



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 06 014 51548

Office: NEBRASKA SERVICE CENTER

Date:

MAR 05 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 (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. At the time he filed the petition, the petitioner was a postdoctoral fellow at Johns Hopkins University (JHU) School of Medicine, Baltimore, Maryland. The petitioner was later promoted to a research associate. 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:

(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 (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.

The petitioner’s initial submission included a 42-page introductory statement in which the petitioner discussed the evidence and his qualifications for the waiver. The petitioner referred to himself in the third person throughout much of this statement. Excerpts from this statement follow:

Cystic fibrosis (CF) . . . is one of the most common lethal inherited diseases and results from mutations in the cystic fibrosis transmembrane conductance regulator (CFTR) gene. The most common mutation worldwide is a three-base-pair deletion that results in the loss of phenylalanine at position 508 ($\Delta F508$) of CFTR. . . . Most patients with $\Delta F508$ are pancreatic insufficient and do not transport significant amounts of chloride in the sweat duct or nasal epithelium, although variability in pulmonary outcome has suggested that if $\Delta F508$ CFTR levels could be increased in the cell membrane, clinical outcome might improve. . . .

Beneficiary is recognized by his peers as playing a prominent role in cystic fibrosis research, he is integral to interdisciplinary projects from transgenic mice, functional genomics and proteomics to therapeutics projects on cystic fibrosis. . . .

Beneficiary has received solid training in the fields of functional biology and genomics research, and has made significant accomplishments and contributions greatly recognized by peers and institutions. Beneficiary has mastered cutting edge sophisticated experimental techniques that will be critical in development of therapeutics for various disease[s] and disorders. Consequently, Beneficiary is highly praised as outstanding and exceptional by his peers, and his expertise plays a critical role in finding new treatment for cystic fibrosis, corneal disease and other diseases. . . .

Beneficiary's research accomplishment is certainly at a higher level than his peers. He has published thirteen peer-reviewed papers in major International journals. . . .

A labor certification process seeks personnel with just minimum requirements of education and experience. Many essential qualities that Beneficiary has, which are extremely important to serve the national interest, would neither be taken into account nor be articulated in a labor certification process. Failure to consider these factors could result in improper replacement of Beneficiary. Since Beneficiary will serve the nation to a substantially greater degree than anyone with minimum qualifications, Beneficiary's absence would deprive the nation of his exceptional and crucial contribution and therefore damage the national interest. . . .

My interest and potential experiments to develop CF therapeutics would be lost if I'm not given an opportunity to continue this work. Indeed it would take years to bring someone else to my level of experience.

As a matter of fact, I am the only molecular biologist with expertise in both functional biology and genomics in this interdisciplinary project in which this kind of combinatorial approach is critical and fundamental to rescue the CFTR defect in CF. . . .

My ongoing research holds the keys to understand the mechanism of various diseases applying state of [the] art functional biology and bioinformatics tools. This research will provide insights into the cause and treatment of cystic fibrosis, corneal wound healing and transplant, LASIK eye surgery, inflammatory disorders, neurodegenerative diseases and cancer. I hold a critical expertise in cutting edge technologies in modern biomedicine research and recognized by my peers for the same.

The petitioner submitted copies of published articles and unpublished manuscripts, and evidence of several conference presentations. These materials demonstrate that the petitioner has been prolifically productive in his field, but eligibility for the waiver requires more than simply producing work. The petitioner must also establish the impact of that work. The petitioner claimed that his work has been widely cited; to support this assertion, the petitioner submitted copies of five articles containing independent citations of his published

work. These five articles are not *prima facie* evidence that the petitioner's work is more widely cited than that of others working in the same area of inquiry.

The petitioner submitted several witness letters in support of the petition. Most of the witnesses have taught, supervised, or collaborated with the petitioner. We shall discuss examples of these letters here.

[REDACTED] has supervised the petitioner's most recent work at JHU. She described her project as one that seeks "to advance our understanding of the pathogenesis of Cystic Fibrosis (CF) and to accelerate drug development for CF" and stated:

Upon arrival in my laboratory, [the petitioner] performed in an outstanding manner and has been successfully working on these research goals. He has proved his qualification as an outstanding, hardworking, dedicated, and skillful intellectual scientist and is ready for a faculty appointment. His job could not be performed by minim[ally] qualified workers.¹

[The petitioner] is an indispensable researcher; I would rank him as one of my best postdoctoral fellows. . . .

His research work on understanding the function of lumican has several implications from cornea to tumor biology. His research work is well cited by others in fields of cornea and cancer biology. He was first to describe the implications of modulating lumican for therapeutic intervention for corneal wound healing, corneal transplant, other inflammatory diseases and cancer signaling. His research work laid the groundwork for further development of lumican as therapeutics. . . .

His present research on cystic fibrosis . . . is leading to the discovery of a novel therapeutic pathway in cystic fibrosis. . . . I strongly feel that his continued effort in my lab will lead to the development of novel therapeutics for cystic fibrosis.

[REDACTED]'s letter shares several passages with a letter from the petitioner's previous mentor, [REDACTED]. Both letters, for instance, contain the sentence: "He has excellent bench skill and has a strong background in diverse modern biology techniques." In both letters, that sentence is preceded by an evaluation of the petitioner as "an indispensable researcher," and followed by praise for the petitioner's training "in modern bioinformatics tools" and "education and training in microbial genetics, molecular biology, immunology and signal transduction" [REDACTED]'s letter added a reference to "cell biology").

No fewer than five of the ten newly-written witness letters (two others are photocopies of letters from 1999) contain the exact sentence: "His research work on understanding the function of lumican has several implications from cornea to tumor biology." We acknowledge that these witnesses have endorsed the

¹ There is no indication that the petitioner, if he were to leave this temporary postdoctoral position, would be replaced by a minimally qualified worker. [REDACTED] stated that she chose the petitioner "out of several outstanding candidates."

petition, but the obvious common authorship of at least portions of their letters diminishes the weight we can put on the exact wording thereof.

Two initial witnesses appear not to have collaborated directly with the petitioner. Both of these witnesses discussed the petitioner's work in positive but general terms. [REDACTED] Associate Professor at Harvard Medical School, stated:

I met [the petitioner] at [the] 23rd Biennial Cornea Research Conference in Oct' 2003 and was impressed by his research on functional analysis of extracellular matrix proteoglycan, lumican. His research work on understanding the function of lumican has several implications from cornea to tumor biology. . . .

I consider [the petitioner] to have tremendous potential as a talented and bright scientist in our research community. His distinguished research contributions have been acknowledged internationally. . . . His outstanding contribution in the field of extracellular matrix proteoglycan and signal transduction, along with his outstanding ability and reputation as a researcher make him an ideal candidate for immigration to this country as an outstanding researcher.

Associate Professor at the University of Maryland School of Medicine, stated:

[The petitioner's] scientific achievements are reflected from his CV. His present research work is directed towards understanding the endoplasmic reticulum associated degradation (ERAD). The atypical function of ERAD is associated with the pathogenesis of various diseases ranging from malignancies, hypertension, [and] neurodegenerative diseases, to muscle wasting, etc. ERAD is also involved in degradation of misfolded $\Delta F508$ cystic fibrosis transmembrane regulator (CFTR) and hence leads to the pathogenesis of cystic fibrosis (CF). His research work to elucidate the function of components of ERAD is leading to identification of novel therapeutic targets for CF and other ERAD related disorders.

[The petitioner] will be critical in developing novel therapeutic approaches for the treatment of CF. His research work will be indispensable in understanding the mechanisms of the disease and establishing effective methodologies for the prediction of clinical prognosis and the cure. He is an invaluable asset to our scientific communities. He has made a number of original contributions of major significance to the medical research.

[REDACTED] did not identify any particular "original contributions of major significance." To identify the petitioner's areas of inquiry is not to specify the contributions the petitioner has made in those areas.

On August 16, 2006, the director issued a request for evidence, instructing the petitioner to submit further documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director specifically requested "additional documentary evidence which will indicate that [the petitioner] had,

as of the priority date of this petition, a degree of influence on [the] field which distinguishes [the petitioner] from other scientists with comparable academic or professional qualifications.”

In response, the petitioner submitted additional letters, published articles, and other materials relating either to the petitioner’s own work or to the general area of research.

Chair of Pediatrics at the University of Florida, stated:

[The petitioner’s] unique ability and valuable expertise in functional genomics is leading to development of new and novel target sites against the dread disease, CF. . . . It is essential for the continuing productivity of research and the development of new therapeutic targets for CF that [the petitioner] continues to design experiments that provide critical information on the sites of inhibition.

. . . His distinguished research contributions have been acknowledged internationally. . . . [The petitioner’s] degree of influence on his research field is clearly demonstrated by international recognition of his research work.

Associate Professor at the University of Missouri-Columbia, stated:

I know [the petitioner] as he is one of the pioneers in the functional application of cDNA microarray at Johns Hopkins Medical Institution. . . .

[The petitioner] has [a] remarkable degree of influence on his and other areas of health sciences; often scientists call him for his expertise and opinion on their research problems. . . . I recognize him as a well established young scientist of international acclaim.

(Emphasis in original.) The quoted letters include claims that the petitioner has earned international recognition for his work, but the record contains no objective evidence to support those claims. International recognition is not a requirement for the national interest waiver, but if the petitioner claims such recognition (either directly or by submitting witness letters containing that claim), then the petitioner’s credibility is diminished unless the petitioner is able to show that such claims are true. As with the initial letters, the new letters are strongly complimentary of the petitioner and his work, but some of the shared language found among initial letters reappears in this second submission.

The petitioner submitted numerous published articles describing his research project in laboratory. A number of these articles are identically worded, which suggests that they were simply copied from a JHU press release; some versions of the story, indeed, credit JHU as the source.

The director denied the petition on February 15, 2007. The director acknowledged the intrinsic merit and national scope of the petitioner’s area of research, but found that the petitioner had not sufficiently set himself apart from other researchers in the field.

On appeal, the petitioner submits a new letter from [REDACTED], who states that the petitioner's "recent discovery of a novel treatment for cystic fibrosis has been extensively cited by media (published and televised) and is one example of his leadership and exceptional expertise." [REDACTED] does not elaborate. It appears that [REDACTED] refers to the multiple articles taken from a JHU press release issued in 2006 (after the petition was filed). The record does not establish the response of the mainstream media (as opposed to specialized professional publications) to this press release, nor does the available evidence suffice to show that JHU's announcement garnered more attention than is typically accorded to press releases from major research universities.

The petitioner asserts that his continued involvement in his present research cannot be guaranteed without a national interest waiver. The petitioner's H-1B nonimmigrant status permits him to work at JHU through July 31, 2009, and the denial of the present petition does not affect that status. The AAO notes that JHU appointed the petitioner to his research associate position for a one-year period, which does not readily suggest that JHU contemplates employing the petitioner long-term, with or without a waiver. More significantly, the petitioner's argument has more to do with his own interest in securing further employment than with the national interest. Similarly, the argument that the petitioner cannot obtain federal funding without permanent resident status presumes, rather than demonstrates, eligibility for the benefit sought.

The petitioner asserts that he has demonstrated that he "is an internationally known and highly respected scientist . . . who has risen to the top of [his] field of endeavor." To repeat an earlier observation, the petitioner need not be at the top of his field to qualify for the waiver, but exaggerated and unsupported claims are not without consequences for the petitioner's overall credibility. There remains a quantity of objective evidence, such as copies of scholarly articles, but this evidence does not inherently establish the value of the petitioner's work relative to that of others in the field.² Witness letters promise some degree of assessment of the petitioner's work, but the presence of identical passages in different witness letters indicates that the witnesses were furnished with finished or drafted letters, or at least instructed in what to write.

The most objective evidence in the record appears to indicate that the petitioner's work attracted the greatest notice well after the petition's October 2005 filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). At best, the filing of the present petition appears to have been premature, based in large part on the anticipated reaction to research that the petitioner had only recently begun when he filed the petition.

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

² As an example of an article citing his work, the petitioner submitted a copy of "Analysis of Intimal Proteoglycans in Atherosclerosis-prone and Atherosclerosis-resistant Human Arteries by Mass Spectrometry" by [REDACTED] *et al.*, *Molecular & Cellular Proteomics* 4: 1350-1357, 2005. The article includes a sentence about the role of lumican in wound healing, followed by a collective citation of four source articles. The petitioner is a co-author of two of the four cited articles. The citation draws no distinction between the petitioner's two articles and the other two articles.

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.