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U.S. Citizenship
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FILE: LIN 06 063 51838 Office: NEBRASKA SERVICE CENTER Date:

APR 03 2008

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:

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.

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 on appeal. The appeal will be sustained and the petition will be approved.

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 research scientist at the University of Illinois at Urbana-Champaign. 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.

On appeal, the petitioner indicates that a brief will be forthcoming within 30 days. To date, a year after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

Section 203(b) of the Act states, in pertinent part:

(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 the 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 (Commr. 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 also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory letter, the petitioner described his work:

Under the supervision of [REDACTED], Professor of Chemistry and Biophysics, my research is focused on the design and synthesis of bisphosphonates (a class of compounds with two phosphate groups) and related compounds as anti-cancer and anti-infectious drugs.

. . . [M]y current projects have great potential to develop several new drugs to treat various deadly diseases, such as blood cancers (leukemia, lymphoma and myeloma) and HIV infection. . . .

Immunotherapy is of considerable current interest and importance since many cancers are resistant or even refractory to traditional treatments, such as chemotherapy, radiation and surgery. Cells of the immune system, including $\gamma\delta$ T cells, natural killer (NK) cells and natural killer T (NKT) cells are of particular interest, since they have potent antitumor effects. . . . [B]isphosphonates . . . stimulate $\gamma\delta$ T cells and have recently been shown to have considerable activity in the treatment of relapsed/resistant lymphoma and myeloma in clinical trials. . . .

I recently made a series of novel pyridinium-1-yl bisphosphonate compounds . . . which are potent $\gamma\delta$ T cell stimulators . . . and are 500 times more active in stimulating $\gamma\delta$ T cells than is pamidronate used in [recent] clinical trials. Further development and optimization of these compounds could potentially lead to a new drug for immunotherapy of blood cancers and other types of cancers. . . .

I am currently also participating in a project in [REDACTED]'s group to develop bisphosphonate compounds . . . as potent inhibitor[s] of HIV reverse transcriptase. . . .

Bisphosphonate compounds . . . potentially inhibit the growth of a variety of parasitic protozoa and they are therefore potentially [a] new class of drug to treat tropical diseases, such as Chagas' disease and malaria caused by these parasites.

The petitioner submitted letters from witnesses whom he described as "experts in the field, including university Professors, a Director of a pharmaceutical company and Vice President of a national professional organization. . . . It is noteworthy that three of the referees do not know me personally and they made their independent judgments based on my qualifications provided and their knowledge in the field of drug discovery." We will consider examples of these letters here. We note that two of the three "independent" witnesses, [REDACTED] of the University of Iowa and Professor [REDACTED] of the Venezuelan Institute for Scientific Research, have collaborated with [REDACTED] and share author credit with the petitioner on published articles in the record.

The most independent witness appears to be [REDACTED], Senior Vice President of Research at the Leukemia & Lymphoma Society, stated that the petitioner "has already produced several novel compounds which are much more effective than those reported previously (including those in clinical trials to treat relapsed/resistant lymphoma and myeloma). These new drugs have the potential to significantly impact the treatment of leukemia, lymphoma and myeloma within the next 3-5 years" (emphasis in original).

[REDACTED] stated that the petitioner "has been the key member of my group. . . . He and our synthetic team have made several hundreds of novel compounds. . . . He succeeded in making several types of novel 'pro-drugs' (protected drugs that could be metabolized to real drugs inside [the] body) to increase the oral availability. He also plays an important role in drug design and testing."

Professor [REDACTED] stated: "[REDACTED]'s group has found that certain nitrogen-containing bisphosphonates" act against parasites that cause malaria and other diseases in impoverished countries, "leading in some cases

to complete parasitological cures (in mice).” F [REDACTED] added that many of these parasites have shown signs of drug-resistance, making the need for new drugs all the more urgent.

[REDACTED], who supervised the petitioner’s postdoctoral training at the Tokyo Institute of Technology, stated that the petitioner “has made several stellar advances in synthetic organic chemistry, and his accomplishments have generated international attention.”

As objective evidence of the impact of his research, the petitioner submitted information from a citation database identifying “122 publications citing my research articles and patents,” including “75 . . . produced by other research groups, as of December 2005.” The petitioner submitted copies of sample articles containing citations of his work.

On March 16, 2006, the director issued a request for evidence, instructing the petitioner to “demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of your services by making available to U.S. workers the position” the petitioner currently holds. The director also requested evidence of “a past record of specific prior achievement which justified projections of future benefit to the national interest” and the petitioner’s “ability to serve the national interest to a substantially greater extent than the majority of [the petitioner’s] colleagues.”

In response, the petitioner asserted that the heavy citation of his published work, among other things, demonstrated his impact not only on academia but also the pharmaceutical industry. The petitioner submitted new letters from some prior witnesses as well as [REDACTED] of the University of Pittsburgh and [REDACTED] of the University of California, San Diego. Prof. [REDACTED] focused on the petitioner’s “design and synthesis of bisphosphonate and related compounds as potent inhibitors of HIV reverse transcriptase, which have potential in controlling HIV resistance to AZT therapy.”

[REDACTED] stated that his laboratory, in collaboration with [REDACTED]’s laboratory, had discovered a new technique that renders drug-resistant *Staphylococcus aureus* “susceptible to attack by the immune system” by blocking the formation of a pigment that normally protects the bacteria. This latter development, by itself, cannot establish eligibility for the waiver, because there is no evidence that this work began before the petition’s filing date. An immigrant petition can only be approved if the beneficiary is eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). This new development, nevertheless, demonstrates the petitioner’s continued involvement in significant drug development research. The developments described by [REDACTED] and by [REDACTED] are both relevant to continuing efforts to combat drug-resistant pathogens.

[REDACTED] in a new letter, noted that he receives many applications for each position that opens in his laboratory, and the labor certification process would therefore likely result in the hiring of a United States worker from among that applicant pool. Prof. [REDACTED] stated that the petitioner “would certainly make substantially greater contributions than the vast majority of the US workers,” and therefore it would be in the national interest to ensure that the petitioner is not replaced.

The director denied the petition on February 27, 2007. The director acknowledged the intrinsic merit and national scope of the petitioner's work, as well as the strongly favorable character of the witness letters, but found that the petitioner had not effectively demonstrated that the labor certification process would work against the national interest in this instance. The director noted that the "minimum required qualifications" for a given position are specific to a given position, rather than "some imaginary rock-bottom standard" that would compel the hiring of incompetent or poorly-qualified United States workers.

On appeal, the petitioner emphasizes the widespread citation of his past work and his corroborated role as a key researcher in the development of several important new drug candidates. The petitioner adds that he will supplement the record at a later date. That supplement to the record has not materialized, but nevertheless the appeal as it stands is substantive and persuasive when viewed in the context of the record as a whole.

The director was entirely correct in asserting that the term "minimum" in reference to a worker's qualifications does not require an employer to select the least qualified applicant or an applicant who does not possess the skills necessary for a given position. This, however, is only part of the picture. We find that the director did not give sufficient weight and consideration to the objective evidence of the petitioner's past influence on his field, which shows that the impact of the petitioner's work stretches well beyond Prof. Oldfield's circle of collaborators.

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 field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.