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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: Nebraska Service Center Date: JAN 06 2003

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)

IN BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Erinath Hayward
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations 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 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.

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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 petitioner holds a Ph.D. in cardiac electrophysiology from Suzhou Medical College. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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 Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service 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.

We concur with the director that the petitioner works in an area of intrinsic merit, cardiac research, and that the proposed benefits of his work, improved treatment of cardiovascular disease, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications will.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, note 6.

The petitioner has submitted reference letters from his immediate circle of colleagues and his published research abstracts and articles with no evidence this work has been widely cited. In addition, the petitioner has submitted six awards from China, upon which counsel relies heavily in his arguments.

Dr. Hon-Chi Lee, the petitioner's direct supervisor at the University of Iowa,¹ asserts that the petitioner has "superb skills in basic electrophysiology" including mastering the "patch clamp technique, which is among one of the most demanding experimental techniques." As stated in Matter of New York State Dept. of Transportation, special or unusual knowledge or training 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. Id. at 221. Dr. Lee continues:

The project [the petitioner] was involved with, the role of G-protein in the regulation of the cardiac sodium channels, was extremely challenging. Yet, that project was completed within a period of time that other postdoctoral fellows would probably take twice as long. The quality of the results is in particular impressive. [The petitioner] identified that certain so-called "signal transducer" proteins in the plasma membrane of the heart can regulate the sodium channels, which play a key role in determining how fast electrical impulses would conduct in the heart, through special structures known as caveolae. This finding is very important because it can help us understand how the excitability of heart cells is regulated.

Since joining my laboratory in February 1998, I have had daily interactions with [the petitioner] who has been involved with several important projects. The first group of projects involves the role of lipid metabolites on the regulation of ion channels in heart cells and is funded by a Program Project Grant on Lipids and Lipid Metabolites from the National Institute of Health. This is an area that has not been extensively studied. [The petitioner's] results so far suggested that the metabolites of arachidonic acid, which is an important fatty acid found in the membranes of heart cells, have important regulatory function on cardiac ion channels. He found that epoxyeicosatrienoic acids (EETs) which are converted from arachidonic acids by heart cells, activate an important potassium channel known as the ATP-sensitive potassium channel, K_{ATP} . K_{ATP} channels were thought to be opened only during conditions when cellular ATP is depleted such as heart attacks. [The petitioner] found that EETs which are present in heart cells can open the K_{ATP} channels even in the presence of physiological concentrations of ATP. This finding is very important, because this is the first time that direct evidence is found that confirm K_{ATP} channels can be active and may have important functions under normal conditions. [The petitioner] also found that EETs can inhibit the cardiac sodium channels. Detailed characterization showed

¹ In response to the director's request for additional documentation, counsel refers to Dr. Lee as "of Harvard Medical School and Harvard University" and a "**nationally recognized expert** in the field of cardiovascular physiology and electrophysiology." (Emphasis in original.) While Dr. Lee may have obtained his degree from Harvard University, the record contains no evidence that he is a nationally recognized expert. It remains, he is the petitioner's supervisor at the University of Iowa.

that EETs behave like some common antiarrhythmic drugs which suppress the development of life-threatening rhythm disturbances. This is particularly important since EETs are produced in much greater quantities such as heart attacks, and this could be one mechanism that the heart may obtain protection in the development of lethal arrhythmias. Another project that [the petitioner] is involved with is to study the role of alpha-2 adrenergic receptors on ion channels in mammalian Purkinje cells. This project is funded by a Merit Review Award from the Department of Veterans Affairs. We are the first group to report the presence of alpha-2 adrenergic receptors in mammalian hearts. Our preliminary results suggest that the alpha-2 receptors may suppress the transient outward potassium currents and prolong the Purkinje action potential duration. This project has important implications especially in characterization of a novel receptor system in the heart, as well as determining the electrophysiological effects of these receptors in the heart. [The petitioner] performed all the experiments with expert skill. He is thorough, analytical, and insightful in the handling of data. He is knowledgeable, self-critical, and would only accept results that are of the best qualities and interpretations that have been vigorously tested.

In my opinion, [the petitioner] is a rare bird. His skills and knowledge in electrophysiology are of the highest standards. His scientific findings have the potential to open up new areas of research and may help improve our understanding of the basic principles of cardiac electrophysiology.

All published research has the potential to open up new areas of research and add to the pool of knowledge. It remains, the record does not contain letters from independent researchers who have been influenced by and are applying the petitioner's results to their own research. In a second letter submitted in response to the director's request for additional documentation, [redacted] noted that the petitioner had authored an additional four articles submitted for publication and that "all these are major studies involving novel findings that will significantly advance the area of our research and the manuscripts are submitted to the very best journals in the area of our research." [redacted] concludes, "these findings can potentially help us to develop better approaches in the diagnosis and treatment of heart disease and hypertension." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Articles submitted for publication after the date of filing cannot establish the petitioner's eligibility at that time. Moreover, assertions that the petitioner's findings are "potentially" groundbreaking support the director's conclusion that the petition was filed prematurely, before independent researchers could confirm the importance of the findings in articles which cite the petitioner's work.

[redacted] professor at the University of Iowa in whose laboratory the petitioner worked, asserts that the petitioner made significant findings in his research funded by the National Institute of Health. We note that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent which justifies a waiver of

the job offer requirement. [REDACTED] en discusses the important role played by Na⁺ in the propagation of electrical signals in the heart and continues:

Although it has been shown that G-proteins modulate Na⁺ channel activity through different pathways, the mechanism of these effects have been enigmatic. Using patch clamp techniques, [the petitioner] was able to provide data suggesting that one pathway in the enhancement of cardiac Na⁺ current by stimulatory G protein α -subunit was due to an increase in the number of functional Na⁺ channels in the membrane. The increase in the number of functional channels was without a change in the voltage-dependence and kinetics of the Na⁺ channel. [The petitioner] also demonstrated that the functional region of the G protein α -subunits is near the N-terminus of the protein. This was a very difficult and demanding project. Without [the petitioner's] extremely diligent work and his outstanding technique, this study would not have been successful within such a short time. [The petitioner's] findings are important because his findings suggest a new pathway of sodium channel regulation.

Dr. Jiang Weng-Ping, a professor at Suzhou Medical College in whose laboratory the petitioner worked, writes:

From 1991-1995, [the petitioner] was involved in a research project on the mechanism of Endothin-induced arr[h]ythmias, which is one of the strongest angiotensin[s] in [the] human body and the value is 10 folds higher during cardiac ischemia.

To my surprise, [the petitioner] not only mastered several difficult electrophysiologic techniques within a short period of time, but he also used them very successfully in cardiac arrhythmic research. His special skills and strong background in cardiac electrophysiology had proven to be great value to my research project. He investigated the effects of endothin-1 on arrhythmia on cardiac tissue and ionic channel levels and found that endothin can induce cardiac arrhythmia via enhancements of L-type calcium activity and potassium channel activity during ischemia.

He was the first person to prove such hypotheses. Later, other investigators confirmed his findings. [The petitioner's] findings are significant because they may provide clues to understand the mechanism of development of arrhythmias during ischemia and heart infarction and help diagnose and treatment [sic] patients suffering from coronary heart disease.

[The petitioner's] research findings were published in J. of Chinese Medicine 108(8): 618, 1995, a top professional journal in the field of study in China. In recognition [of] his outstanding achievements in medical researches [sic], [the petitioner] was conferred the following awards:

1. Science Development Award of National Health Institute, P.R. China, 1997.
2. Chinese Military Science Development Award, 1997.
3. National Science Development Award of Nuclear Industrial Department, P.R. China, 1997.

As stated above, all published research contributes to the pool of scientific knowledge. Producing results that “may provide clues to understand” how heart disease develops is not a groundbreaking result. In addition, while [REDACTED] asserts that the petitioner was the first to prove a certain hypothesis which has been confirmed by other researchers, the record contains no support of this assertion, such as evidence of articles citing the petitioner’s work.

The above letters are all from the petitioner’s collaborators and immediate colleagues. While such letters are important in providing details about the petitioner’s role in various projects, they cannot by themselves establish the petitioner’s influence over the field as a whole. On appeal, counsel relies on two non-precedent decisions from the Administrative Appeals Office (AAO). According to the summary submitted by the petitioner, one of those cases makes specific reference to “experienced witnesses with no immediate connection to the petitioner, demonstrating that the petitioner’s reputation has traveled beyond her circle of colleagues and former professors.” The petitioner has not submitted independent witness letters in this case. The summary of the other case, while stating that multiple Chinese awards and letters from “supporters” were significant in that case, does not specify whether those supporters were all the immediate colleagues of the petitioner. In addition to not knowing all the facts of that case, it is a non-precedent decision and, as such, is not binding on us.

The petitioner further submitted the following awards:

1. Second degree award for “recording of His-bundle EKG in ten patients of congenital cardiac disorders,” from the Department of Health of Fujian Province in 1987,
2. Second degree award for “applied research on clinical cardiac electrophysiological studies” from the Department of Health of Fujian Province in 1995,
3. Second degree award for “application of invasive cardiac treatment on tachycardiac arrhythmias” performed between 1990 and 1992 from the Science and Technology Association of Fujian Province in 1995,
4. Third degree award for “application of patch clamp techniques” from the Ministry of Health of China in 1996,
5. Third degree award for “basic and clinical researches [sic] on Cardiac Arrhythmias” from the National Education Committee of China in 1997, and
6. Third degree award for his work on the “effects of endothelium on cardiac electrophysiology and cardiac trigger activities” from the Department of Supplies of the Chinese Navy in 1996.

Counsel asserts throughout the proceedings that these awards are major, noting that three of them are from the Chinese central government. In response to the director's request for additional documentation, counsel asserts that the petitioner's awards were "covered by major national newspaper[s] in China." On appeal, counsel goes so far as to assert that these awards are sufficient evidence that the petitioner is nationally acclaimed and, thus, would qualify as an alien of extraordinary ability under 8 C.F.R. 204.5(h).² The assertions of counsel do not constitute evidence. Matter of Ohaighena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no official information regarding the significance of these awards or evidence of national media coverage in China. The petitioner also submitted a letter welcoming him as a member of the Biophysical Society upon receipt of his dues. In response to the director's request for additional documentation, the petitioner submitted an application for membership to the society which indicates that two recommendation letters from current members are required and asks for three principal publications. Recommendation letters from colleagues and three publications are not significant accomplishments in the petitioner's field.

In addition, the regulations provide that "recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations," 8 C.F.R. 204.5(k)(3)(ii)(F), and "memberships in professional associations," 8 C.F.R. 204.5(k)(3)(ii)(E), are evidence of exceptional ability, a classification normally requiring a labor certification. We cannot conclude that meeting one, two or even the requisite three requirements for an alien of exceptional ability is evidence that the labor certification requirement should be waived in the national interest. As stated in Matter of New York State Dept. of Transportation:

Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Id. at 218-219.

Finally, the petitioner submitted several published abstracts and articles. The number of abstracts and articles is notable. Nevertheless, the Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time

² We note that this classification requires that the alien meet at least three of the criteria listed at 8 C.F.R. 204.5(h)(3).

academic and/or research career,” and that “the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.” Thus, this national organization considers publication of one’s work to be “expected,” even among researchers who have not yet begun “a full-time academic and/or research career.” This report reinforces the Service’s position that publication of scholarly articles is not automatically evidence of influence on the field; we must consider the research community’s reaction to those articles.

As stated above, the petitioner has not submitted evidence that his work has been widely cited. We note again that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, *supra*. Therefore, any evidence of citations submitted on motion must reflect that the petitioner had already been widely cited at the time of filing the petition. In response to the director’s request for additional documentation, counsel refers to “recent feedback from peer review notes.” Those notes, however, are not in the record. As stated above, the assertions of counsel are not evidence. Moreover, any article published in a peer-reviewed journal must be determined to be original and significant by the reviewers. Finally, on appeal, the petitioner submits evidence that his article has been accepted by the *Journal of Physiology* and evidence of this journal’s esteem. Again, this article was not published at the time of filing. While publication in a highly esteemed journal can increase the chance that one’s work will be influential and widely cited, at the time of filing, the petitioner’s article had not yet appeared in this journal and, thus, had not been widely cited.

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, 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.