



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

OCT 24 2006

IN RE:

Petitioner:

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:

[REDACTED]

PUBLIC COPY

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.

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2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) 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 seeks employment as a research assistant at Washington University School of Medicine (WUSM) in St. Louis, Missouri. 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 (CIS)] 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 "is an exceptionally outstanding researcher with recognized accomplishments in the field of medical research with a current focus on organ transplantation, include lung, heart, liver and islet. . . . [The petitioner] has very rare microsurgery skill with which can complete most animal transplantation model for medicine and clinical [sic]." Counsel states that the petitioner "has made remarkable and breakthrough contributions, which have significant impact in his research community," and that the petitioner has "authored or co-authored ten (10) research papers . . . made five (5) conference presentations," and "received one (1) highly competitive scholarship from Japan Ministry of Education for his excellent academic and research achievements in the field." Counsel states that these "research accomplishments represent the top level of the research advance and knowledge in the field today, which obviously places him well above his fellow research scientists in the field."

The petitioner's initial submission includes copies of his published articles and unpublished manuscripts. This evidence establishes that the petitioner has been an active researcher in his field, but the articles do not, by themselves, establish the significance of the findings set forth therein. The petitioner also submits a translated copy of a letter dated July 29, 1992, from [REDACTED] Dean of Student Affairs at Niigata University in Japan. Dean [REDACTED] states: "It is my pleasure to inform you that [REDACTED] (Ministry of Education, Culture and Science, Government of Japan) has decided to offer you the Japanese Government [REDACTED] Scholarship, based on recommendation by Niigata University." After studying under this scholarship, the petitioner received his doctorate in 1998. The record does not reveal the criteria for this scholarship, or otherwise support counsel's assertion that the petitioner received the scholarship "for his excellent academic and research achievements in the field." The assertions of counsel do not constitute

evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A note included with the initial submission reads, in part: "Strong testimonial letters from high-ranking experts and/or government officials in the field will be submitted promptly upon request."

On October 26, 2005, the director issued a request for evidence, instructing the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing [the petitioner's] research," as well as copies of other articles that the petitioner himself had written. The director also advised the petitioner that he "must demonstrate to some degree [his] influence on [his] field of employment as a whole."

In response, the petitioner submits copies of additional articles and conference presentations by the petitioner, as well as four witness letters. Counsel states: "All the four authors of testimonial letters are top leaders, authorities, and first-class experts with nationally/internationally recognized research achievements in the field of the beneficiary's work." Most of these witnesses have personally taught the petitioner or participated in his postdoctoral training. Two witnesses are on the faculty of WUSM, and a third served on the faculty of Niigata University while the petitioner was a student there.

Dr. [REDACTED], Professor Emeritus at Niigata University and, now, President of the [REDACTED] of Niigata, states:

[The petitioner] has successfully completed two projects independently including "Significance of abdominal aortic aneurysm surgery in patients more than seventy years," and "High intensity transient signals (HITS) during open-heart surgery relationship between HITS frequency and micro-bubbles." This was a big challenge for him. Not only would it provide the high-throughput approach to accelerate the study on life science, but also we would gain a worldwide advantage in this research area.

The petitioner does not explain the specific relevance, if any, of the above graduate school projects to the petitioner's current work in transplantation research.

Professor [REDACTED], Chief of the Section of [REDACTED] at WUSM, states:

[The petitioner] has been currently playing a very important role in our two main research projects: Liver-mediated multi-system injury and steatotic liver ischemic injury. . . .

There were over 17,000 American patients on the . . . waiting list for liver transplantation, but with only about 5,000 donor organs being available in 2002. This situation is further complicated by the prevalence of steatosis in about 13%-50% of donor livers, which is associated with a high risk of dysfunction and primary non function because steatotic livers tolerate ischemia-reperfusion injury poorly.

Ischemia-reperfusion injury is a complex pathophysiology, the most promising protective strategy is preconditioning which increases the tolerance of fatty and normal liver, NF-kB may activate the immediate early phase of ischemia-reperfusion injury and stimulate the upregulation of proinflammatory cytokines. The aim of this study is to test whether ischemic preconditioning protects the steatotic liver against a prolonged period of ischemia.

As indicated above, the significance of [the petitioner's] studies as well as his accomplishments within the scientific and medical communities cannot be overemphasized.

The study described above was, apparently, still ongoing at the time Prof. [REDACTED] wrote the letter; he describes "[t]he aim of this study" but reports no findings. Prof. [REDACTED] explains that the petitioner possesses skills in certain surgical techniques that are rare among researchers at WUSM, but this in itself is not an argument for a national interest waiver. If WUSM has a permanent opening for a position that requires knowledge of the techniques, then that skill could presumably be listed on an application for labor certification. If the position is only temporary (as the petitioner himself specified on the petition form), then the beneficiary's existing nonimmigrant status already permits his short-term participation in the study.

Professor [REDACTED], Director of [REDACTED] and of the Islet Core Facility at WUSM, states:

[The petitioner] joined my laboratory as a postdoctoral research fellow in 1999. Since one of my research interest[s] is in the area of organ transplantation, I needed a microsurgical scientist who was proficient in cardiovascular and hepatobiliary surgery in murine transplant models. The goal of these studies is to understand the immunobiology of organ rejection in order to develop new strategies to prevent acute and chronic rejection of the transplanted organs in humans. I was very lucky to recruit [the petitioner] since he already had expertise in murine cardiac transplantation. . . . He has a very rare and unique skill in performing microsurgery of heart, liver and tracheal transplantation in murine models that only a very limited number of scientists can carry out successfully within our medical school as well as outside. He is also an integral member of our transplant research group for microsurgical experiments and contributes significantly with other members of our transplant team. Without the specialized skills of [the petitioner], several research projects . . . would be seriously hindered and could not be completed.

Dr. [REDACTED] thus emphasizes not any pattern of past achievement on the petitioner's part, but rather on the petitioner's mastery of valuable surgical techniques and his concomitant value to ongoing studies at WUSM. Dr. [REDACTED] states that the petitioner's departure would jeopardize "several research projects" at WUSM, but he does not specify what steps WUSM has taken to keep the petitioner on staff following the completion of his temporary assignment. Countless research institutions in the United States rely on the temporary efforts of postdoctoral researchers; we cannot create a situation in which a nonimmigrant researcher's assignment to an important project is a *de facto* entitlement to a national interest waiver. While we must consider each petition on its own merits, ongoing participation in a particular project of limited duration is not generally a powerful argument for approval of the waiver.

The only witness who does not appear to have worked directly with the petitioner is Dr. [REDACTED] who is a Professor at [REDACTED] School and Director of the Transplantation Research Center at Brigham and Women's Hospital in Boston, Massachusetts, as well as Past President of the American Society of Transplantation. Dr. [REDACTED] states:

I know Professor [REDACTED] and he said [the petitioner] did a very great work contributing to the organ transplantation and islet transplantation. As very few scientists have the extensive and outstanding skills in Molecular and Cell biology specially microsurgery as he performed.

[The petitioner] is an outstanding research scientist with unusual knowledge and research talent in the field. He has been playing an irreplaceable and critical role in the ongoing projects in Kumar's lab. . . . His research potential is significantly above most of the researchers in the field. I would like to rate him among the top ones. Without doubt, the breakthrough he made would be impossible and the future progress will be adversely delayed in absence of [the petitioner].

Like other witnesses, Dr. [REDACTED] focuses on the difficulty of replacing the petitioner in his current position, rather than on any history of specific achievements that have demonstrably influenced the field to a substantial degree. It is clear from the wording of the statute and regulations that exceptional ability in the sciences is not, by itself, grounds for a waiver; aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement. Therefore, the general assertion that the petitioner possesses above-average surgical and research skills cannot suffice to qualify him for the waiver, which is a special immigration benefit over and above the underlying immigrant classification. Also, the petitioner cannot establish the relative significance of his work simply by describing it.

The director denied the petition, stating: "the record does not establish that the petitioner's research accomplishments distinguish him from those in the field who have long since completed their education and postdoctoral training." The director discussed the witness letters and enumerated the evidence of record, and stated: "Frequent citation by independent researchers . . . demonstrates more widespread interest in, and reliance on, the petitioner's work. . . . [T]he record is devoid of evidence that other scientists have cited the petitioner's work in scholarly works."

On appeal, counsel contends that the director "only took into consideration partial evidence of the petitioner's conference presentations and publications" because the director did not list all of those materials in the decision. The denial did not rest on the quantity of the petitioner's publications and presentations, so much as on the absence of objective evidence that the petitioner's work has had a significant impact outside of his own circle of collaborators and mentors.

Regarding the impact of that work, counsel states that the appeal includes "evidence that his research results have been cited ten (10) times nationally and internationally." We note that, in the request for evidence, the director had specifically instructed the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing [the petitioner's] research." In response to that notice, the

petitioner did not submit any such materials or explain his failure to do so. The director was, therefore, entirely justified in finding that the petitioner had submitted no such evidence. Counsel, on appeal, does not explain why the petitioner waited until the appellate stage to submit evidence that the director had very specifically requested earlier.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not discuss this evidence in detail. The AAO finds no error in the director's handling of this issue.

We note counsel's assertion that, "[c]ompared with numerous approved NIW [national interest waiver] petitions this law office has filed with USCIS to date, the petitioner's qualifications are well above average." CIS maintains no comprehensive database of the specific evidence included in every approved petition, and the AAO rarely reviews the records of approved petitions (except on certification), so there is no objective way for the AAO to determine whether counsel's assertions are accurate, or whether the AAO would have concurred with the findings of eligibility in those instances. In terms of the quantity of the petitioner's published output of a dozen or so articles, the record indicates that three of the petitioner's four witnesses each claim to have written over 200 published articles. Thus, the only objective means of comparison that the petitioner has made available does not readily demonstrate that the petitioner stands out among researchers to the extent claimed.

The only exhibit accompanying the appeal that is not either redundant or untimely is a new letter from Prof. [REDACTED]. Much of this letter is taken word-for-word from the professor's earlier letter, including the assertion that research at WUSM cannot continue in the petitioner's absence. As we have already noted, the petitioner's employment at WUSM is inherently temporary, and as such will come to an end regardless of whether or not the petitioner receives a waiver. The record does not objectively establish the petitioner's track record as a particularly influential researcher.

A new passage in the letter reads: "labor certification is not appropriate in his case. Because his expertise is relatively unique, there is no conflict between him and comparable U.S. workers in seeking employment in organ transplant research. In fact, the United States is in great need of such talented organ transplant researchers." The absence or shortage of other qualified workers does not make labor certification inapplicable or inappropriate; to the contrary, such an absence or shortage creates the very conditions that are conducive to approval of an application for labor certification. Labor certification is predicated on the claim that qualified U.S. workers are unavailable; Prof. [REDACTED] appears to stipulate this very point on appeal.

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.