

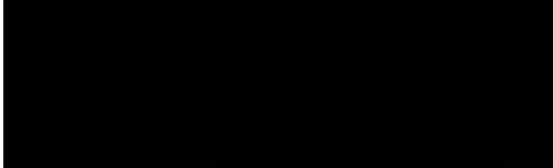
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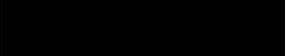
U.S. Citizenship
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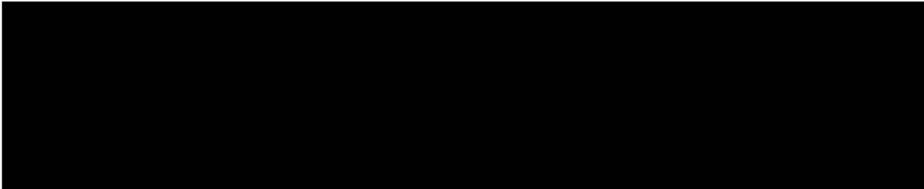
Petitioner:



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. The petitioner seeks employment as a postdoctoral research associate at the Institute of Human Virology at the University of Maryland. 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, an alien cannot qualify for a waiver simply by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory statement, counsel described the petitioner’s work:

[The petitioner] is an outstanding researcher in the field of chemistry and its sub-disciplines with extensive experience in bioremediation using microorganisms, bioconjugate chemistry, biological analytical chemistry, [and] biological chemistry. . . .

As part of his research, [the petitioner] has successfully focused his research on bioremediation of heavy metal toxicity that is vital for . . . understanding the mechanism underlying the heavy metal contamination and the processes to chemically degrade its toxicity. . . .

At the [State] University of New York he has been actively working on the phytoremediation, which is the use of plants to clean up the contaminants in a sustainable and environmentally friendly manner. . . . [The petitioner’s] research in this field has already resulted in many significant discoveries. . . .

Based on his research success, [the petitioner] was recruited to join Professor Wuyuan Lu at the Institute of Human Virology at the University of Maryland. He is currently investigating the structure and function of human α -defensins. . . . Today, we face further challenges in responding to such harmful bacteria, since they are obtaining immunity to existing antibiotics. [The petitioner's] research focuses [on] ultimately designing novel antibiotic therapeutics for the treatment resistant infections, existing and emerging infectious diseases.

Counsel goes on to discuss bioremediation of heavy metal contamination and states that the petitioner "is proving that she [*sic*] can make a huge difference in the fields of environmental chemistry and bioremediation research. As a result, [the petitioner's] continued research in these fields of intrinsic merit will impact all parts of the nation and benefit the United States on a national scope." The record, however, does not reflect the petitioner's "continued research" in bioremediation. It appears, rather, that the petitioner participated in such research in conjunction with his now-completed work at the State University of New York (SUNY) at Syracuse. The petitioner's most recent documented work at the University of Maryland does not relate to bioremediation, and the record does not demonstrate the petitioner's intent to return to that specialty. It appears, instead, that bioremediation was simply a project assigned to the petitioner as part of his doctoral and postdoctoral training at SUNY Syracuse. The petitioner's body of work, as a whole, may serve as a guide to the petitioner's level of skill, but if the petitioner no longer works specifically in bioremediation, then his continued presence in the United States offers no prospective national benefit in that regard.

Five witness letters accompanied the petitioner's initial filing. Counsel indicated that one of these five letters "is an Independent Advisory Opinion from an international scientist who [has] not worked with [the petitioner] and does not know [the petitioner] personally but rather through his publications and presentations at scientific conferences." Four of the five letters, including the one singled out by counsel, concern the petitioner's past work in bioremediation.

Two of the initial witnesses are SUNY Syracuse faculty members. [REDACTED], whose "acquaintance with [the petitioner] is through frequent, informal discussions," stated that the petitioner's development of "the first immunoassay for anatoxin-a . . . is a tremendous contribution to public health." [REDACTED] who supervised the petitioner's work at that university, described the petitioner's project as "a monumental undertaking for a graduate student . . . that few if any in the world will repeat," and indicated that a member of the petitioner's thesis defense committee opined that the petitioner's project "would rival any of the current work being done in the United States."

[REDACTED], now a research scientist at the American Type Culture Collection in Manassas, Virginia, previously studied alongside the petitioner under [REDACTED]. [REDACTED] stated that the petitioner "has demonstrated the essential mechanism underlying the natural power of heavy metal toxicity prevention by siderophores produced by mycorrhizal fungi. . . . The innovative research design utilized by [the petitioner] provides a basis for future researchers seeking to elucidate the role of siderophores in heavy metal movement in the environment."

Winkelmann of the University of Tuebingen, Germany, is the independent witness to whom counsel referred. [REDACTED] stated:

I have personally never met [the petitioner], but I know him through his work in the field of biochemistry research of siderophores. . . .

[M]ycorrhizal fungi, fungi symbiotically associated with plants, have a remarkable ability to [protect] plants from heavy metal toxicity and make their associated plants stronger and more tolerant to heavy metals. Mycorrhizal fungi increase siderophore production under heavy metal stress. Siderophores are small molecules . . . [that] can either remove or immobilize heavy metals and decrease the exposure of plants to heavy metals. . . .

The major contribution that [the petitioner] has made to the heavy metal removal problem is his groundbreaking discovery in determining the interactions between heavy metals and a common mycorrhizal siderophore ferricrocin. . . . His findings portend a major breakthrough for understanding the interactions between siderophores and metals as well as siderophore-mediated metal transport, and essential for the application of siderophore-producing mycorrhizal fungi in bioremediation of heavy metals. . . . His continuing research will provide the novel and “green” approaches towards the treatment of heavy metal contaminations. . . .

[The petitioner] is continuing his work on siderophore-mediated heavy metal removal using a strong set of techniques and his considerable knowledge of the field. . . . I am confident that [the petitioner’s] future contribution to the research [field] of environmental-friendly heavy [metal] contaminations will be significantly greater than most of his peers in the field.

referred repeatedly to the petitioner’s “continuing research” in bioremediation, but the petitioner’s work in bioremediation ceased the month that that [redacted] wrote the letter (June 2005).

The remaining witness, [redacted], Associate Professor at the University of Maryland, oversees the petitioner’s current research. [redacted] described that work:

[The petitioner] is currently investigating the structure and function of human α -defensins. Defensins are antimicrobial proteins of innate immunity against microbial infections. They kill a broad range of microbes including bacteria, fungi and certain enveloped viruses. [The petitioner’s] research is to elucidate the structural determinants and sequence rules governing the variety of biological functions of these proteins, and ultimately, in designing novel antibiotic therapeutics for the treatment of antibiotic resistant infections, existing and emerging infectious diseases. . . . [D]efensins do not induce antibiotic resistance as they act non-specifically on the bacterial cytoplasmic membrane. Therefore, defensins are ideal candidates for the development of novel antibiotic therapeutics. The obstacle of the project is that no[t] enough protein materials can be obtained from natural source[s]. . . . [The petitioner] used [a] newly developed method to chemically synthesize defensins in large quantity and high purity.

The petitioner is a co-author of several published articles. As an objective gauge of the impact of those articles, the rate of independent citation is of more value than the quantity of articles that the petitioner has produced. The petitioner's initial submission established the existence of the petitioner's articles relating to bioremediation, but contained no evidence of independent reaction apart from [REDACTED]'s letter. As of the petition's filing date, the petitioner had begun working with defensins so recently that he apparently had not yet produced any published work in that area.

On September 12, 2006, the director issued a request for evidence, requesting additional statements from independent experts and "documentary evidence of [the] impact of [the petitioner's] achievements," including evidence of citation of the petitioner's published work. In response, the petitioner submitted five new letters. Four of the five witnesses have collaborated with the petitioner or work for the same employer; these witnesses focus largely on work that the petitioner undertook after the petition's filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date based on a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Regarding the work the petitioner was already performing as of the filing date, [REDACTED] of the National Cancer Institute, who collaborates with the petitioner and [REDACTED]'s laboratory but does "not interact with [the petitioner] on a daily basis," stated that the petitioner's "novel findings will greatly increase understanding of the fundamental mechanisms of defensin associated innate immunity."

The most independent witness appears to be [REDACTED], a Senior Scientist at AtheroGenetics, Inc., who "was impressed by [the petitioner's] great achievements in the area of human defensins as innate defense mechanism against notorious infectious diseases." [REDACTED] asserted that the petitioner's "current research provided [a] foundation for the development of critically needed therapies for infectious diseases. . . . [The petitioner's] achievements have brought rare insight for the development of novel drugs to treat drug-resistant bacteria and provided us with a novel template for drug development." [REDACTED] asserted that the petitioner's "discovery provided guidance and [a] novel alternative to my own work for drug development."

With respect to the director's request for evidence of citation of the petitioner's work, the petitioner submitted a copy of a 2005 article from *Proteomics* that cited a recent article by the petitioner in *Biomaterials*. The citation (a joint citation, along with a 2002 article by others) described the preparation of peptides in an experiment regarding copper absorption by *Arabidopsis*. This single citation does not establish the breadth or depth of the petitioner's impact on his specialty.

The director denied the petition on April 10, 2007, acknowledging the intrinsic merit and national scope of the petitioner's work, but finding that the petitioner has not distinguished himself from other researchers in his specialty. The director noted that the petitioner submitted little independent evidence of his impact in the field, and also that "the petitioner filed this petition shortly after leaving one research field for another. There is no evidence that as of the filing date of this petition that he had yet made any impact of note in his new field, and the evidence indicates that the impact which he had made on his previous field was minimal."

On appeal, counsel does not address the petitioner's recent change of research focus, but provides a list of the petitioner's "demonstrated past achievements," with quotations from old and new witness letters.

A particularly prominent witness on appeal is [REDACTED], head of the Institute of Human Virology and discoverer of HIV. [REDACTED] states that the petitioner “is now actively collaborating with leading HIV/AIDS researchers to unveil the mechanisms of action of defensins in hopes of developing defensins as a novel class of antiviral agents for AIDS therapy.” This research appears to be an example of work that the petitioner began after the filing date; the petitioner’s substantial initial submission contained no mention of any work involving HIV/AIDS. The AAO does not challenge [REDACTED]’s reputation or expertise, but his letter and other materials submitted on appeal support rather than refute the director’s finding that the petitioner’s work with defensins appears barely to have begun at the time the petitioner chose to file his petition. Pursuant to *Matter of Katigbak*, a researcher at the very outset of a career in biomedical research cannot base a claim of eligibility on research he had not yet performed as of the filing date, on the expectation that he would accumulate a significant track record before adjudication of the petition is complete.

While the petitioner’s past and present work involves overlapping skill sets, the record establishes no clear nexus between the petitioner’s former work with soil remediation and his subsequent study of defensins. As [REDACTED] acknowledges in a new letter on appeal, the petitioner “has been . . . transformed to a biomedical researcher” following “a change in his research direction.”

We concur with the director that the petitioner has not established that his past work in bioremediation will prospectively benefit the United States. Furthermore, the petitioner has not shown that his past work has had a substantial impact throughout the field of bioremediation, or supports a conclusion that we could reasonably expect substantial future impact in biomedical research. This is not to say that such future impact is not possible, only that the petitioner has not met his burden of proof in this regard as of the petition’s September 2005 filing date. As of the filing date, the petitioner’s published work had accumulated minimal citations, and subsequent submissions do not reveal any change in this trend. The petitioner has obtained a small quantity of independent witness letters, but when viewed in the larger context of the record, these statements do not suffice to demonstrate that the petitioner’s ongoing work has been notably influential within his field.

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.