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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: WAC 05 064 51055 Office: CALIFORNIA SERVICE CENTER Date: JAN 2

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.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The director initially rejected the appeal, but subsequently reopened the petition and forwarded the appeal to the Administrative Appeals Office (AAO) for appellate review. The matter is now before the AAO on appeal. The appeal will be sustained and the petition will be approved.

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 researcher at the University of California, Davis (UCD). She has since been promoted to the position of project scientist. 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:

> (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 the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (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.

The petitioner's initial submission includes five witness letters. Dr. an Assistant Professor at UCD, states:

> My laboratory group focuses on understanding the mechanisms, regulation and roles of homologous chromosome pairing during meiosis and in nonmeiotic cells. Meiosis is a specialized cellular division that . . . leads to the production of eggs and sperm. During meiosis, two copies of each chromosome that [is] present in the cell line up together. This process is called homolog pairing. If it fails, a gamete might end up with a wrong number of chromosomes, leading to infertility or birth defects such as Downs syndrome.
>
> [The petitioner] currently is carrying on two projects in my lab. The first project is directed towards understanding the mechanisms of pairing of homologous chromosomes in yeast meiosis. . . . The second project is focused on the structure and organization of the meiotic chromosomes. Currently, [the petitioner] is the only Post Doctoral Researcher in the lab and she is solely responsible for these two major projects undertaken by my lab.

Dr. [redacted] then describes the petitioner's specific achievements in technical detail, stating for instance that the petitioner "has created a strain that allows her to screen for the recessive mutations that affect homolog pairing," and "created a vector which is going to be used for mutagenesis."

Prior to working at UCD, the petitioner underwent three years of postdoctoral training at the University of California, Berkeley under Professor [redacted] Prof. [redacted] states:

> At my lab, [the petitioner] pursued a project that concentrated on the expression of multidrug transporters in *Escherichia coli*. The major multidrug transporter in this organism, AcrAB, has been extensively characterized. **However, [the] *Escherichia coli* genome encodes multiple multidrug transporters, and very little is known about their expression.** [The petitioner] isolated a plasmid that, when introduced into Escherichia coli cells with knocked-out AcrAB, increased their resistance to antibiotic[s] novobiocin and deoxycholate. [The petitioner] showed by HPLC that this increase in novobiocin resistance is due to the reduced accumulation of the drug.

Professor [redacted] of the University of Oklahoma worked alongside the petitioner in Prof. [redacted] laboratory. Prof. [redacted] asserts that the petitioner's "published articles represent the foremost research achievements in the field. For this reason, [the petitioner's] articles have been cited, in combination, 41 times in other papers." The record identifies the citing articles, showing that one of the petitioner's articles had been cited 25 times.

The remaining two letters are from faculty members at the University of Illinois at Chicago, where the petitioner earned her doctorate. Professor [redacted] states:

> I first met [the petitioner] when she did her rotation project in my lab. . . . The project she worked on in my lab included characterization of toxicity of the plasmid isolated from Escherichia coli genomic library. . . . Although student rotation projects are typically limited in both time and goals, I immediately recognized [the petitioner] as a bright and independent student who did not require a lot of supervision.

Professor [redacted] states:

> In my laboratory, during her rotation, [the petitioner] proposed to show the existence of a multidrug efflux mechanism in Streptococcus pneumoniae. This pathogen has intrinsically low sensitivity to fluoroquinolone antibiotics, close to the breakpoint separating sensitive and resistant bacterial strains. She has discovered that susceptibility of this organism to norfloxacin and ciprofloxacin – the most commonly prescribed antibiotic – increases about 2 to 3.5 times in the presence of plant alkaloid reserpine, an inhibitor of several other multidrug transporters from gram-positive bacteria. . . .
>
> In addition, while in my lab, [the petitioner] conducted her thesis project. Her thesis project started with identification of a mutation that increased multidrug resistance in Bacillus subtilis by increasing the expression of two multidrug transporters – Bmr and Blt – at the same time. The disruption of one of the two transporters in the cells carrying this mutation led to lower levels of drug resistance, and the disruption of both abolished the increase in

> drug resistance altogether. [The petitioner] mapped the mutation on the Bacillus subtilis chromosome by phage transduction and then localized it on the mta gene. . . .
>
> All these findings greatly enhanced our understanding of multidrug resistance.

On May 20, 2005, the director issued a request for evidence, instructing the petitioner to submit further documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director observed that the petitioner's initial witness letters are from individuals who have worked directly with the petitioner, and therefore the letters do not establish that the petitioner's work has been especially influential within her field. The director requested "testimonial letters . . . from **significant** organizations, such as . . . NATIONAL INSTITUTE [*sic*] OF HEALTH" (emphasis in original). The actual name of the entity is the National Institutes of Health (NIH).

In response, the petitioner submits a copy of an internal communication issued by NIH in March 2005, indicating that 18 U.S.C. § 205 generally prohibits NIH staff members from "making representations on behalf of another before or to a federal entity" regarding claims made against the federal government. Counsel states that, because of the cited statute, the petitioner is unable to solicit witness letters from researchers employed by the federal government.

The communication[1] states in part: "NIH staff members may not write letters of reference/recommendation to (or for submission to) another federal agency in support of visa or Green Card applications (except as noted below)." The exceptions include pre-existing performance evaluations and reference letters that were prepared for prospective employers rather than for submission to immigration authorities. The key exception is this:

> An official letter may be written by a high level NIH official (IC Director, Scientific Director, or above) as part of the official agency (e.g. NIH) sponsorship of a candidate for NIH employment, and submitted by the Division of International Services-Office of Research Services (DIS-ORS), NIH, to the DHS-USCIS. DIS-ORS is the only office at NIH authorized to communicate with other agencies on immigration matters.

Also, individual NIH employees are permitted to answer inquiries directly addressed to them from other government agencies, so long as the responses are routed through DIS-ORS.

Clearly, while the petitioner may be unable to solicit letters from individual researchers at NIH, the statute does not prohibit "a high level NIH official" from making an official statement on behalf of NIH. The statute (and/or NIH's interpretation thereof) thus represents an impediment to an alien whose recognition at NIH is limited to a few particular researchers, but it is no barrier to an alien whose work is of such a caliber that NIH, as an institution, recognizes the alien's importance to the national interest. Obviously, NIH anticipates the issuance of such official letters; otherwise, NIH would not have promulgated a policy regarding the

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[1] Memorandum from Michael M. Gottesman, M.D., Deputy Director for Intramural Research: *Signature Authority at NIH on Immigration Matters Involving Foreign Scientists* (March 25, 2005). The text of the memorandum is available online at http://www1.od.nih.gov/oir/SourceBook/ethic-conduct/visasignatureauthority.htm.

procedures for doing so. The policy prevents only the issuance of those letters that would have the least evidentiary weight (compared with official, institutional endorsements); it prevents lower-level NIH employees from creating the appearance that they speak on behalf of NIH.

The petitioner also submits three new letters, two of which are from UCD faculty members, attesting to the significance of her work and the importance of her continued participation in Dr. [redacted] laboratory. These witnesses do not explain how long the petitioner would remain there if immigration concerns were not an issue. (The petitioner's previous postdoctoral appointment lasted only three years.)

The remaining letter is from Professor [redacted] of Harvard University, who claims numerous accolades including membership in the National Academy of Sciences. Prof. [redacted] states:

> As a distinguished scientist in the field of meiosis, I am very familiar with [the petitioner's] research. . . .
>
> Professor [redacted] laboratory has made major advances in the subject of meiosis. . . .
>
> In Professor [redacted] laboratory, [the petitioner] is the leading Project Scientist. Her research involves the isolation and cloning of mutations that affect the homologous chromosome pairing process. Isolation of such mutants has been a very difficult and challenging task, and [the petitioner] has succeeded in this project where many previous researchers have failed. . . . Importantly, by concentrating specifically on homolog pairing, [the petitioner] has been able to obtain and study mutants that are much more relevant for human aneuploidy than are mutants identified in previous studies. These outstanding accomplishments clearly place [the petitioner] above most of her peers. . . .
>
> [The petitioner] has made very significant contributions to the research of meiosis. Her contributions to date exceed those of many other well-qualified and highly skilled researchers at the Ph.D. and post-doctoral levels. Additionally, she is currently undertaking further critical research in which she is on the verge of significant accomplishments.

The director denied the petition, stating that Prof. [redacted] is the only witness whose knowledge of the petitioner's work might not derive from working directly with the petitioner. The director quoted from Prof. [redacted] letter, but also, confusingly, stated that the petitioner works "in the area of Integrated Circuits." (The paragraph containing this erroneous reference appears to have been copied from an unidentified earlier decision.) The director found that "[t]he record does not provide sufficient examples of the significan[ce] or the impact of the beneficiary's research to distinguish the beneficiary from available U.S. workers having the same minimum qualifications."

On appeal, counsel asserts that the director failed to consider evidence that the petitioner "has produced original innovative material which is of critical importance to the U.S. health industry and which is sought throughout the United States by professors, labs, and government agencies alike." Here, counsel does not elaborate, simply asserting that the fruits of the petitioner's work are "sought throughout the United States."

The reference to "government agencies" is particularly troubling, given counsel's earlier emphatic assertion (repeated on appeal) that evidence from "government agencies" was unobtainable under 18 U.S.C. § 205. The question arises as to how counsel knows that "government agencies" "throughout the United States" are, in fact, clamoring for the petitioner's work. Counsel's general assertion does not answer this question. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel is on a stronger footing in asserting that the petitioner "has submitted credible evidence proving that she excels her peers [*sic*] in many ways." Prof. [redacted] letter provides some indication of a reputation that extends beyond the petitioner's own circle of mentors and collaborators. Also pointing in this direction, more objectively, are the dozens of citations of the petitioner's articles indicated in the initial filing. The director, in denying the petition, stated that "heavy citation of articles" can be a favorable consideration, but the director did not address the petitioner's materials relating to citation of her work. Counsel notes a prior submission indicating that the number of citations of the petitioner's work has increased from the 41 initially claimed. Further inquiry in this area shows heavy citation of several of the petitioner's articles, with one article cited over 60 times and an aggregate total of over 140 citations, most of them independent rather than self-citations. The cited articles already existed, and were being cited, at the time of filing. The new citations, therefore, amount to the continuation of an existing pattern of citation, rather than an entirely new factor that cannot properly be considered in relation to the filing date. The petitioner does not serve the national interest by having her work cited repeatedly. Rather, she serves the national interest through her own work, and the citations simply reflect the importance and influence of that work.

We concur with counsel that the director's decision does not appear to reflect full consideration of the evidence of record. The reference to "Integrated Circuits" further separates the decision from the facts of record. Upon careful consideration of all the materials available to the AAO, we find that the petitioner has established eligibility for the benefit sought.

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 evidence 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.