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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 04 2008

SRC 07 223 55048

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.

Maura Deadrick
for Robert P. Wiemann, 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 an alien of exceptional ability in the sciences and as a member of the professions holding an advanced degree. The petitioner seeks employment as a medical researcher specializing in dermatology. 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 petitioner also seeks classification as an alien of exceptional ability in the sciences, but such a finding would be of no further benefit to the petitioner. Because the beneficiary qualifies as a member of the professions holding an advanced degree, the issue of exceptional ability is moot and will not be pursued here. 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 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.

In a statement accompanying the initial submission of the petition, the petitioner discussed the physical and economic costs of "skin disease," a blanket term that, according to the petitioner, covers a range of disorders "from cancer to common itching due to dryness." Given this highly broad range of ailments that have little in common apart from pertaining to the skin, we are not persuaded that everyone working with "skin disease" is involved in potentially lifesaving decisions and treatments. The petitioner submitted background evidence establishing the intrinsic merit and national scope of research into skin disease, especially dangerous cancers such as melanoma. The director did not dispute that the petitioner had satisfied those two prongs of the national interest test from *Matter of New York State Dept. of Transportation*.

The petitioner claimed influence through "11 international and national research papers, 9 international presentations, 20 national conference presentations, and countless magazines and newspaper articles. Further,

the alien [has] appeared on national TV programs educating [the] public about anti aging and prevention of skin disease in general." The petitioner also claimed to have "treated thousands of patients since 1998." The petitioner asserted that this combination of research and clinical practice separates him from others in his field. At the time of filing, the petitioner was a researcher at Gowoonsesang Clinic and held a two-year professorship at Chung-Ang University.

Describing his own work and referring to himself in the third person, the petitioner stated:

> Among many contributions, discoveries, researchers, and works, the research paper of "Effect of Botulinum Toxin Type A on Contouring of the lower face" . . . was highly recognized by international journal. . . . This research paper has been cited by many medical research scientists in Korea. Here is another discovery in the dermatologic history in Korea: "Effect of Epigallocatchin-e-Gallate on Expression of iNOS mRNA and Production of NO in HaCaT Cell." This research proved major impact of Nitric Oxide (NO)'s role in inflammation and multiple stages of carcinogenesis. The substance, epigallocatachin-3 gallate, abstracted from 'Green Tea' inhibits the UVB and LPS induced production of NO in HaCaT cells and proves therapeutic effects. . . . He is also one of the advisors of the biggest cosmetic company called "Tappyungyang," responsible for product safety on human skin.

[*Sic.*] The petitioner submitted evidence of his medical credentials and copies of several articles and conference abstracts, but initially provided no objective documentation to establish the wider influence of his research. The petitioner also submitted copies of what appear to be promotional materials for cosmetic products.

The petitioner stated he should receive a waiver because "obtaining permanent residence through the labor certification process can take up to five years," thereby jeopardizing the ability of the United States to become a leader in skin disease research. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dept. of Transportation* at 223. Furthermore, the burden is on the petitioner to establish that his admission to the United States would make the United States a leader in skin disease research. The petitioner's work up to now has taken place in South Korea, and he did not establish or even claim that South Korea is now a leader in such research, much less that such leadership is due in significant part to his efforts.

On November 26, 2007, the director issued a request for evidence. The director instructed the petitioner to "submit one or more letters attesting to your accomplishments and potential in dermatology," particularly "letters . . . from those experts who have never met you but are familiar with . . . your accomplishments." The director also requested evidence to show "the number of times your publications have been cited by others in the field of dermatology."

In response, the petitioner submitted a letter from [redacted], an associate professor at the Catholic University of Korea. [redacted] stated: "While I do not know [the petitioner], he is acquainted with and well-known, rather, as a leading dermatology researcher in Korea. . . . His research endeavors [are] often highly

recognized by experts in the field of dermatology." credited the petitioner with "a number of breakthroughs" but cited only one example, specifically the petitioner's aforementioned article "Effects of Botulinum Toxin . . . ." [redacted]s comments about that article are taken, almost word-for-word, from the article itself.

The petitioner submitted partial copies of his articles and a printout from the Korea Citation Index, but claimed "it is very hard to keep track [of] research papers created before 2007 automatically." The printout indicated that "Effects of Botulinum Toxin . . ." has been cited six times. The petitioner also submitted partial copies of seven other articles that cite the petitioner's earlier work from 1996-1997, primarily a 1997 case study entitled "A case of acquired digital fibrokeratoma." We note that, from their titles, none of the petitioner's documented citations appear to address melanoma or other malignancies. The cited articles appear to focus instead on benign conditions of largely cosmetic concern.

The director denied the petition, stating that the citation information and the letter from do not establish that the petitioner's work has been, and will likely continue to be, especially significant or influential in the field of dermatology.

On appeal, the petitioner states: "The [redacted]k Letter clearly states that the paper entitled 'Effects of Botulimun [*sic*] Toxin Type A on Facial Contouring of the Lower Face' . . . was the first research ever in the history of Korean dermatology to show that the use of boutlinum [*sic*] toxin A for the masseteric hypertrophy can be simple, safe and predictable method." The closest that [redacted] came to making such a statement consisted of a passage copied almost exactly from the article itself.

Furthermore, a "Commentary" that appeared alongside the petitioner's article contradicts the claim that the petitioner conducted "the first research ever in the history of Korean dermatology" on the subject. The authors of the commentary are two doctors based in Daegu, Korea, whose article "Botulinum toxin type A treatment for contouring of the lower face" was published in 2003, two years before the petitioner's article appeared. In that commentary, the authors observed that "several studies are currently available worldwide concerning the effect of botulinum toxin type A (Botox) on masseter muscles." Indeed, the petitioner's own article cites a 1994 article, "Botulinum toxin treatment of bilateral masseteric hypertrophy," that was already more than ten years old when the petitioner cited it. The petitioner is clearly not the first to study the use of Botox on masseter muscles, and whether or not he was among the first to do so in Korea is irrelevant to the national interest of the United States. The article does not establish the petitioner as a pioneer of the treatment. Rather, the focus of the article appears to be the effort to pinpoint the optimum dosage. The accompanying commentary seems to question the petitioner's results, noting the petitioner's conclusion that "patient satisfaction decreased sharply after 4 months of treatment" whereas the authors of the commentary reported patient satisfaction "for approximately 10 months." The most potent criticism seems to be: "Considering the considerable time and effort put into this work, it is very regrettable to mention that these insufficient data would make it difficult to argue for the statistical significance of the data."

The petitioner submits new letters from some of his co-authors, who assert that the petitioner played a major role in the research that led to the articles concerned. The AAO takes these letters into consideration. Nevertheless, while the director questioned the degree of the petitioner's contributions to his various articles,

this issue was not the only basis for denial, nor was it the principal basis. The broader issue is that, while the petitioner cites his various evidentiary exhibits as "proof of the Petitioner's major contribution to his field" and "major recognition by those in the field," objective review of the evidence shows only that the petitioner has been an active and productive researcher in his field. As shown above, there is no credible support for his claim to be the first in Korea to study the use of Botox on masseter muscles to reshape the lower face.

The last letter submitted on appeal is from [redacted], one of the petitioner's colleagues at Chung-Ang University. [redacted] calls the petitioner "an excellent dermatologist in the field of laser treatments and cosmetic dermatology" and states that the petitioner "will definitely devote himself to the prosperity of cosmetic dermatology of the USA. His recent interest is focusing on the disease of acne which is one of the most common skin disorders of teenagers." There is no mention at all of melanoma, despite the petitioner's submission of exhaustive documentation regarding melanoma in his initial filing. This raises further questions regarding the petitioner's grouping of deadly cancers and benign cosmetic issues under the all-encompassing term "skin disease."

[redacted]s letter also leaves open the question of whether the petitioner intends to conduct research in the United States, or whether he instead intends to practice medicine as a dermatologist. We note that graduates of foreign medical schools who seek to practice medicine in the United States are inadmissible unless they meet certain requirements set forth at section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B). The petitioner has not shown that he meets those requirements. By declaring a particular class of aliens to be inadmissible, Congress has effectively declared the admission of such an alien to be contrary to the national interest.

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.