have no reservation to say that [the petitioner's] work in Dr. [REDACTED] laboratory is not only outstanding but also the very best in the particular field of study.

Professor [REDACTED] of Baylor College of Medicine explains that neuroscientists seek to understand how the brain accounts for the movement of the head and eyes when interpreting visual signals. Prof. [REDACTED] asserts that the findings from Prof. [REDACTED] laboratory "are a significant part of a recent body of work that may completely change the way we think about the neural control of eye movements and the role of the vestibular nucleus and other brainstem areas in the control of gaze." Prof. [REDACTED] emphasizes the difficulty of recording the output of individual neurons without injury to the cells or physical head restraints, and he states that the experiments performed by the petitioner and Prof. [REDACTED] "represent a technical *tour de force* and, currently, can be performed in only a few laboratories in the world." Prof Sparks deems the petitioner to be "an absolutely essential member of the research team involved in these studies. . . . As an expert in the area of motor control, I assure you that [the petitioner's] work is of great importance."

Dr. [REDACTED] an assistant professor at Cornell University's Weill Medical College, states "I have never been [the petitioner's] collaborator, but I have been following his research with a great enthusiasm." Dr. [REDACTED] credits the petitioner with "significant discoveries in the field. He is the first person who identified the functions of Vestibular Nuclei in squirrel monkeys, his findings are important because they show that Vestibular Nuclei plays [*sic*] an essential role in different postures." Dr. [REDACTED] an assistant professor at Northwestern University's Feinberg School of Medicine, credits the petitioner with "a great achievement to understand the brain mechanisms of posture control and self-motion, and will likely lead to discoveries of the cause of falls resulting from vestibular disorders."

On July 29, 2004, the director denied the petition, stating that the petitioner's minimal citation history does not show "that the petitioner's record of publications set him apart from his peers." The director also found that the independent witness letters are either vague, or else refer to projects that began after the petition was filed. The director concluded that, despite enthusiastic support from witnesses, the petitioner had failed to show that he "had already made any measurable impact on his field."

The petitioner filed an appeal on September 15, 2004. In this appeal, the petitioner stated that he has submitted a paper to a "top journal" and is still awaiting the results of the peer review process. The director rejected the appeal as untimely, pursuant to 8 C.F.R. § 103.3(a)(2)(i), and considered it as a motion, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The director denied the petition again on January 21, 2005, reaffirming the prior finding that the petitioner had not documented "a specific record of achievements which significantly distinguished him from other postdoctoral researchers in his field."

On appeal from this second denial, the petitioner states:

On November 5th 2004 I received an award from [the] Brain Research Foundation and Brain Research Institute Executive Committee during the Brain Research Foundation Neuroscience Day conference. While about 40 postdoctoral research associates . . . presented their work, I was the only postdoctoral research associate to whom the award was given. . . . I was presented with this honor because the committee recognized the outstanding merit of my work. . . .

While the award was received recently, most of the work honored was done before the filing date [of] December 27 2002. This award demonstrates my ability to distinguish myself from my peers if given the opportunity.

The record contains no first-hand documentation of this award. The record does contain a copy of a certificate from the conference, but this certificate indicates only that the petitioner was a "Poster Presenter" at the conference.

The record shows that the Brain Research Institute is located at the University of Chicago, where the petitioner works. Professor [REDACTED] who moderated the conference, states: "This unique forum is intended to provide all members of the neurosciences community at the University of Chicago the opportunity to share their *newest findings* in neuroscience" (emphasis added). Given that the petitioner received this award nearly two years after the petition's filing date, it is difficult to conclude that the research had been essentially completed before the filing date. Even then, we note that formal recognition of one's work is, pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(F), one element of a claim of exceptional ability. Aliens of exceptional ability in the sciences, in turn, are not automatically eligible for the waiver; they are typically subject to the job offer requirement. Considering that this award from the petitioner's own employer would not, by itself, suffice to establish exceptional ability, we cannot find that the same award would represent a strong argument for the added benefit of a national interest waiver, even if the beneficiary had received the award prior to the filing date.

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. An alien cannot qualify for a given priority date based on factors that did not come into existence until after that date had passed.

While, clearly, there are some independent witnesses who have high opinions of the petitioner and his work, these witnesses do not indicate the impact that the petitioner's work had already had on the field as of the petition's filing date. They either refer to projects that hit their stride after the filing date, or to the overall reputation of Prof. [REDACTED] laboratory at the University of Chicago. There is reason to believe that many of the petitioner's findings are (or were, as of the filing date) preliminary or tentative; and other arguments appear to hinge on the petitioner's mastery of technology developed by others. Such expertise is not a strong argument for a waiver; see *Matter of New York State Dept. of Transportation* at 221, n. 7.

For the above reasons, based on careful consideration of the evidence submitted, we conclude that the petitioner's request for a national interest waiver is, at best, premature. We note that the petitioner holds an H-1B nonimmigrant visa that allows him to continue working at the University of Chicago until 2008. The denial of the instant petition in no way affects the validity of that nonimmigrant visa, and therefore the petitioner has several years of authorization to continue his research while the university pursues other avenues to secure an immigrant visa for the petitioner, should it choose to do so. (If the university has no intention of employing the petitioner after he completes his temporary postdoctoral employment, then a national interest waiver would not compel the university to continue employing him.) 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.