

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

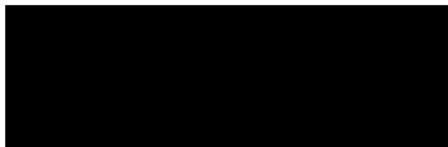
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5



FILE:

LIN 04 245 52073

Office: NEBRASKA SERVICE CENTER

Date:

APR 02 2007

IN RE:

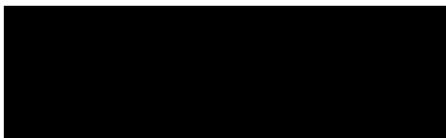
Petitioner:

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:



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.

Maui Plussor

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office 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 or a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment 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.

On appeal, counsel submits a brief and additional evidence. Much of the documentation submitted in response to the director's request for additional evidence and on appeal relates to influence in the field after the date of filing. The petitioner must establish his eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). While we uphold the director's decision in this matter, our decision is without prejudice to the subsequent petition filed by the petitioner, receipt number LIN-06-106-52411, which the director approved on July 28, 2006.

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) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement 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 petitioner holds a Ph.D. from Beijing Medical University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established

that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor 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 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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, cancer research, and that the proposed benefits of his work, improved cancer immunotherapy, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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.

Matter of New York State Dep't of Transp., 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner obtained his Ph.D. from Beijing Medical University in 2000. The petitioner then worked as a postdoctoral fellow at Yale University School of Medicine. In 2002, the petitioner followed his supervisor, [REDACTED] to the Cleveland Clinic. While the record contains evidence that the petitioner's postdoctoral position at Cleveland Clinic has been renewed, the record also establishes that postdoctoral research fellowships at the Cleveland Clinic are limited to one year or less. One of the bases claimed for a national interest waiver in this matter is Cleveland Clinic's policy of not filing immigrant petitions on behalf of its postdoctoral fellows, who occupy inherently temporary positions. This policy, and the petitioner's apparent disinterest in hiring the petitioner into a more permanent position, does not bind this office. 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. *Id.* at 223. The petitioner also relies on his track record as a researcher, which we will consider below.

The petitioner has submitted several letters, most of which are from the petitioner's own colleagues. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far

more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

During his graduate studies, the petitioner worked in the laboratory of [REDACTED] explains that the petitioner worked on studies funded by both Chinese authorities and the Rockefeller Foundation. [REDACTED] praises the petitioner's techniques and skills and asserts that he demonstrated the protective effect of an antioxidant used to preserve food. These results "would help to maintain normal function of the heart when Doxorubicin is given to patients. It would be possibly developed into a new drug to treat the side effects caused by Doxorubicin." While the record indicates that the petitioner's innovation was patented, [REDACTED] does not indicate that any pharmaceutical company has licensed the patent or otherwise begun working on a drug based on the petitioner's work. An alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. [REDACTED] further indicates that the petitioner's other project demonstrated that Dimethyl Fumarate "is a very promising drug candidate in the prevention and treatment of gastric ulcers." Once again, however, the record lacks confirmation from pharmaceutical companies confirming that they are pursuing this work.

[REDACTED] asserts that the petitioner is currently pursuing a cancer vaccine for patients with malignant brain tumors. In 2002, the petitioner published a paper in the *Journal of Immunology* reporting his development of "a method to amplify the anti-tumor immune response more than one thousand-fold." [REDACTED] explains that the "hyperexpanded T cells were able to cure advanced tumors in a very stringent mouse preclinical model, similar to patients with advanced metastatic cancer." A second manuscript, published shortly before the petition was filed, "describes important features of a sustained anti-tumor immune response. This work has highly relevant implications for other researchers who are working toward development of immunotherapy for cancer."

While the petitioner had completed another manuscript with [REDACTED] that work had not been published as of the date of filing. [REDACTED], Director of the Center for Surgery at the Cleveland Clinic, asserts that the petitioner's work may also be applicable to other forms of cancer and even other diseases.

The petitioner also submitted two letters from independent sources. [REDACTED], Chief of the Laboratory of Molecular and Tumor Immunology at Providence Portland medical Center, does not explain how he has knowledge of the petitioner's work, although he indicates that he gained his information from [REDACTED] and his own interactions with the petitioner. Significantly, the third through seventh paragraphs in [REDACTED] letters are taken nearly verbatim from [REDACTED] letter with appropriate pronouns changed. While [REDACTED] signed the letter, attesting to its contents, the duplication of entire paragraphs from [REDACTED] letters suggests that [REDACTED] did not author the content of his letter. [REDACTED] does not indicate that his own work has been influenced by the petitioner.

The petitioner also submitted a letter from [REDACTED] Director of the Tumor Vaccine Group at the University of Washington. [REDACTED] asserts that the petitioner has "consistently performed at the highest level, publishing in journals such as the *Journal of Immunology* and *Cancer Research*." As of the date of [REDACTED]'s letter, January 13, 2004, the petitioner had only published in the *Journal of Immunology*. In fact, the record reflects that as late as May 2005, well after the September 2, 2004 filing date of the petition, the petitioner's manuscript was deemed unacceptable for publication in *Cancer Research*. The revised manuscript was not accepted until at least August 2005 and was not published until October 2005.

The petitioner submitted evidence of her membership in the American Association of Immunologists (AAI) and the American Association for Cancer Research (AACR). AAI requires only a Ph.D. and first-authorship of one article. As stated by the director, membership in professional associations is one of the regulatory criteria for alien of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting one criterion, or even the requisite three criteria, warrants a waiver of that requirement in the national interest. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 222.

As of the date of filing, the petitioner had authored 11 articles reporting his work in China, two articles reporting his work with [REDACTED] and is listed as an author for work presented by [REDACTED] Kjaergaard of the Cleveland Clinic at an AACR conference in 2004. The petitioner's references discuss the prestige of the journals that have published his work. We will not, however, presume the influence of an article from the journal in which it appears. Rather, the petitioner must demonstrate the influence of the individual article. As of the date of filing, the petitioner's 2002 article in the *Journal of Immunology* had been cited twice by independent research teams. On appeal, counsel asserts that these citations were just the beginning and submits evidence that this article has now been cited by six independent research groups. We further acknowledge that an article published after the date of filing has been accessed 1,259 times.

On appeal, [REDACTED] and [REDACTED] assert that there is a limited number of institutions performing research in the narrow area of cancer immunology. In a new letter, [REDACTED] asserts that her own laboratory is relying on the petitioner's work. This statement is supported by a paper presented in September 2004 in which [REDACTED] cites the petitioner's work. While the record reflects that the petitioner's work had begun to attract a limited amount of attention as of the date of filing and has subsequently become more influential since that date a petitioner cannot establish a priority date in the hope that work just being completed will prove influential during the petition's adjudication period. *See generally* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge.

It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. We concur with the director that the petitioner's accomplishments as of the date of filing were not indicative of a degree of influence over the field as a whole.

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 alien employment 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 an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.