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U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B5-

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 22 2009  
SRC 06 195 51169

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

*John F. Grissom*

John F. Grissom  
Acting 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 dismiss the appeal.

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 he filed the petition, the petitioner was a postdoctoral fellow at the University of Minnesota (UM), 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:

(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 U.S. Citizenship and Immigration Services (USCIS)] 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 filed the petition on June 9, 2006. In a statement accompanying the initial submission, the petitioner described the nature of his work:

My application for a national interest waiver is based on my research expertise in molecular biology with a focus on providing environmentally friendly and healthier alternatives to pesticide-based agriculture and therefore of national interest to the United States. . . .

Engineering disease and pest resistance in plants can provide environmentally friendly and healthier alternatives to pesticide-based agriculture. . . . [A]n approach that induces the plant’s natural defenses could confer protection against diverse pathogens. . . .

At the present time, I am the lead scientist on a Department of Energy (DOE) funded project, "Functional Genomics Analysis of Arabidopsis Resistance to the Necrotrophic Fungus *Alternaria brassicicola*." Necrotrophs are fungi that cause disease by killing plant tissue and living off the dead tissue. . . . [T]his project aims at identifying the genes that are induced following infection by a model necrotrophic fungus, *Alternaria brassicicola*. . . . Secondly, . . . this project aims at identifying the genes that are required for resistance to this fungus. . . . Finally, this project aims at characterizing the effects of mutations on *A. brassicicola* [sic]-induced gene expression using expression phenotyping. . . . I should commence microarray hybridization shortly, and the gene expression profiling experiments should be completed by the end of June, 2006.

. . . To my knowledge, this work represents the first attempt to link expression phenotypes with functional phenotypes during a plant-pathogen interaction. . . .

For almost a decade, my research focused on various aspects of a noxious weed called *Striga*. *Striga* species (witchweeds) are obligate parasitic plants that attack the roots of cereals and legumes . . . affecting the livelihood of some 300 million people in Africa from 25 countries. . . .

[T]he spread [of the parasite in the United States] was halted and the acreage infested with this parasite was rapidly reduced by 99 percent (from 450,000 acres to about 3,400). At the present time, I am one of only about 5 individuals in the United States with the expertise to work on this parasite at all levels ranging from its basic biology to the molecular level. . . .

My work . . . has received a lot of attention in the international arena, and was the first work that analyzed and described the genetics of the ability of the cotton plant to induce suicidal germination. Suicidal germination refers to the ability of cotton to induce the germination of *Striga* seeds that die following their inability to parasitize cotton. . . . I also demonstrated for the very first time that ubiquitin-specific protease . . . is expressed following . . . compatible interactions of *Striga* and its host, but absent in incompatible interaction. . . . This pioneer finding may turn out to be a key component to disarm this noxious parasite. . . .

I was a key member of a team mapping the resistance genes to *Striga gesnerioides* in cowpea, and led a team in the mapping of resistance genes to *Alectra vogelli* (a related parasite to *Striga*) in cowpea.

Along with copies of his academic degrees, the petitioner submitted a letter from [redacted] of Old Dominion University, Norfolk, Virginia, who stated: "The research conducted by [the petitioner] has done a lot to help us understand the mechanisms involved in the host parasite relationship. It would certainly be in our national interest to have the expertise resident in this country."

On August 20, 2007, the director issued a request for evidence, instructing the petitioner to submit documentation to distinguish the petitioner from others in his field. In response, the petitioner stated:

Scientists for several decades focused on breeding host plants with resistance to witchweeds, with very little (if any) effort directed towards understanding the genetics or the mechanisms of the interaction of these parasites with their hosts. This is where my research comes in. My research on host-parasite/pathogens interactions has received both national and international recognition, as evident through the publication of my work in international scholarly journals which have attracted favorable comments from other scientists in the field. . . . [M]y publications are cited by scientists from a wide range of disciplines in international journals.

With regard to evidence of citation of the petitioner's published work, the petitioner established that one of his articles is on the "Recommended reading list" included in *Tackling the Scourge of Parasitic Weeds in Africa*, a research brief published by the Systemwide Program on Integrated Pest Management. The petitioner identified ten articles that contain independent citations of his work.

Five witness letters accompanied the petitioner's response to the request for evidence.

██████████ who supervised the petitioner's doctoral studies at the University of Virginia (UVA), stated:

I would rank [the petitioner] among the top young scientists studying plant-plant pathogen interactions and based upon his experience with parasitic angiosperms among the most uniquely trained individuals within his age decile.

. . . [The petitioner's] research has been instrumental and essential over the years in helping numerous scientists gain an understanding of how to deal with the problems of parasitic plants.

██████████ asserted "there are *no* available US workers in this field (parasitic plants) that come even close to [the petitioner's] level of expertise and achievement" (emphasis in original). ██████████, the petitioner's supervisor at UM, stated:

[The petitioner] found that mutations in some genes do indeed compromise resistance to *Alternaria*, enabling him to conclude that these genes are important in resistance. He is presently investigating the mechanisms by which these genes promote resistance. The outcome of this work will facilitate reducing the current chemical-based control of necrotrophs in favor of healthier alternatives involving the manipulation of [the] plant's natural defenses.

. . . [The petitioner] is the lead scientist on the projects outlined above. . . . He has been responsible for the sustained and high level progress in these research projects. . . .

These major projects that he is currently steering will be severely hampered if we were to lose the services of [the petitioner]. It would not be possible to replace him.

With regard to the final sentences in the above letter, USCIS records show that the petitioner no longer works at UM. The petitioner currently works at Augsburg College, Minneapolis, under an H-1B nonimmigrant visa valid through September 1, 2011. Therefore, any arguments about the harm that would result if the petitioner left UM are moot, as he has already left.

The remaining two witnesses were outside of the petitioner's immediate circle. of  
IFAPA-Alameda del Obispo Research Center, Córdoba, Spain, stated:

[The petitioner's] research on the noxious weed *Striga* (witchweeds) has been instrumental in addressing some of the most challenging problems posed by parasitic angiosperms. . . . [The petitioner's] work on the genetics of suicidal germination of *Striga hermonthica* (the most ubiquitous species) by cotton . . . was the first of its kind to demonstrate the inheritance of witchweed germination stimulation by a false host (cotton). *Striga* seeds, which are nearly microscopic[,] can remain dormant in the soil for several years unless they receive a chemical signal from the roots of a potential host. This work demonstrated that the ability of a non host to stimulate the germination of witchweed seeds can be exploited and enhanced in order to curb the soil seed bank of these parasites. . . .

[The petitioner's] research has shaped our understanding of the witchweed host-parasite interactions and parasitic angiosperms in general, and I personally do not know of anyone at his current level who has accomplished this much in the field.

[REDACTED], Dean of the School of Life Sciences at Northwest University, Xi'an, China, and Standing Director of the Botanical Society of China, stated:

I got to know about [the petitioner] through his research/publications on witchweed (*Striga*) and plant-pathogen interactions. . . .

In a very well planned and executed experiment both at the field and laboratory levels, [the petitioner] showed for the first time that various *Striga asiatica* isolates exhibited different degrees of virulence. . . . The significance of this work . . . is that different isolates of this parasite must be considered and treated as ecotypes in plant breeding programs aimed at developing resistance to witchweeds. This approach has been adopted and is currently being used by plant breeders around the world to develop resistant crop varieties to different pests. . . . I have cited [the petitioner's] publications in my work, and always look forward to his next publications with great anticipation because they always bring in the missing pieces of knowledge and therefore reshape our thinking.

The director denied the petition on December 7, 2007, stating that the petitioner had not submitted evidence to establish the significance or influence of his work. The director noted that the overall importance of the petitioner's field of research cannot suffice to establish that the petitioner's work, in particular, warrants a national interest waiver. On appeal, counsel states that the director "failed to consider the alien beneficiary's current work in the national interest, related to alternative energy and bio-fuels." The record contains no prior reference to "alternative energy and bio-fuels." In a subsequent statement, the petitioner states:

[T]he adjudicator . . . did not analyze my current and arguably most significant work in the National Interest, related to the U.S. biofuels and alternative energy initiatives. . . .

It seems clear that the adjudicator in this case did review my research accomplishments related to "witchweeds" and "parasitic" plants, but failed to consider the important research I have done for the last 3 years at the University of Minnesota . . . in connection with biomass biological defense mechanisms in bioenergy feedstocks.

The petitioner acknowledges "[i]t is possible that my earlier documentation did not bring sufficient attention to this work." Review of the record indicates that the petitioner did not mention biofuels at all in previous submissions. The petitioner had previously discussed his work with *Arabidopsis* at UM, but solely in the context of pest resistance. Pursuant to 8 C.F.R. § 103.2(b)(16)(ii), a determination of statutory eligibility shall be based only on information contained in the record of proceeding. Because the petitioner did not include evidence or information about biofuels in the record of proceeding, the director was not able to take that evidence or information into consideration. Because the petitioner, prior to the denial, never mentioned the significance of his work as it relates to biofuels, we cannot fault the director for failing to consider biofuels in the denial notice. The director's failure to introduce a subject never before broached by the petitioner cannot reasonably be construed as error by the director.

The AAO will not entertain the petitioner's new claims regarding biofuels for the first time on appeal. The petitioner had a reasonable opportunity to raise the issue of biofuels in the initial filing, and again in response to the request for evidence, but he did not do so. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

The petitioner's appeal includes an "Index of Exhibits," listing 40 appellate exhibits including letters, articles, and other materials. The exhibits themselves are absent from the record. Most of the exhibits, as described, either concern the petitioner's work with biofuels or constitute background evidence that does not pertain specifically to the petitioner or his work.

The petitioner states: "Since 2005, I have been involved in advanced research at the University of Minnesota, funded by the U.S. Department of Energy," relating to the protection of biofuel crops. As noted previously, USCIS records establish that the petitioner has since left UM for Augsburg College. Therefore, even if the petitioner had successfully established that his work at UM warranted a waiver (which he has not done), his continued employment at UM is no longer a valid consideration in the petitioner's favor.

The petitioner states that the director “failed to recognize the overall importance and magnitude” of the petitioner’s previous work with witchweeds. The petitioner quotes from a letter from [REDACTED] of the State University of New York at Oswego. While the letter itself is, as noted above, not in the record, the petitioner provides this quotation from the missing letter:

Striga is able to **genetically** adapt very quickly to different hosts and environments, explaining why it is so difficult to develop universally resistant host-crops. Because of this fact it is important to understand how to control Striga itself, not just modify the crops we are attempting to protect from the noxious weed. Because Striga is such a complicated parasitic weed, it is imperative that it be studied at the molecular/genetic level in the manner [the petitioner] has demonstrated and continues to explore.

(The petitioner’s emphasis.) With respect to the assertion that the petitioner “continues to explore” the genetic composition of *Striga* witchweeds, the petitioner himself has not indicated that he still performs this research. Rather, he has repeatedly and consistently referred to this work in the context of past work that he performed at institutions where he no longer works.

The petitioner has documented a handful of citations of his published work, and produced letters from some citing authors attesting to their reasons for citing the petitioner’s work, but the record lacks the caliber of objective, documentary evidence that one could reasonably expect if, as claimed, the petitioner’s work with *Striga* has truly resulted in widespread and fundamental changes in the way researchers and growers combat the weed. This is not a definitive finding that the petitioner’s work has not had such an impact. Rather, it is a procedural finding that the petitioner, on whom the burden of proof rests, has not produced sufficient evidence to support the petitioner’s claims of influence.

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.