U.S. Department of Homeland Security
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Washington, D.C. 20529-2090

U.S. Citizenship and Immigration Services

B4

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 01 2006

SRC 07 800 17793

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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 she filed the petition, the petitioner was a postdoctoral research associate at the University of Illinois at Urbana-Champaign. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner 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 U.S. 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 letters from five witnesses, all of whom have demonstrable ties to the petitioner or institutions where the petitioner has worked or studied. [redacted] supervised the petitioner's doctoral studies at Purdue University. He stated:

> [The petitioner] carried out outstanding work in . . . the isolation of antibacterial peptides from tissue engineered materials that are implanted in the body in order to promote healing of various types of injuries. . . . Surgeons noted that the incidence of infection for this type of material (which is referred to as SIS) was much lower than expected, and this led to a search for an antibacterial molecule that may be present in this matrix (derived from pig's intestines).
>
> [The petitioner's] research was instrumental in developing purification techniques, characterization of the peptides, and assays for detecting and validating antimicrobial activity of extracts from SIS. . . .

> [The petitioner] now has a significant knowledge base which would be crucial to the development of bioseparations and isolation of various types of therapeutic compounds from other types of natural or biological materials.

[redacted], now a section head at Human Genome Sciences, Inc., collaborated with the petitioner at Purdue University in 2000 when the petitioner was a student and was a postdoctoral researcher. [redacted] credited the petitioner with "a pivotal role in the project of antimicrobial peptides." She further stated:

> Besides purification of the antimicrobial peptide, [the petitioner] has made two other major contributions to this project. Firstly, she has successfully identified the amino acid sequence of the active component in SIS. . . .
>
> Secondly, [the petitioner] further thoroughly investigated the mechanism of antimicrobial activity. . . . Also, [the petitioner's] work has substantially improved our understanding of the relationship between antimicrobial activity and synergistic reagents. . . .
>
> Due to her unparalleled research skills [the petitioner] is likely to make major contributions in the future to an extent in this field that is highly unlikely among her peers.

The remaining letters addressed the petitioner's more recent work at the University of Illinois. The petitioner's supervisor there, [redacted], stated:

> Ethanol is currently produced mainly from corn. . . . However, without subsidies and tax waivers, most ethanol plants would shut down. One solution is to find additional co-products from corn that could enhance their profitability and make them economically viable. Our research group has identified two such compounds, zein and xanthophylls, that are present in corn but are not being manufactured to any significant degree at present. Zein is a protein that has a market value of $5-20/lb (compared to corn which sells for $0.05/lb). It has a wide range of uses from food coatings, environmentally-friendly plastics and films, fibers and wound dressings to shellac-substitute, nanomaterials for drug delivery and even as a "non-sticky" chewing gum. Xanthophylls such as lutein and zeaxanthin are used for the treatment of a multitude of diseases, particularly of the eye. They have a market value of up to $7000/lb at the wholesale level. Together they could double the revenue of a typical ethanol plant without any additional materials coming into the plant. . . .
>
> [The petitioner] has successfully developed a new and rapid process to purify zein and xanthophylls simultaneously. Her method is superior to the existing methods because high yield and high purity can be obtained at the same time, which has never been achieved before. . . .
>
> [The petitioner's] unique experience and excellent skills enable her to make significant contributions in this and similar areas of research to a higher level than her peers at the same career stage. . . . Her role in the current project is essential and irreplaceable. If she cannot

> continue her work in our laboratory, the protein purification project will be substantially hindered as it will be extremely difficult to find another with [the] same level of expertise to replace her critical role.

When, as here, a witness asserts that the petitioner merits a waiver because she is irreplaceable to a given project, it is entirely appropriate to consider whether or not the petitioner has since left the position in which she is said to be irreplaceable. When the petitioner filed her appeal of the denial of the instant petition, she provided an address in Memphis, Tennessee, demonstrating that she had left the University of Illinois.

The petitioner filed this petition on June 25, 2007. USCIS records indicate that on or about July 11, 2007, less than three weeks after this petition's filing date, St. Jude Children's Research Hospital filed a nonimmigrant petition on the alien's behalf (receipt number EAC 07 204 53621). The petitioner's documented departure from [redacted] laboratory nullifies the argument that she is "irreplaceable" at that laboratory. Given that she left the laboratory within a month of filing the petition, there is little reason for us to assume that, at the time of filing, the petitioner intended to continue working for Prof. Cheryan.

[redacted], President and CEO of Prairie Gold, Inc., stated:

> I came to know [the petitioner] three years ago when I served as the Market Development Director of the Illinois Corn Marketing Board, the sponsor of her research project. . . . Throughout the whole process I was impressed by her work and recognized her superior ability.
>
> It is important to note that [the petitioner's] field of study, involving the development of environmentally friendly bio-based products, generates tremendous benefit to our nation and plays an increasingly important role in fuel ethanol production.

[redacted], a research molecular biologist for the United States Department of Agriculture and adjunct professor at the University of Illinois, praised the petitioner's work in [redacted] laboratory and stated that the petitioner "will undoubtedly continue to contribute and have significant impact in the field of protein separation, agricultural and bioprocessing (*sic*). [The petitioner's] expertise and creativity are needed to maintain the technology advancement and industry leadership of our nation in this area."

We will entertain appraisals of the petitioner's research skills, and give due consideration to the petitioner's work at the University of Illinois in the context of her work history, but we cannot base a favorable finding on the importance of continued research in a field in which the petitioner no longer works. The record contains no evidence that the beneficiary's work at St. Jude Children's Research Hospital involves "the development of environmentally friendly bio-based products," or that the petitioner "will undoubtedly continue" performing such research.

The petitioner submitted copies of two published articles she co-wrote and a provisional patent application relating to her work, but no evidence that any ethanol plant had implemented, prepared to implement, or expressed interest in implementing her methods. The petitioner submitted a copy of a provisional patent

application for a "Method and System for Production of Zein and Xanthophylls Using Chromatography," filed in May 2006, for which the petitioner is the third of three named inventors.

On November 16, 2007, the director issued a request for evidence, requesting evidence of the citation history of the petitioner's published work. In response, the petitioner submitted three new letters and documented that her two articles had each been cited one time. [redacted], a research assistant professor at the University of Illinois, stated: "The significance of her work has been recognized by the fact that [the petitioner's] recent papers have already been cited twice within 7 months. This is a remarkable accomplishment, since it normally takes at least one year to get the first citation. Being cited within half a year means that her work is noteworthy and well received." The record contains no objective support for this claim. It is not self-evident that only the most important articles are cited after less than a year, or that researchers, when deciding whether to cite an article that is relevant to their own research, routinely refrain from citing the newest (and thus most current) publications, but would not hesitate to cite those same publications several months later.

[redacted], a principal research scientist at Cargill Inc., Wayzata, Minnesota, stated that the petitioner's "project, purification of zein protein and xanthophylls from corn, plays a pivotal role in enhancing utilization of corn." [redacted], writing in January 2008, gave no indication of awareness that the petitioner no longer worked in that area. [redacted] asserted that the petitioner's "work on purification of zein isomers was a great step forward in zein research."

[redacted], principal scientist at Teleflex Medical, Wyomissing, Pennsylvania, stated that the petitioner's "research represents a major breakthrough in the development and optimization of zein and xanthophylls production." [redacted] concluded that the petitioner "has demonstrated exceptional competence, initiative and perseverance in the field of analytical chemistry, biochemistry and bioseparations. . . . And I have no doubt in my mind that she will continue to make significant contribution [sic] in the same field." [redacted] noted that a particular zein isomer has applications in drug design, but did not specify what direct role, if any, the petitioner has played or will play in drug design in this manner.

The petitioner submitted documentation showing that, on July 23, 2007, she received an invitation to participate in "a panel of outside experts to help [the National Science Foundation (NSF)] to help us review and make funding recommendations for proposals in the area of '**Assay Development and Enhancement**'" (emphasis in original). The invitation was issued after the petition's June 25, 2007 filing date, and therefore could not, under the best of circumstances, directly establish eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), which requires that an alien must be eligible for the benefit sought as of the petition's filing date.

The director denied the petition on February 25, 2008, stating that the minimal citation of the petitioner's published work does not establish that the petitioner's work has had significant impact in her field.

On appeal, counsel cites an unpublished AAO decision in which a petition was approved for an alien researcher despite the alien's sparse citation history. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Nevertheless, the AAO continues to hold that citations are not the sole measure of an alien's eligibility for the national interest waiver. Other factors, including letters from independent expert

witnesses, should receive due consideration. This does not mean, however, that an alien who is able to locate cooperative witnesses are presumptively eligible. Each proceeding must be considered on its own merits.

Regarding the petitioner's participation on an NSF panel in late 2007, counsel acknowledges that the NSF issued its invitation after the filing date. Counsel argues, however, that the invitation is still material because it reflects a reputation that the petitioner had earned before the petition's filing date. The petitioner has not established the significance of the invitation (for instance, by establishing the criteria that led to the issuance of the invitation, or by showing how many other invitations went out). Counsel observes that the NSF invitation referred to the petitioner's "outstanding expertise," but the invitation is not persuasive evidence that the NSF singled out the petitioner based on her reputation rather than her research specialty. We note that the invitation includes several questions (*e.g.*, "Are you a Government Employee?") that are so general that they do not reflect any sort of familiarity with the petitioner's individual history or accomplishments. An excerpt of the NSF's *Grant Proposal Guide*, submitted on appeal, offers little clarity in this regard.

On appeal, counsel refers to the petitioner as "a researcher at one of our country's top research facilities, namely the St. Jude Children's Research Hospital." Because the petitioner's relocation to St. Jude took place after the petition's filing date, the AAO will not focus on details of her work there. The AAO will only consider the extent to which the petitioner's work at the hospital relates to her prior work (which was the original focus of the waiver application). Pursuant to *Katigbak*, cited above, the petitioner's new job at St. Jude cannot form the basis of a petition filed before the petitioner worked there.

Three new letters accompany the appeal. [redacted] identified as a "Full Member" at St. Jude, repeats prior claims about how some "fractions of zein" have drug design applications. Similarly, [redacted], Chair of the Department of Chemical Biology and Therapeutics at St. Jude, states that the petitioner's "research in zein purification has enabled further investigation of zein application in drug delivery. She has proven herself to be an aggressive and creative researcher with great impact to the field." Neither witness specifies how, or even if, the petitioner's present work relates to such applications.

[redacted], in a new letter, asserts that the NSF invites "only senior scientists with considerable influence in their field" to participate as panel reviewers. The record does not support this assertion. It is not clear in what sense a 30-year-old researcher, who completed her postdoctoral training only weeks before, is a "senior scientist." The "Selection of Reviewers" section of the NSF's *Grant Proposal Guide* cites factors such as "geographic balance," "age distribution" and "generalized knowledge," but there is no mention of "senior scientists" or "considerable influence."

At the time she filed the petition, the petitioner did not show significant impact or influence in her field of endeavor. At that time, the waiver request was predicated on the importance of ethanol as a fuel additive, and the petitioner's efforts to make ethanol plants profitable by isolating valuable compounds from the corn processed at ethanol plants. Notwithstanding the assertion that a waiver was required because the petitioner was "irreplaceable" in such research, the beneficiary left that work shortly after she filed the petition – so soon afterward that it is difficult to suppose that the petitioner had no idea that she was about to move to Tennessee and work at St. Jude. The petitioner's lack of documented impact, coupled with her almost immediate abandonment

of the principal claimed justification for the waiver application, leads to the conclusion that the petition is premature at best.

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, 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.