

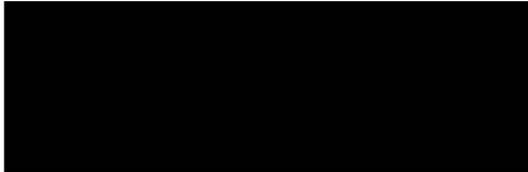
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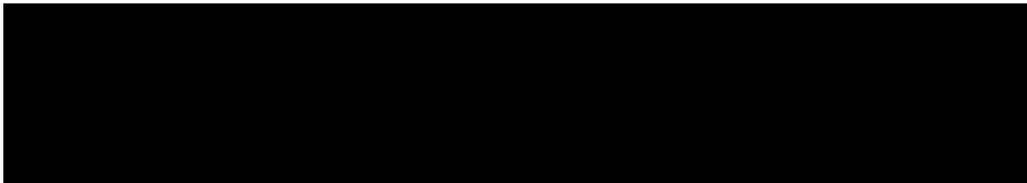
FILE: LIN 06 137 51548 Office: NEBRASKA SERVICE CENTER Date: **APR 23 2008**

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 he filed the petition, the petitioner was a doctoral student at Harvard University. Since completing his doctorate in 2006, the petitioner has begun working a research associate at New England Biolabs, Inc., in Ipswich, Massachusetts. 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 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.

Several witness letters accompanied the initial filing. The most detailed letter is from Professor [REDACTED] who has supervised the petitioner’s doctoral studies at Harvard University. Prof. [REDACTED] stated:

The research interests of my group lie in the emerging area of chemical biology. My co-workers and I aim to gain a fundamental understanding of processes that control the expression and preserve the integrity of genetic information. . . .

For his Ph.D. studies, [the petitioner] first worked on the Ada project. Ada is an *E. coli* protein that is responsible for its adaptive response to alkylation damage. . . . What make Ada unique are its dual roles, it is both a DNA repair protein and transcription factor. . . .

[W]e . . . hypothesized that it was the alleviation of electrostatic repulsion between protein and DNA that gave rise to the tighter binding of Ada to DNA after methylation. If that is the case, we should also be able to get higher affinity by reducing the repulsion through other

means. Those were exactly the results that [the petitioner] obtained. . . . [The petitioner's] work has given us a clear and elegant picture of how Ada functions and inspired people in the field to look for other transcription factors that may have a similar mode of action.

[The petitioner] then started his project on DNA topoisomerases in collaboration with Novartis. . . . [I]nhibitors of DNA topoisomerases represent a major class of anticancer drugs.

[The petitioner's] work has given us enormous insight about the molecular mechanism of two very important classes of proteins: Ada (DNA repair protein/transcription factor) and DNA topoisomerase (DNA topology modulating enzyme). . . . [The petitioner's] crystal structures of the ATPase fragment of human topoisomerase II α . . . provid[e] the atomic resolution images of this very important protein to inspire the creation of new drugs to target this protein and to kill cancer.

All of the remaining initial witnesses are either Harvard faculty members, former students of [REDACTED] or have otherwise collaborated with the petitioner. Most of these witnesses discuss the same projects described above, except for some Harvard faculty members who offer general information on the petitioner's performance in classes that they taught or seminars that they led. The distribution of witnesses, therefore, is not strong evidence that the petitioner's work has attracted significant notice outside of Harvard University and alumni of [REDACTED]'s group.

The petitioner identified 21 articles that contain citations of the petitioner's articles. Ten of these citations are actually self-citations by the petitioner's coauthors, leaving a modest total of eleven apparently independent citations.

On December 22, 2006, the director issued a request for evidence, instructing the petitioner to submit documentation of his influence on his field and other evidence to show that a waiver of the job offer requirement would serve the national interest.

In response, the petitioner submitted additional letters and documentation. 1993 Nobel Laureate [REDACTED], Chief Scientific Officer of New England Biolabs, stated: "there was never any hesitation about offering [the petitioner] a job at New England Biolabs," but he did not indicate what the petitioner does at that company. It is, therefore, not possible to determine the extent to which the petitioner's current work represents a continuation of his prior work at Harvard upon which the waiver request was originally predicated.

Harvard Professor [REDACTED], Dean of that university's Faculty of Arts and Sciences, offered strong but general praise for the petitioner's abilities and stated: "There is no doubt that [the petitioner's] work has caught the attention of major pharmaceutical companies." The record contains no evidence from any "major pharmaceutical companies" to demonstrate this attention first-hand.

Three of the letters are from independent witnesses. Assistant Professor ██████████ of Rice University stated that she is “familiar with [the petitioner’s] research through his substantial contributions to the field of DNA interacting proteins,” and that the petitioner’s findings “will stimulate research in this area for years to come.” ██████████ of the University of California at Berkeley credited the petitioner with “several seminal discoveries” that have “had a critical impact on a number of vital biomedical areas.” Assistant ██████████ of Virginia Polytechnic Institute stated that the petitioner’s “accomplishments are . . . significant and influential and have established him as a top young researcher in his field.” The only witness to describe the petitioner’s influence on the field in any detail was ██████████ who summarized some of the published articles that cited the petitioner’s work.

The petitioner submitted an updated citation list, showing 46 citations, 15 of which are self-citations by the petitioner’s coauthors. The articles arising from the petitioner’s work at Harvard yielded 23 citations, one of which is a self-citation. The remaining citations pertain to the petitioner’s earlier work in China and, judging from their titles (*e.g.*, “Theoretical study of far-infrared spectra of some palladium and platinum halide complexes”), related to inorganic chemistry rather than organic or biochemistry.

The director denied the petition on June 26, 2007. In the decision, the director acknowledged the intrinsic merit and national scope of the projects described in the record, but found that the witnesses’ “letters fail to demonstrate a past history of significant accomplishments on the part of the petitioner.” The director’s decision contains some erroneous or contradictory claims. For instance, the director put forth the erroneous conclusion that “[t]he petitioner offers no evidence that his work has been published,” but then acknowledged the petitioner’s publication history while stating that publication, by itself, is not evidence of eligibility for a waiver. Regarding citation of those publications, the director first stated “the evidence does not establish that the petitioner’s research has been widely cited by other scientists.” These flaws in specific portions of the decision, however, do not alter the director’s overall finding that the petitioner had not established that his research has been more important or influential than that of others performing research in the same specialty.

On appeal, counsel quotes from witness letters to support the contention that the petitioner has “demonstrated past achievements in the field of biochemistry and structural biology (with a focus on DNA repair and function).” Counsel then states that the petitioner’s “work has been cited **46 times (non-self citations)** by scientists from around the world.” The figure cited by counsel is misleading for two reasons. First, while the citations are not self-citations by the petitioner, a significant number of the citations are self-citations by the petitioner’s co-authors. Furthermore, half of the 46 citations pertain to the petitioner’s research in inorganic chemistry in China, and therefore those citations do not relate to the petitioner’s “achievements in the field of biochemistry and structural biology (with a focus on DNA repair and function).” There remain 22 independent citations of the petitioner’s recent work as it relates to biology/biochemistry, a number which, while respectable, does not automatically compel a finding of eligibility for the waiver.

Counsel states that the petitioner’s “non-participation in his current work would be contrary to the national interest.” The record, however, offers few clues about the petitioner’s “current work.” The petitioner studied structural biology under ██████████ at Harvard, but the petitioner is no longer ██████████ student. We see no reason to assume that the petitioner’s undescribed current work at New England Biolabs is closely similar to his prior work at Harvard, given the significant differences between the petitioner’s work in China

(which related to inorganic chemistry, focusing on metals) and his later work at Harvard. The only consistent thread in the petitioner's publication history is that the articles all relate to the broad discipline of chemistry. The word "Biolabs" in the company name supports a presumption that the petitioner's work relates somehow to biology, but the record is otherwise devoid of evidence to show that the petitioner's current work closely relates to his activities in ██████████'s laboratory. Certainly, it cannot be argued at this stage that a denial of the waiver would have any direct impact on progress in a laboratory that the petitioner has already left.

While the petitioner's work has not been entirely devoid of impact, the evidence submitted in this proceeding does not consistently demonstrate that the petitioner's work has attracted significant notice outside of Harvard and the petitioner's circle of collaborators. Furthermore, whatever the significance of the petitioner's work at Harvard, the petitioner has left that university and there is no evidence that the petitioner's subsequent work represents a close continuation of his doctoral research. These findings do not foreclose the possibility that the petitioner may eventually qualify for the waiver, but the present petition appears to be 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.