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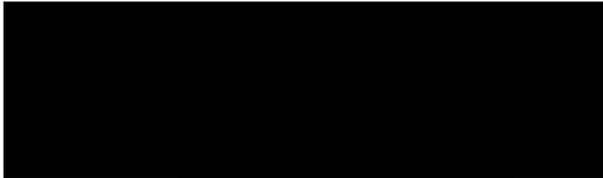
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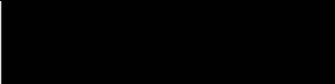
U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

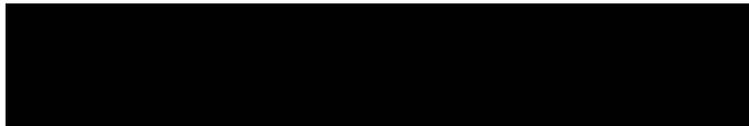
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IN RE:

Petitioner:

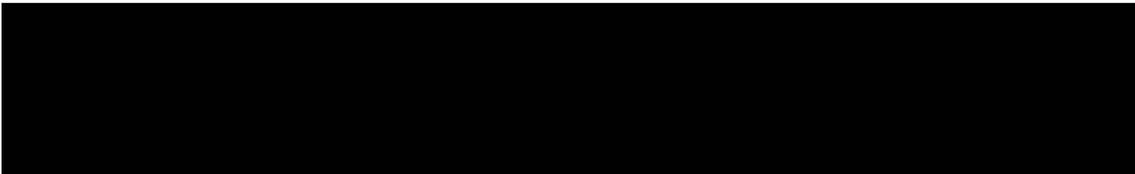


Beneficiary:

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, 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. The petitioner seeks employment as an oncology (cancer medicine) researcher. 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 provided sufficient information about his intended future work to establish that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

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 petitioner claimed to qualify for classification as an alien of exceptional ability in the sciences. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, and the AAO does not dispute the director's finding. An additional finding of exceptional ability would be of no further benefit to the petitioner, and therefore the issue of whether the petitioner so qualifies is effectively moot. 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.

On his Form I-140 petition, the petitioner stated that he “will be involved in research projects of oncological science, evaluation and findings in BREAST CANCER, CYTOGENETICS, ONCOGENETICS AND POSTMENOPAUSAL CHANGES THAT LEAD TO BREAST CANCER” (emphasis in original). On a Form ETA-750B Statement of Qualifications accompanying the petition, the petitioner indicated in all capital letters that he seeks to be “SELF EMPLOYED,” “SOME WHERE IN THE GREATER LOS ANGELES AREA.” The petitioner also asserted on the Form I-140 that he seeks a salary of \$120,000 per year.

The petitioner indicated that, since 1978, he has been a “scientist/oncology researcher” at Hacettepe University Institute of Oncology in Turkey. Counsel’s introductory statement contains what is at times a hyperbolic description of the petitioner’s achievements. For instance, counsel stated: “The petitioner is the WINNER OF THE WORLD’S MOST PRESTIGIOUS AND HONORARY DISTINCTIONS AWARD IN 1994 entitled: MERIT AWARD OF AMERICAN SOCIETY OF CLINICAL ONCOLOGY” (emphasis in original). Materials in the record identify the petitioner as one of 52 recipients of the award in 1994. The award apparently consisted of “\$1,000 towards [the petitioner’s] expenses incident to [the petitioner’s] participation [at a conference] in Dallas.” The award is presented to “young physicians,” and the winners were listed under the heading “Student/Resident/Fellow Award Recipients.” The record is devoid of evidence that the award is “the world’s most prestigious.”

As another example, counsel claimed that the petitioner holds several memberships that are “only granted to highly qualified researchers and scientists.” Materials in the record show that the petitioner’s “Active member” status in the above-mentioned American Society of Clinical Oncology is “[a]vailable to physicians and other health professionals at the postgraduate level for whom the majority of their professional activity is related to oncology patient care and clinical research.” The petitioner’s associate membership in the American Association for Cancer Research “is open to graduate students; medical students and residents; clinical and postdoctoral fellows.”

From the above examples and others in the record, it is clear that counsel’s evaluation of the evidence is neither objective nor moderate. Any evaluation of the evidence of the record must rest on the evidence itself, rather than on counsel’s claims regarding the significance of that evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In a letter accompanying his initial filing, the petitioner indicated that his past studies have been supported by grant funding, which required him to sign away the rights to his findings. He stated:

Therefore not being permitted to apply for a patent registration of my scientific research discoveries in my native country, I am considering carrying on my research program in the United States where I could secure patent recognition for my current and future discoveries in my particular field of endeavor. . . .

Upon immigration and final settlement in the United States, I will have my entire breast cancer research findings duly patented in this country and will consequently initiate necessary contacts to share my discoveries with the world’s first class universities, research organizations as well as scientific societies.

On November 18, 2006, the director issued a request for evidence, stating:

In describing his anticipated work in the United States, the petitioner states that he will have his finds in breast cancer research patented. He adds: “I will share my discoveries with the world’s first class universities, research organizations as well as scientific societies.” Please submit an

additional letter from the petitioner in which he elaborates on these plans and explains how his expertise in this specialty will be applied to his work in the U.S. The petitioner should provide names of universities or other institutions or organizations where he will perform this work (“...shar[ing] my discoveries...”) and he must describe the exact work to be performed. Provide documentary evidence of his anticipated work, such as contracts or letters from universities, institutions or other organizations who attest to the petitioner’s plans.

In response, the petitioner submitted a ten-page letter, consisting mostly of a list of his published writings. Apart from this list, the petitioner stated that he “had a very productive time” during a 1991-1993 sabbatical at Southwest Biomedical Institute, Scottsdale, Arizona. The petitioner asserted that, during that time, he “was able to do research on cytogenic findings in solid tumors” “[i]n collaboration with [REDACTED] . . . who is the present Associate Director for International [A]ffairs of the U.S. Department of Health and Human Services.” The petitioner submitted copies of letters from the early 1990s, verifying that he was an “exchange visitor” during that time.

The petitioner did not indicate that he had made any tentative arrangements regarding his intended future work in the United States. Rather, he stated:

Upon immigration and final settlement in the United States, I will have my entire cancer research findings duly patented in this country and will consequently initiate necessary contacts to share my discover[ie]s with the following scientific societies:

1. The American Association for Cancer Research
2. The American Society of Clinical Oncology
3. The American Cancer Society

The petitioner asserted that his research findings “are easily marketable,” but he provided no details about those findings, how they are “marketable,” or how he intended to “market” them.

In denying the petition on January 30, 2007, the director did not contest the substantial intrinsic merit of cancer research. The director also acknowledged that “objective evidence of wide citation” establishes the petitioner’s influence in his field. The denial rested on the director’s finding that the petitioner had provided no evidence that he would “apply his expertise in medical oncology or in a related specialty as an integral part of continuing research in the United States.” The director found that “the petitioner has not detailed his precise anticipated activities in the U.S. beyond securing patents,” and that, at best, the petitioner has provided only vague and unsubstantiated assertions of intent regarding his possible future activities. The director concluded that the petitioner’s ill-defined plans do not meet the threshold for the national interest waiver.

On appeal, counsel argues that the petitioner “is indeed a distinguished scientist whose sustained focus on BREAST CANCER RESEARCH arms him with scientific ingenuity to rise aggressively to the American challenge of continued fighting against what stands to be women’s most dreaded nightmare: Breast Cancer” (emphasis in original). The director did not question the petitioner’s credentials as a researcher or the value of breast cancer research; the director specifically acknowledged both in the decision. The decision rested on the

director's determination that a vaguely-expressed intent to patent unspecified work is not a sufficient basis for a national interest waiver. Counsel, on appeal, does not rebut this finding, offering only the still-vague assurance that the petitioner will continue to seek appropriate employment. Counsel asserts that the petitioner is "on THE VERY TOP OF HIS FIELD OF ENDEAVOR" (emphasis in original), but for reasons already discussed, we cannot put much credence in counsel's unsupported and often exaggerated claims.

The petitioner's statement of intent raises questions that have not been answered. The petitioner initially stated that he wished to be a "self-employed" researcher, without indicating what resources, if any, were at his disposal to conduct independent research in this manner. The petitioner stated that he could not keep the rights to his research in Turkey because he relied on grant funding, but he did not show that he would be able to finance his work in the United States without grant funding. (The record shows that the petitioner's past research in the United States was grant-funded.)

With respect to the petitioner's core claim – *i.e.*, his stated intent to seek patents for his work – we cannot overlook the petitioner's failure to specify what, exactly, he seeks to patent. The web site of the United States Patent and Trademark Office (USPTO) offers this description of a patent:

A patent for an invention is the grant of a property right to the inventor, issued by the United States Patent and Trademark Office. . . .

The right conferred by the patent grant is, in the language of the statute and of the grant itself, "the right to exclude others from making, using, offering for sale, or selling" the invention in the United States or "importing" the invention into the United States. . . .

There are three types of patents:

- 1) Utility patents may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof;
- 2) Design patents may be granted to anyone who invents a new, original, and ornamental design for an article of manufacture; and
- 3) Plant patents may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.¹

From the information on the USPTO's own web site, it is clear that patents apply to "inventions" rather than to research findings. The description of an existing biological process, such as might be reported in a published case study in a medical journal, does not appear to be patentable. The petitioner has not shown that his cancer research has ever involved, or is likely to involve, the invention, discovery or improvement of any process, machine, article of manufacture, or composition of matter. The petitioner does not claim to be involved in the

¹ <http://www.uspto.gov/web/offices/pac/doc/general/index.html>, visited January 16, 2008.

formulation of patentable anti-cancer drugs; he claims only to study cancer itself. Observations about the progress or manifestations of cancer, or about the behavior of cancerous cells, do not appear to be patentable; the petitioner could not obtain a patent giving him the exclusive right to make and publish such observations.

As the director has acknowledged, the petitioner is an accomplished researcher in an area of undisputed merit. The petitioner's asserted plans, however, are unacceptably vague. Where the petitioner does offer details, those details have not been shown to reflect accurately the realities of cancer research in the United States. 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.