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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 17 2003

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)

IN BEHALF OF PETITIONER:

[redacted]

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth 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 sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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 biomedical/nutritional researcher. At the time of filing, the petitioner was a doctoral student at the University of Wyoming, having begun those studies three months before filing the petition. 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.
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> (B) Waiver of Job Offer.
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> > (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 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.

Counsel describes the petitioner's work:

> [The petitioner's] initial research on kidney stones focused on treating kidney stone patients with Chinese herbal medicine and acupuncture. Her research at the Central Laboratory [of the Shanghai Qigong Research Institute] has been one of distinction and great achievement, clearly distinguishing herself from her peers. . . .
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> [The petitioner] continued her commitment to kidney stone research when she enrolled in the Master's program in Nutrition at the University of Wyoming in 1994. . . . [H]er research focuses on the effect of dietary factors on urinary calcium excretion in order to gain insight into the formation of kidney stones. [The petitioner's] discoveries have provided medical specialists with new methods to treat kidney stone patients.

Most kidney stones consist of calcium oxalate, and the petitioner's work is largely concerned with the absorption of oxalate. Counsel indicates that the petitioner's work has led to "standard therapy for patients with kidney stones" and that the petitioner's published articles "have continued to be some of the primary data used in the area of kidney stone research." Counsel contends that the

petitioner merits a national interest waiver because her accomplishments "prove that she is especially qualified to make significant strides that are likely greater than those of her peers."

Along with copies of her scholarly articles, the petitioner submits several witness letters. Professor Michael Liebman, who directs the petitioner's doctoral research, states that the petitioner "was a key player in . . . cutting-edge research as her laboratory expertise was indispensable to the achievement of the study's goals." Prof. Liebman states:

> [The petitioner's] research has also significantly contributed to our understanding of how dietary practices can influence risk of stone formation. Partially based on her work, it is now accepted that intestinal absorption of dietary oxalate can make a significant contribution to urinary oxalate excretion and can thus be an important risk factor for kidney stone formation. [The petitioner's] research also helped establish that consumption of rich sources of calcium and magnesium, in conjunction with high-oxalate containing foods, likely exerts a protective effect against the formation of calcium oxalate kidney stones. It is most unusual to find someone at [the petitioner's] stage of career to have made so many significant contributions to this field.

Apart from individuals who have worked with the petitioner at the University of Wyoming or at Shanghai Qigong Institute, three other individuals have provided letters on the petitioner's behalf. The strongest of these independent endorsements comes from Dr. Hongwei Sun, research faculty instructor at Baylor College of Medicine, who states "[a]lthough I have never worked with [the petitioner], I have read all her papers published in the distinguished journals. . . . She has already made marked contributions in this field." Dr. Sun adds that the petitioner's "discoveries are very significant and will provide medical specialists novel methods to treat kidney stone patients." Professor Linda K. Massey of Washington State University, Spokane, states that the petitioner "is co-author on three published reports of great significance to the field of diet and kidney stones. Without her assistance, both in the laboratory and intellectually, these papers would not have been published."

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director asserted that the overall importance of kidney stone research is not sufficient to establish eligibility for the waiver.

On appeal, counsel argues that the petitioner has submitted "several letters from respected experts in medical science, including letters from experts outside of her 'immediate circle of colleagues' that [indicate] she has established an impressive record of past achievements that are already reaping benefits for the national interest and that are above what would be expected from others with similar minimum qualifications." The only new exhibit submitted on appeal is a letter from Dr. Michael Liebman, asserting that the petitioner made "critical" contributions to the published articles discussed above, and "continues to play a key role in this ongoing research."

Counsel is correct in asserting that the record contains letters from independent sources, contradicting the director's finding that the record lacked such materials. This evidence supports the contention that the petitioner's work is viewed as important beyond the confines of the University of Wyoming, and demonstrates that the director's decision contains a material error of fact. While the evidence of record does not present the strongest possible case (lacking, for instance, documentation of heavy citation of the petitioner's published work), the documentation appears to be, on balance, sufficient to warrant approval of the petition.

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 above testimony, and further testimony 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.