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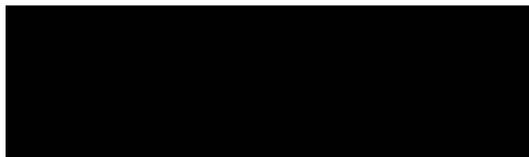
FILE: [REDACTED]
SRC 07 800 21871

Office: TEXAS SERVICE CENTER Date: **SEP 26 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

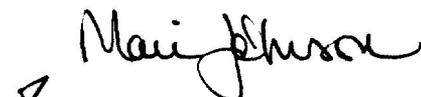
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

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 research associate at the Children's Nutrition Research Center at Baylor College of Medicine (BCM), Houston, Texas. 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 failed to submit supporting documentation within seven days of electronically filing the petition.

The petitioner electronically filed the Form I-140 petition on July 23, 2007. Online instructions for electronically filing Form I-140¹ read in part: "The required initial evidence must be received by the Service Center within seven business days of e-Filing the Form. If you do not submit the required initial evidence in the requisite time period, you will not establish a basis for eligibility, and we may deny your petition or application."

The director denied the petition on December 20, 2007, stating "no evidence has been received in support of [the] petition." On appeal, the petitioner submits copies of documentation showing that the required evidence was mailed one day after the electronic filing date, and delivered two days after that on July 26, 2007. The record confirms the accuracy of these claims.

The petitioner has overcome the sole stated basis for denial of the petition, by establishing the timely submission of the supporting evidence for his petition. Therefore, the director's denial cannot stand. Nevertheless, another factor, not mentioned by the director, prevents the outright approval of the petition.

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. In the interest of thoroughness, the AAO will review the matter on the merits. If the merits do not support approval of the petition, then it would serve no purpose for the director to instruct the petitioner to submit the required Form ETA-750B.

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. --

¹ Instructions available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=47f2065d85cee010VgnVCM1000000ecd190aRCRD&vgnnextchannel=9059d9808bcbd010VgnVCM100000d1f1d6a1RCRD>, visited September 12, 2008.

(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 available evidence indicates that the petitioner qualifies for classification 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 the 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 nine witness letters; we shall discuss examples here. Five of these letters are from BCM faculty members. Professor Teresa A. Davis stated that the beneficiary’s “research has focused on the function of SIRTUIN genes in aging and aging related diseases, such as obesity and cancer.” [REDACTED] added that the beneficiary’s work with transcription factor PU.1 “provides a new potential target for developing anti-obesity and anti diabetes drugs.”

[REDACTED] Assistant Professor at BCM, stated:

Our lab is studying the molecular mechanism underlying the observation that long term dietary food restriction delays aging and age-related diseases, including obesity, diabetes and cancer. The idea is that if we can figure out the molecular players mediating the effects of dietary restriction, we might be able to design drugs to activate the pathway to promote longevity and fight against diabetes and cancer.

[REDACTED] described several of the petitioner’s research contributions. Here is one example: “He has also developed transgenic mice with SIRT2 over expression in the fat tissue and found that forced SIRT2 expression reduces total fat mass in mice to make mice leaner. We predict that these mice are resistant to diet induced obesity and they have a longer lifespan. Experiments are underway to confirm these predictions.”

Other letters demonstrate that the beneficiary’s reputation and impact are not limited to BCM. For example, [REDACTED] of the Chromatin and Gene Expression Laboratory at France’s *Institut National de la Santé et de la Recherche Médicale* (INSERM), stated:

I became interested in [the petitioner’s] work because of our common interest in histone-deacetylases. . . . [The petitioner] is working in a US-based laboratory . . . specializ[ing] in the functional studies of a specific group of histone-deacetylase, SIRT1 and SIRT2. . . .

I became aware of [the petitioner’s] new findings on SIRT1 and SIRT2 in the recent histone-deacetylase meeting sponsored by [the] Federation of American Societies on Experimental Biology. . . . [The petitioner] and other scientists have independently demonstrated that SIRT2 and SIRT1 can deacetylate FOXO3a . . . [which] is a critical transcription factor

regulating metabolism, anti-oxidation and anti-cancer reaction. The deacetylation of FOXO3a was found to increase its DNA binding affinity, presumably enhancing FOXO3a function. There are also reports showing that SIRT1 down regulates FOXO3a function. [The petitioner] speculates that there are additional regulatory mechanisms which he proposes to investigate. . . . His data . . . provided one explanation [of] SIRT1's mysterious effect on FOXO3a. . . .

[The petitioner's] finding and on-going research is very important because pharmaceutical companies in the U.S. and around the world are investigating the potential beneficial effect of small compounds that can activate SIRTs, as anti-aging supplements. [The petitioner's] work brings a cautionary note on the use of such small molecule regulators of SIRTs. He has indeed demonstrated that SIRTs' regulatory functions on FOXO transcription factors may cause harmful effects in some physiological or pathological conditions where FOXO degradation is prominent, such as in prostate and breast cancers. . . .

[The petitioner's] research not only discloses the mechanism of SIRT1 and SIRT2's regulatory effect on FOXO3a function, but also leads to the development of new approaches to rationally control the activity of SIRT1, SIRT2 and FOXO, in patients to treat cancer and the adverse effects of aging.

The petitioner submits copies of his published articles, along with a printout from a citation database showing that one of his articles, published in 2005, was cited 25 times within two years of publication. Another printout appears to refer to additional citation of the petitioner's work, but the document is in Chinese with no certified English translation as required by 8 C.F.R. § 103.2(b)(3).

The petitioner has shown, by the evidence described above and other evidence in the record, that his work appears to have attracted significant notice and influenced others in the field. If further adjudication (including a request for such evidence as the director may deem necessary) supports rather than refutes this finding, and the petitioner provides the required initial evidence including Form ETA-750B, then approval of the petition would be in order at that time. The record as it now stands, however, does not yet warrant approval of the petition. Therefore, this matter will be remanded. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.