

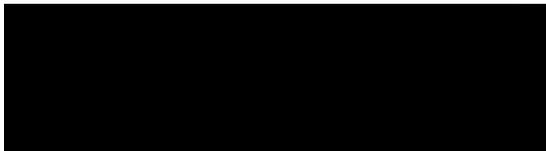
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U.S. Citizenship
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Services

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FILE:

EAC 06 029 50051

Office: NEBRASKA SERVICE CENTER

Date: **AUG 15 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:

SELF-REPRESENTED

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 an alien of exceptional ability and as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral associate at the University of Miami, Florida. He subsequently became a research scientist working at the Naval Institute for Dental and Biomedical Research, Great Lakes, Illinois. 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 the classification sought, 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 record amply demonstrates that the petitioner, who holds a doctorate from the University of Minnesota, qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would serve no constructive purpose and be of no further benefit to the petitioner, and therefore the AAO need not explore that issue 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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The

director, however, did not note this omission in the request for evidence or the denial notice. We will, therefore, review the matter on the merits.

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.

The petitioner submitted copies of published articles and abstracts of conference presentations. These materials show the products of the petitioner’s work but they do not, by themselves, establish the significance

of that work. To discuss that significance, the petitioner submitted letters from two witnesses, both of whom have demonstrable ties to the petitioner. Dr. [REDACTED], an associate professor at the University of Minnesota, where the petitioner earned his doctorate, stated;

[The petitioner's] research at the University of Minnesota was directed toward developing methods for micromechanical engineering of neural networks *in vitro*. A number of groups had found that mechanical force can be used to initiate axons and stimulate their elongation *in vitro*. . . .

We then sought to extend this individual cell manipulation method to one where many neurons could be manipulated in parallel in a chip-based format. . . . [The petitioner] assisted in the design and testing of a transparent, microfabricated micropost array that can potentially manipulate up to 2500 individual neurons simultaneously. . . .

The field of cell micropatterning has grown considerably in recent years. . . . However, we found that the published methods all rely on: 1) chemical grafting of a nonadhesive molecule . . . to prevent cell adhesion, and 2) masks for photolithography. . . . The former requirement means that chemical processing is complex (and often unsuccessful), while the latter requirement means that pattern production is time-consuming (and inflexible). To solve these problems, [the petitioner] investigated the use of poly-dimethylsiloxane (PDMS), which naturally inhibits cell adhesion. To make subregions of PDMS adhesive, [the petitioner] made microcontact printing stamps (from PDMS), coated them with an adhesion molecule . . . , and pressed the stamp onto the PDMS surface. . . . [T]he cell patterns persisted for days *in vitro*. . . .

[The petitioner] also investigated a solution to the second problem (the need for masks) by using a novel direct writing method called mesoscale maskless materials deposition. . . . These results allow cells to be patterned on virtually arbitrary surfaces by directly writing either permissive or nonpermissive materials onto the surface. In addition, the method works on curved and irregular three-dimensional objects.

Professor [REDACTED] of Augsburg College, where the petitioner earned his baccalaureate, described the petitioner's work with him:

[The petitioner] worked with me during the 1999-2000 academic year as an Undergraduate Research Assistant in Augsburg's Center for Atmospheric and Space Sciences. His work involved the analysis of magnetometer and ELF/VLF radio receiver data from several research stations in Antarctica. The naturally-occurring electromagnetic emissions we were studying were generated at high altitudes in Earth's space environment as a result of complex interactions between various plasma constituents, and were guided to Earth along magnetic field lines. . . .

[The petitioner's] Ph.D. work, studying the use of micromechanical forces for nerve regeneration, has led to his appointment as a postdoctoral researcher to continue these studies in a medical school setting. His investigations of the use of magnetic fields and superparamagnetic beads to control the path of axons can in this setting be well matched with clinical needs, and is a vital "next step" in bringing this new technology to practical use, as well as understanding our fundamental understanding of neurobiology.

The petitioner's initial submission did not show that his work had had any impact outside of his own circle of mentors and collaborators. On June 12, 2007, the director issued a request for evidence, instructing the petitioner to submit documentary evidence of such impact. The director also requested information about the petitioner's "proposed activities in the United States."

In response, the petitioner submitted a letter from Dr. [REDACTED] Assistant Professor of Ophthalmology at the University of Miami, who stated:

I am serving as [the petitioner's] supervisor at the Bascom Palmer Eye Institute, University of Miami Miller School of Medicine. . . .

The inability to regenerate the central nervous system has been a huge medical question, and the previous research has mainly focused on addressing the issues relate to the environment of the injury site. Interestingly, mechanical tension has been used to initiate and elongate axons from neurons. As part of [the petitioner's] graduate training at the University of Minnesota, he developed technology for application of mechanical tension and to understand the role of mechanical tension in axon growth. [The petitioner's] research at the University of Miami is to develop novel nanotechnology to overcome the intrinsic factors that inhibit regeneration, and provide an opportunity for addressing the issues related to enhancing regeneration in the central nervous system. . . .

[The petitioner] is also investigating the use of magnetic nanoparticles and magnetic fields as a system for controlling signaling molecules in neurons that play a very important role in their survival and growth. . . .

Medical applications of [the petitioner's] research expertise are not only limited to enhancing regeneration. His expertise can be very well applied to many research areas including nanotechnology based targeted drug delivery, developing biosensors for drug and toxicity testing, medical imaging and diagnostics, and targeted cell therapy.

The petitioner submitted additional copies of his published and presented work, as well as four articles that contain citations of the petitioner's work. One of these four articles is a review article that cited over 100 articles concerning methods of printing living cells onto surfaces. The small number of citing articles do not demonstrate that the petitioner has been especially influential in comparison to the numerous other research groups conducting similar research into cell printing.

The director denied the petition on February 22, 2008, acknowledging that the petitioner has made contributions in his field but finding “it has not been shown that the petitioner’s work has yet had a measurable influence in the larger field” and that the record “does not persuasively distinguish the petitioner from other competent researchers.”

On appeal, the petitioner asserts that “postdoctoral positions are awarded because of significant past accomplishments and record of contributions.” The petitioner submits no documentary evidence to establish that a postdoctoral position is a form of recognition, rather than a more or less routine rung on an academic career ladder.

The petitioner states that the director credited him with only two published articles, whereas he had actually completed work on a third article as of the petition’s filing date. There is no indication that the director would have approved the petition if this completed manuscript had been treated as a published article.

The petitioner asserts that the recommendation letters in the record “not only discussed my contributions or past record but also discussed future benefits.” The director did not state otherwise. Rather, the director stated that, while witnesses have speculated about future applications of the petitioner’s work, there is no evidence that such work has yet yielded therapeutic applications or otherwise been widely adopted.

The petitioner names five articles that contain citations to his work. The petitioner has not shown that this level of citation elevates him above others in the field to an extent that would warrant the special benefit of a national interest waiver. Similarly, the petitioner emphasizes his participation in scientific conferences, but he does not show that this activity shows that he has been singled out for recognition.

The petitioner states: “Currently, I hold a position with **the Department of Defense**, specifically **the United States Navy (Naval Institute for Dental and Biomedical Research)** through a major defense contractor, General Dynamics Information Technology” (the petitioner’s emphasis). A job with a defense contractor is not “a position with the Department of Defense,” and holding such a position is not presumptive evidence of a key role in national defense. Also, the work described, involving “the development of a nanosystem for controlled delivery of antibiotics,” does not appear to relate directly to the work that the petitioner performed prior to the date of filing. It appears, instead, to be a largely new project, and therefore it cannot qualify the petitioner for a priority date that precedes the petitioner’s involvement with the project. Therefore, even if the petitioner had established conclusively that this project qualifies him for a waiver (which he has not done), the project could not result in approval of the present petition. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Because activities that the petitioner undertook after the filing date cannot establish eligibility, it would serve no practical purpose to discuss those duties in detail here.

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.