U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

BS

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, a public corporate division of the State of New York Department of Health, seeks to classify the beneficiary 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 beneficiary 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.
> >
> > > (i) Subject to clause (ii), 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 beneficiary holds a Ph.D. in Zoology from [redacted] in India. An educational evaluation accompanying the petition from International Education Research Foundation, Inc. indicates that this degree has been independently evaluated as being equivalent to a Ph.D. in Zoology from an accredited U.S. institution. The director found that the beneficiary 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 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 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.

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 beneficiary's contributions in the field are of such unusual significance that she merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. The petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

The application for the national interest waiver cannot be approved. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the beneficiary cannot be considered for a waiver of the job offer requirement. The director, however, does not appear to have informed the petitioner of this critical omission. Below, we shall consider the merits of the petitioner's national interest claim.

Along with copies of the beneficiary's published work, the petitioner initially submitted four letters of support.

Associate Professor, State of New York Department of Health, states:

> [The beneficiary] has spent the past 8 years as a research scientist engaged in research in molecular biology and genetics to understand mechanisms of gene regulation that are important for the health of cells in higher organisms, including humans. She has been involved in cloning and sequence analysis

of new genes which are useful in the development of new technology used in testing for genetic diseases.

* * *

Prior to her arrival in my lab, [the beneficiary] cloned a RAP1 homologue, a central component of genes, from different yeast species (CG). The results of this research were published in the international scientific journal *Yeast*. This work provided strong evidence of her skills in molecular biology, and is significant because RAP1 is a protein that has central roles in many important cellular processes, such as transcription, replication, and gene silencing...

[The beneficiary] has also studied the function of GCR1, a gene involved in the expression of glycolytic genes in Saccharomyces cerevisiae, a type of gene that helps to create growth defects in yeast. [The beneficiary] was able to isolate a GCR1 mutant. [The beneficiary] has also made significant contributions in cloning of a vitellogenesis inhibiting hormone gene (VIH) in shrimp. These research accomplishments attest to [the beneficiary's] proficiency as a molecular biologist and are a strong indicator that she will continue to be a productive contributor to scientific research aimed at improving the public health and welfare.

Since joining my lab a little over a year ago, [the beneficiary] has mastered new techniques involved in chromatin analysis from yeast. I have been extremely impressed with her dedication to her work and her diligence in assimilating a large new body of scientific research central to her new studies on transcription and chromatin.... I anticipate that we will be writing up some of her work for publication in a seminal journal by Fall 2002.

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for a national interest waiver. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), in which in which the Regional Commissioner of the Immigration and Naturalization Service (legacy INS) held that subsequent developments in an alien's career cannot retroactively establish that she was already eligible for the classification sought as of the petition's filing date.

[redacted] also states that the beneficiary has received awards to further her research training, including fellowship grants from the Indian and Japanese governments. We note here that recognition from government agencies relates to one of the criteria for classification as an alien of exceptional ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest.

In regard to the beneficiary's prior publication record, [redacted] states:

[The beneficiary] has published a significant body of work describing her research activities.... [T]hese publications include articles in *Yeast*, the *Journal of Aquatic Biology*, *Physiology*, and the *Journal of Ecology*; which are all highly prestigious and internationally acclaimed scientific journals. [The beneficiary] has also presented her work at prestigious conferences in India and Japan.

The record, however, contains no evidence showing that publication or presentation of one's work is unusual in the beneficiary's field or that independent researchers have heavily cited her work.

A significant portion of letter is devoted to the beneficiary's educational background, research experience, and laboratory skills in the area of gene transcription. We note, however, that such qualifications are amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation* an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

Uemura, Senior Researcher, Institute of Molecular and Cell Biology, National Institute of Advanced Industrial Science and Technology, Japan, states:

> After completing two years as a Post Doctoral Research Fellow in my laboratory, [the beneficiary] moved to the U.S.; Department of Molecular Genetics, Wadsworth Center, Albany, New York, where she is conducting research on "Transcription in Eukaryotes." She is focusing on the understanding [of] how transcriptional activators and general transcription machinery contend with chromatin in vivo using yeast *Saccharomyces cerevisiae* as a model system.
>
> [The beneficiary] possesses the zeal to conduct original and innovative research in her area of endeavor and intend to continue in the field of Yeast Molecular Biology and Genetics. With her experimental skills, in-depth understanding of the scientific problems and proven scientific experience, [the beneficiary] could certainly [make] strong contributions to the development of research in the field of Molecular Biology and Genetics of Yeast.

Professor, Department of Zoology, Andhra University, India, states that he supervised the beneficiary's Ph.D. research and that she demonstrated her ability to conduct research regarding "the molt cycles, growth, and reproductive behavior of the freshwater prawn. refers to the beneficiary as one of his "best graduate (Ph.D.) students." University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The beneficiary's scholastic achievement may place her among the top students at her educational institution, but it offers no meaningful comparison between the beneficiary and experienced professionals in the research field. Rather than identifying how the beneficiary's past research has significantly influenced her field letter concludes by stating: "I am confident that [the beneficiary] should definitely make very important contributions to the yeast molecular biology and with her extraordinary biological background she should prove to be an outstanding and productive scientist." Such assertions regarding the beneficiary's potential to make future contributions are not adequate to demonstrate her eligibility for a national interest waiver. Rather, the petitioner must submit evidence showing that the beneficiary's work has influenced her field to a substantially greater degree than that of other molecular biologists having the same minimum qualifications.

Professor of Zoology, University, India, where the beneficiary earned her bachelor's degree, states that he has known the beneficiary for several years. notes that the beneficiary "published two papers in the *Journal of Yeast* (2001)." In the same manner a nd Uemura, indicates that the beneficiary "possess[es] the zeal to conduct original and innovative

research" and that she "would certainly make notable contributions to yeast molecular biology research in the United States of America." letter does not explain how the beneficiary's past work is of greater benefit than that of other molecular biologists.

The letters from indicate that the beneficiary has published her work in international journals. We do not find, however, that publication of one's work in an international journal is presumptive evidence of eligibility for the national interest waiver. When judging the influence and impact that the beneficiary's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the beneficiary's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the beneficiary's work. The petitioner, however, has provided no evidence showing that the beneficiary's published work has been heavily cited.

The director requested further evidence that the beneficiary had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional witness letters. These letters adequately demonstrate that the beneficiary works in an area of intrinsic merit and that the proposed benefits of her work would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In his second lett states:

> [The beneficiary] has conducted groundbreaking research in the field of transcriptional regulation. One important ability of [the beneficiary] is her ability to obtain superior results on chromatin structure as it is affected by transcription factor binding at a rate and consistency that far surpass the results of a typical research microbiologist with the minimum qualifications for the field. [The beneficiary] can therefore make rapid progress in her experiments, which are important to our understanding of gene regulation, a field of high medical relevance. Furthermore, [the beneficiary's] understanding of chromatin structure and gene regulation, especially with regard to the "general transcription factors" that she is studying, far surpasses that of a typical researcher. Her superior understanding of this area allows her to remain at the forefront of research. In fact, she recently presented her...results at a high profile international meeting in Big Sky, Montana, where [they were] enthusiastically received. A typical researcher might be able to carry out the type of experiments she is performing if someone like myself were to give them detailed, day by day instructions, but they would not be able to understand the significance of each step and then use that understanding on their own to determine how the research should proceed, as [the beneficiary] is capable of doing (and indeed is doing).
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> [The beneficiary] has authored numerous papers and presented numerous lectures in her field. Her research has produced results which have been recognized at the national level.

claims that the beneficiary's "research has produced results which have been recognized at the national level," but the record contains no citation history of her work to support this claim. While we accept that the

beneficiary is adept in performing transcriptional regulation experiments, it should be noted that objective qualifications (such as independent laboratory experience) are amenable to the labor certification process.

, Assistant Professor, X-ray Crystallography, Colorado State University, states:

> I have been made aware of [the beneficiary's] research at a recent international Keystone conference.... Her presentation on chromatin opening and transactivator potentiation by ABF1 and RAP1 in the budding yeast *Saccharomyces cerevisiae,* has been very well received by her peers (including by me), and is considered to be an important contribution to the extremely active research area of how the organization of eukaryotic DNA into chromatin affects essential cellular processes. [The beneficiary] has contributed seminal work to this central question that has an impact on fundamental aspects of human disease.
>
> I have since then had the opportunity to meet [the beneficiary] when I visited her current mentor, Dr. . Some aspects of [the beneficiary's] research are to be published soon in a distinguished and internationally recognized journal.

Participation in scientific conferences and symposia is routine and expected in the scientific community. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not justify a projection of future benefit to the national interest, nor does it warrant a waiver of the labor certification process. In this case, it has not been shown that the beneficiary's individual presentations have commanded an unusual level of attention throughout her field.

Associate f Health and Department of Biomedical Sciences, states:

> Admission of [the beneficiary] as a permanent resident of the United States is, in my opinion, in the national interest as her skills and training are highly sought, and she will provide much needed biomedical research expertise. Such expertise will benefit the long-term health care for the American people.
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> I am a scientific colleague of [the beneficiary], and work at the t of Health's enter.... I have known [the beneficiary] for about 1.5 years, and interact with her on a daily basis. I have first-hand knowledge of her abilities, and frequently interact with the laboratory , her supervisor at the Wadsworth Center.

is studying gene transcription in the model organism, *Saccharomyces cerevisiae.* Her work focuses on how chromatin controls when and if gene transcription is activated or repressed. Such work has important implications for human disease, as many diseases are caused by disruption of gene transcription networks. Thus, her work has direct and indirect applications to human health.

The understanding gained will be useful for developing novel pharmaceuticals to combat such diseases as HIV and Cancer, and perhaps to developing applications of gene therapy to treat genetic diseases.

, Deputy Director v York State Department of Health, states:

In humans and other higher organisms, the genetic material, DNA, is packaged up with proteins to create a structure referred to as chromatin. New findings on the relationship between chromatin structure and transcriptional activity are being made that have important implications for public health. For example, changes in transcriptionally repressive chromatin can result in expression of silenced cancer genes, leading to new cancers. As another example, the way a gene is expressed that is introduced into a patient, as in gene therapy, can depend on the surrounding chromatin. These and other important concerns in public health make research in chromatin and gene expression an area of great relevance.

studying how gene expression programs depend on recognition of specific sequences by transcription regulatory proteins, which recruit and regulate chromatin modifying complexes and components of the transcription apparatus. She is studying how specific chromatin structures impact local gene expression.

We generally do not accept the argument that a given field of research is so important that any alien qualified to work in that field must also qualify for a national interest waiver. The above observations from adequately establish the intrinsic merit and national scope of the beneficiary's work, but such general comments are not adequate to show that her individual accomplishments are of such an unusual significance that she qualifies for a waiver of the job offer requirement. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule.

now a Research Scientist at states that he previously "worked with [the beneficiary] for two years a s laboratory at the Wadsworth Center." further states:

[The beneficiary] has provided major contributions to research program she has participated [sic]. She has shown herself to be a tireless investigator and enthusiastic teacher in the laboratory. She has developed and performed laboratory techniques with great skill, searched the scientific literature carefully for papers providing new tool for experiments, interpreted the data she and others in the laboratory have collected and contributed in a major way to the synthesis of her findings and preparations of manuscripts to be submitted for publication in scientific journals.

* * *

> [The beneficiary] has published five research papers in reputed national and international journals. She used yeast as a model to study how gene activators initiate gene transcription. Those studies will provide key facts to understand how tumor genes turn on in human cells...

Publication, by itself, is not a strong indication of impact in one's field, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the beneficiary's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.)* attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the beneficiary herself has cited sources in her own articles. Numerous independent citations would provide firm evidence that other researchers have been influenced by the beneficiary's work. Their citation of the beneficiary's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research. While heavy independent citation of the beneficiary's published articles would carry considerable weight, the petitioner has not presented such citations here.

The director denied the petition, finding that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States.

On appeal, the petitioner submits a third letter from [redacted] and arguments from counsel. We concur with counsel and [redacted] that the evidence in the record adequately establishes the intrinsic merit and national scope of the beneficiary's work. However, the petitioner has not demonstrated that the beneficiary's work has benefited the national interest to a substantially greater degree than that of other U.S. researchers possessing the same minimum qualifications. In addressing this issue [redacted] e states:

> The Center Director's decision stated that we failed to demonstrate that [the beneficiary] has achieved the requisite level of recognition in the scientific community. [redacted] provided statements confirming that [the beneficiary] has achieved a high level of recognition in the scientific community [redacted] are well recognized in the scientific community.

We do not dispute the level of recognition enjoyed by [redacted]. It remains, however, that the petitioner has not provided adequate evidence (such as a citation history) to demonstrate that the beneficiary's research has significantly influenced her field. Aside [redacted] the petitioner's witnesses consist entirely of individuals who are current or former employees from institutions where the beneficiary has studied or worked. These individuals became aware of the beneficiary's work because of their close association with her; their statements do not show, first-hand, that the beneficiary's work is attracting attention on its own merits, as we might expect with research findings that are unusually significant. While the beneficiary may have contributed to research projects undertaken in [redacted] laboratory, her ability to significantly impact the field beyond these projects has not been adequately demonstrated. We accept that the beneficiary has contributed to the overall pool of knowledge in her field (by cloning a RAP1 homologue, for

example), but the record does not distinguish the beneficiary's work from that of other capable molecular biologists.

Counsel states:

> Because of the extremely long processing backlogs for labor certification applications in New York State, waiting for a conventional labor certification would keep the petitioner in a state of uncertainty for a long period of time. This would cause problems for the petitioner's planning and budgeting, and could cause them to cancel any projects that build upon [the beneficiary's] work.

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers to avoid the inconvenience of the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation* the petitioner must demonstrate that the beneficiary will serve the national interest to a substantially greater degree than do others in her field.

Clearly, the beneficiary's current and former colleagues have a high opinion of the beneficiary and her work, as does who knows the beneficiary from a scientific conference and from a visit with The beneficiary's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The beneficiary's work has added to the overall body of knowledge in her field, but this is the goal of all such research; the assertion that the beneficiary's findings may eventually have practical medical applications does not persuasively distinguish the beneficiary from other competent researchers.

For the reasons set forth above, the petitioner has not established that the beneficiary's past accomplishments set her significantly above her peers such that a national interest waiver would be warranted. While the beneficiary has plainly earned the respect and admiration of her professional acquaintances, it appears premature to conclude that the beneficiary's work has had and will continue to have a nationally significant impact. In sum, the available evidence does not establish that the beneficiary's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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 project or area of research, 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.

ORDER: The appeal is dismissed.