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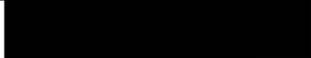
U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: APR 25 2008

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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 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 research associate at Indiana University, Indianapolis. She has since taken a position as a research instructor at the University of Minnesota, Minneapolis. 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 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 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 (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 has been studying breast cancer at Indiana University’s Indiana Cancer Research Institute. Her initial submission included several witness letters, examples of which we consider here. Several of the witnesses whom the petitioner described as “independent researchers” have, in fact, actively collaborated with the petitioner.

Associate Professor [REDACTED] stated:

As [the petitioner’s] post-doctoral research advisor, I have witnessed the strong development of [the petitioner’s] scientific career. Her major contributions [*sic*] to the field of breast cancer research has been her identification of several mechanisms by which the HIV protease inhibitor ritonavir inhibits cancer cell growth. . . .

I specifically recruited [the petitioner] for her expertise in molecular biology and she has greatly exceeded expectations. . . .

She has also identified candidate biomarkers for ritonavir activity which may be very useful in early clinical trials to determine whether the drug is bioavailable and inhibiting expected targets.

Many of the other witness letters stress the petitioner’s discovery of the anticancer effects of ritonavir.

Indiana University Professor [REDACTED] stated that the petitioner's "greatest contribution to the field of breast cancer research has been her recent demonstration that cytochrome P450 enzymes modulate the growth of breast cancer cells."

Some witnesses also discussed the petitioner's research of lung cancer. One of the petitioner's collaborators, [REDACTED] of Vanderbilt University, stated that the petitioner "demonstrated that a gene encoding a cytochrome P450 enzyme is over-expressed in non-small cell lung cancers (NSCLC's) that recur following surgery. This finding is of considerable importance because it may provide insight into a novel mechanism of cancer progression that was not previously recognized."

[REDACTED], Staff Scientist at the National Institute of Immunology, New Delhi, India, stated:

Prior to her research in the United States, [the petitioner] conducted breakthrough research in India on interleukin IL2 and its use as therapeutic agent, in the form of gene therapy, for different types of cancer especially renal carcinoma, melanoma and leukemia. . . . The production of IL-2 is not cost effective. . . . [The petitioner] devised an ingenious technique to attach IL-2 to buffalo beta casein promoter. This allowed for an effective harvest of IL-2 from the buffalo's milk.

The petitioner submitted copies of her published and presented work, but no documentary evidence to show that this work has had an unusually significant impact within the petitioner's field. Simply identifying and describing the petitioner's contributions does not objectively establish that the petitioner's work has served, and will continue to serve, the national interest to a significantly greater extent than the work of other qualified researchers in the same field.

On March 5, 2007, the director issued a request for evidence, stating:

Please submit any available additional documentary evidence that, as of the petition[']s priority date, you had a degree of influence on your field that distinguishes you from other scientists with comparable academic/professional qualifications. The evidence may include, for example, copies of additional published articles that cite or otherwise recognize your research achievements.

In response, the petitioner submitted copies of two articles that contain citations of the petitioner's work. Both were published in 2007, after the petition's 2006 filing date, and one of these appeared in print in May 2007, only days before the petitioner responded to the request for evidence. We acknowledge that these citations relate to work that the petitioner performed prior to the petition's filing date, but two citations do not establish significant influence in the field. Witnesses whom the petitioner selected have asserted that the petitioner made important discoveries, but the record contains minimal evidence that her findings have influenced the work of other researchers.

The petitioner submitted two additional witness letters. Dr. [REDACTED] now (like the petitioner) at the University of Minnesota, stated that the petitioner's "award is evidence of her ranking as a top young investigator." The

award in question was actually an “honorable mention” from a regional institute that “funds investigators at a number of outstanding Midwestern universities.” An award of this kind can form part, but not all, of a successful claim of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(F). Exceptional ability, by statute, is not sufficient grounds for a national interest waiver.

also stated that the petitioner “has been asked to present her work at international conferences,” but the record contains no documentary evidence to show that such presentations are reserved for unusually influential research.

also of the University of Minnesota, states that the petitioner’s “research is now focused on understanding the regulation of breast cancer cell proliferation and apoptosis and the development of new targets to improve therapy for metastatic breast cancer.” speaks of the petitioner’s work with ritonavir in the past tense and indicates that the petitioner has moved on to “a cellular protein, acyl-Co A binding protein.” It appears that the petitioner did not begin this work until after she moved from Indiana University to the University of Minnesota.

On July 23, 2007, the director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner’s work but stating that the petitioner does not qualify for a waiver simply by virtue of being “successful in . . . her endeavors.” The director found that the documentary evidence in the record did not distinguish the petitioner from other researchers who, like the petitioner, seek to find new treatments for dangerous cancers.

On appeal, counsel stated that the director “failed to take into account other evidence which clearly showed that [the petitioner’s] contributions and expertise are well recognized in the field.” The director’s failure to individually list every exhibit in the voluminous record of proceeding does not indicate that the director “failed to take into account” the unnamed exhibits.

The specific exhibits that counsel singles out on appeal include documentation of the petitioner’s “discoveries of new genes [registered with the] National Center for Biotechnology Information.” The discovery or isolation of one of the hundreds of thousands of genes that make up the human genome is not automatic or presumptive grounds for a waiver. Counsel does not explain why the discovery of these particular genes is of special importance.

Next, counsel cites the petitioner’s selection as a “member of the Editorial Board of Academic Journals Inc.” An electronic mail message reproduced in the record indicates that Academic Journals Inc. issued a “call for editors/reviewers,” opening not with a greeting to the petitioner but with the general salutation “Dear Colleague.” The evidence does not indicate that the petitioner was singled out because of her reputation in the field; rather, she answered a general, open call for editors and reviewers to serve on newly-created journals with “an exceptionally fast publication schedule.”

Counsel adds that the petitioner was “invited to publish in BioMed Central’s Cancer Journals” and in “Breast Can[c]er Research.” These journals, like those published by Academic Journals Inc., are “Open Access journals.” Both of the similarly-worded invitations appear to be “form” letters, promoting the journals and

soliciting submissions. The record contains no evidence to show that these invitation letters represent any kind of significant distinction in the field.

The only new exhibit submitted on appeal is a letter from [REDACTED], a Senior Office Supervisor at the University of Minnesota. Ms. [REDACTED] states: "According to University of Minnesota policies, the green card processing is done only for tenured [*sic*] track faculty. Therefore, her green card application will have to be processed independently by her through the National Interest Waiver category." This is not a strong argument. The university is, of course, free to set its own policies regarding what it is willing to do for employees seeking immigration benefits, but those policies should not and do not constrain federal immigration policy. The petitioner's apparent ineligibility for permanent employment at a particular university does not imply her eligibility for permanent immigration benefits.

Furthermore, even assuming for the sake of argument that the federal government ought to shape its enforcement of immigration law to conform to the University of Minnesota's policies, the petitioner was not yet at the University of Minnesota when she filed this petition. [REDACTED] therefore argues, in effect, that the petitioner's subsequent relocation to the University of Minnesota should retroactively demonstrate that the petitioner was already eligible for the waiver before that relocation occurred. The beneficiary of an immigrant visa petition must be eligible at the time of filing; subsequent developments cannot cause a previously ineligible beneficiary to become eligible. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The record shows that the petitioner is a qualified researcher, engaged in promising studies. The record does not, however, demonstrate that the petitioner had, as of the filing date, established a track record that significantly distinguishes her from other researchers in the same specialty. 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.