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



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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: APR 22 2009

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.

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).

Mai Plisson
John F. Grissom

Acting 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 AAO will dismiss the appeal.

In this decision, the term “prior counsel” shall refer to [REDACTED] who represented the petitioner at the time the petitioner filed the petition. The term “counsel” shall refer to the present attorney of record.

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 is a research associate at the University of California, Berkeley (UCB). 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 has not established 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 claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor’s degree and who holds a master’s degree, qualifies as a member of the professions holding an advanced degree. A determination regarding the petitioner’s claim of exceptional ability would be moot; it would occupy significant space in this decision, without affecting the ultimate outcome thereof.

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] 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’s initial submission of February 5, 2007 included numerous witness letters. [REDACTED] of the Shanghai Institute of Biochemistry, where the petitioner studied from 1992 to 1995, described the petitioner’s work there:

[The petitioner's] strong backgrounds in chemistry and the biological sciences enabled her to make interesting discoveries of major importance in the area of molecular chaperone-assisted protein refolding. . . .

Next, she succeeded in achieving industrial level purification of therapeutic proteins for biomedical purposes, namely, GM-CSF. Statistically, GM-CSF, together with other growth factors, account for perhaps 70% of the protein drug research activity in the biotechnology industry, and over 50% of the biotechnology-based pharmaceutical products on the market.

Falsely folded proteins are the root causes of various deadly diseases, including Alzheimer's and Huntington's. One of the key steps toward developing effective [treatment] strategies . . . is to collect ample information for deciphering the mechanisms underlying protein folding and misfolding. [The petitioner's] expertise and rich experience in protein folding and therapeutic recombinant protein production have played an important role in advancing our knowledge in this regard.

Most of the remaining witnesses are professors or former visiting professors at UCB. Professor Michael Botchan explained the nature of the petitioner's work there:

Many transposable elements can be inserted into any DNA sequence, often resulting in undesirable mutations. . . .

[The petitioner's] work focuses on understanding *Drosophila* [fruit fly] P element transposase. . . . [T]he P element family exhibits extremely high rates of transposition *in vivo* and is subject to a number of interesting regulatory events. A thorough investigation into the mechanisms and regulation of P element transposition could substantially advance our understanding of DNA rearrangements, subsequent DNA repair reactions, and the role transposable elements play in shaping the genome in eukaryotic cells. . . .

To date, [the petitioner] has succeeded in imaging the transposon DNA-transposase complex using AFM [Atomic Force Microscopy]¹ greatly helping scientists understand how protein and DNA molecules recognize each other. . . .

Transpososome (a nucleoprotein complex) is a crucial checkpoint in transposition and a prerequisite for initiating DNA cleavage and the subsequent chemical steps in transposition. [The petitioner] has captured the intermediate forms of transpososome where P transposase locate, bind, and synapse donor DNA ends [at] an extraordinary rate, thus, providing a defined architecture within which these stepwise reactions can

¹ Brackets in original.

take place. This remarkable finding may not have been possible were it not for [the petitioner's] perseverance and outstanding ability in employing single molecule manipulations. Her work has significantly contributed to our understanding of transposition. . . .

[The petitioner's] work also addressed a crucial mechanism regarding DNA looping formation. . . . This discovery is of great significance in that it provides an actual example of the detailed dynamic protein-DNA complex looping formation, while affording invaluable insight into subsequent cellular events, like double strand DNA break repair, which is under extensive study due to its direct connection with cancer development and because it is a checkpoint for potential therapy development.

[REDACTED], who has supervised the petitioner's work at UCB, stated:

[The petitioner] has been instrumental in making several major and important breakthroughs. First of all . . . [s]he developed a rapid and simple purification method to yield biologically active P element transposase. This crucial breakthrough now makes possible all of the downstream experiments that we desire to address the mechanisms of P element transposase.

[The petitioner] also is playing a pivotal role in the investigation of an extremely important topic, the role of cofactor GTP in the function of P element transposition. . . . She made several important and novel observations and a great discovery regarding the role of the cofactor GTP in P element transposition using these single molecule methods.

[REDACTED] who has collaborated with the petitioner and [REDACTED] credited the petitioner with "contributions of considerable importance to the field, especially through her work with single molecule visualization."

[REDACTED] stated that the petitioner's work "is important not only for the transposition field, but more generally in the field of nucleic acid biochemistry."

[REDACTED] of Uppsala Universitet in Sweden stated:

I came to know [the petitioner] in 2003 when I was a visiting professor for three months . . . in the laboratory of [REDACTED]. . . .

I am very pleased to see that [the petitioner] now has made several breakthroughs in her research on DNA transposition/recombination and I am convinced that her discoveries will have a profound influence on the scientific community that studies nucleic acid and protein-nucleic acid interactions.

In short, [the petitioner's] work has provided a detailed understanding of biochemical interactions of transposable P elements. . . . [The petitioner] has overcome several difficult technical problems that have puzzled researchers in this field for over a decade.

The remaining two witnesses have not taught at universities where the petitioner has worked or studied. Associate Professor Patrick C. Swanson of Creighton University, Omaha, Nebraska, stated:

Given their importance in such a wide array of biological phenomena, it is important to learn at the molecular level how genetic elements are mobilized and regulated in a variety of systems. This is where [the petitioner's] contribution has been felt.

. . . [The petitioner's] work was a significant influence in our decision to begin pursuing similar AFM studies with the RAG1/RAG2 protein complex that mediates V(D)J recombination.

Dr. Cesare Ascoli, who leads the AFM Group of the National Research Council, Pisa, Italy, called the petitioner's work on the *Drosophila* project "a remarkable achievement." Dr. Ascoli stated:

[The petitioner] designed and carried out experiments that allow high-resolution images to be recorded for qualitative and quantitative data analysis. . . . [The petitioner] adjusted the buffer system to obtain optimal conditions for three different imaging scenarios – only DNA, only protein, and a combination of DNA-protein. Notably, in doing so, she enabled the application of those special conditions to targeted imaging, resulting in faster image collection times and greater accuracy in the interpretations of the data collected. Based upon that successful single-molecule manipulation, [the petitioner] went on to make several important discoveries. She . . . proceeded to elucidate the first chemical step of mobile DNA transposition at the single molecular level. This is of extreme importance toward understanding enzymatic reactions in general. . . . Finally, after all those years of speculation among researchers in the field as to what went on at the molecular level, the images provided by [the petitioner] have settled the matter by providing visual confirmation.

The petitioner submitted copies of one article she had published in *Genes & Development*, a manuscript of an article that, according to the petitioner's *curriculum vitae*, had been submitted for publication in the *EMBO Journal*, and abstracts of three conference presentations. The petitioner did not, however, provide documentary evidence of the impact of her published and presented work. Some witnesses have noted that the petitioner's work appeared in a high-impact journal, but this does not imply the impact of the petitioner's articles; the impact factor is an average, calculated from the citation rate of individual articles. Without individual citation data, we cannot tell whether the petitioner's article was cited at a rate below or above that average.

On March 19, 2008, the director instructed the petitioner to submit documentary evidence, such as citation records, to support the witnesses' claims regarding the petitioner's influence in her field. In

response, prior counsel noted that one of the petitioner's articles appeared in *Genes & Development*, a journal "[w]ith an impact factor of **15.61**" (prior counsel's emphasis), and another article appeared in the *Journal of Biological Chemistry*, "the **most cited biomedical research journal in the world**" (prior counsel's emphasis). As noted above, the impact factor of a journal does not establish the impact of a given article published in that journal.

With respect to the petitioner's own articles, the petitioner documented one citation of the petitioner's *Genes & Development* article, and no documentation of any citations of the petitioner's *Journal of Biological Chemistry* article. The sole documented citation was published in May 2008, over a year after the petitioner filed the petition. There is no evidence that the petitioner's work had been cited at all as of the petition's February 2007 filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

We note that the petitioner's article in the *Journal of Biological Chemistry*, submitted to that journal in May 2007, appears to be the same article previously described as having been submitted to the *EMBO Journal* in 2006. The implication is that the first journal rejected the paper. The record is silent as to why this article appeared in a different journal than the one initially named.

We would not dismiss the importance of a heavily-cited article that appeared in what was usually a low-impact journal. By the same token, the high impact factors of *Genes & Development* and the *Journal of Biological Chemistry* cannot compel us to ignore the negligible citation rate of the petitioner's own work. We are not persuaded by prior counsel's contention that the petitioner's work must be especially important, or else the aforementioned journals would not have accepted the petitioner's articles. The petition must rest on the merits of the individual alien, rather than on the reputation of any person, institution, or journal associated with that alien.

Prior counsel then attempted a numerical demonstration of the significance of the petitioner's work. For example, prior counsel provided lists of published articles and observed that, out of 1,248 papers on the subject of "P elements," only 139 papers were about "P elements transposase," and of those, the petitioner's "publications are the only two papers that employing [*sic*] Atomic Force Microscopy." It does not follow that the petitioner's articles are more significant, important, or influential than the other articles mentioned; it is merely an indication of the highly specialized nature of the petitioner's work.

The petitioner submitted additional witness letters. The letters are generally similar to the first group of letters. [REDACTED] second letter is generally similar to his previous letter. He stated: "Most researchers with an M.S. degree . . . only are able to perform single assignments because of their limited training and expertise. Nevertheless, [the petitioner] is capable of performing various . . . experiments," and credited the petitioner with making "huge progress in our research" possible.

The remaining new witnesses asserted that they know of the petitioner's work through her publications, through the work of [REDACTED] group, or from various professional conferences. [REDACTED]

Principal Investigator at Massachusetts General Hospital, credited the petitioner with

“discovering efficient way [*sic*] to obtain pure and active P-element transposae [*sic*] which greatly improved the ability to perform biochemical experiments. . . . [The petitioner’s] studies have considerably advanced our understanding of the biochemical mechanisms in the field of P-element transposition research.”

Yale University Professor Emeritus Donald M. Crothers stated that the petitioner’s “work has provided crucial information towards modeling the 3D structure of DNA associated protein complex.”

Professor Alan Frankel of the University of California, San Francisco stated:

[D]uring the course of preparing the protein samples for AFM imaging, [the petitioner] noticed that there was apparently a mixture of protein volumes when she analyzed the data obtained by AFM measurements. . . . [The petitioner] believed this phenomenon was caused by the treatment of the samples prior to AFM imaging. She further proved her hypothesis . . . [and] provided another important piece of information, namely that the P-element transposase, in the absence of DNA, is a tetramer. This work resolved the apparent variations in the data obtained, clarified this discrepancy and correctly identified its cause.

Professor David Roth of New York University School of Medicine stated that the petitioner “has played a leading role in the project on the biochemistry of P-element transposition, and I was impressed with their findings on transposable P elements and their implications for specialized genetic rearrangements and closely related DNA recombination reactions.”

Dr. Haiming Chen, Director of the Research Laboratory at the Institute for Myeloma and Bone Research, called the petitioner “an outstanding researcher who has made important contributions in molecular regulation and gene transposition based on the exceptional techniques she developed.”

The director denied the petition on July 25, 2008. The director acknowledged “over a dozen experts in the petitioner’s field have submitted letters to support her petition,” but found that the petitioner failed to provide “first-hand documentary evidence” to support claims regarding the petitioner’s influence and the importance of her work. The director noted, for instance, that the petitioner apparently had no citation record when she filed her petition.

On appeal, counsel asserts that the record shows that the petitioner’s “past achievements exceed those of others with comparable minimum qualifications for her field.” Counsel then lists the petitioner’s achievements. Naming the petitioner’s accomplishments, however, does not establish their significance.

Counsel protests that the director “insisted that Petitioner/Appellant must demonstrate proof of heavy citations.” The director did not “insist” upon evidence of heavy citation. Rather, the director called for objective documentary evidence, and noted that citations are one objective means of measuring a researcher’s impact.

Counsel contends that the petitioner's "most impressive work had only been published in a journal the year of this filing. On that basis it is unreasonable to expect that her work would have been cited extensively. It is reasonable to expect that experts in the field would have taken note of her work but had not yet published work citing the relevant publication." As we have already noted, the article in question was not submitted for publication until several months after the filing date. This is rather different than the picture counsel paints, which is that, as of the filing date, others in the field simply had not had time to cite the article. As noted previously, the petitioner claimed to have submitted the article in question for publication in 2006, but that submission clearly did not result in publication at the time, which tends to undermine the assertion that the article is the petitioner's "most impressive work."

The record indicates that, at the time she filed the petition, the petitioner had produced only one published article. That article appeared in *Genes & Development* in 2005, more than a year before the petition's February 2007 filing date. The petitioner submitted the article for publication in March 2005, and the article contains citations to three articles published in 2004. The petitioner's own evidence, therefore, proves that citations to a published article can appear within a year of the cited article's publication. Nevertheless, there is no evidence that anyone cited the petitioner's 2005 article before 2008.

Citing statistics submitted previously, counsel states: "in 2005 when Petitioner/Appellant's first article was published, there were [*sic*] only a total of 11 articles published on transposase mechanism research and all 11 articles were only cited 32 times total." Counsel asserts that, given this small number, it would be unreasonable to expect heavy citation of articles published on that subject. Counsel adds "the majority of these articles were published by researchers at the Ph.D. level." It is not entirely clear how the observation that most researchers in the petitioner's field hold Ph.D. degrees, while the petitioner does not, is to be construed in the petitioner's favor. The petitioner's lack of a doctoral degree is not a disqualifying factor, surely, but at the same time it is not an affirmative factor in her favor.

With regard to the small number of transposase mechanism articles, we note that the petitioner's own 2005 article cites 33 source articles, which is three times the claimed total number of articles "on transposase mechanism research" in existence at the time. Clearly, the petitioner was not limited to articles "on transposase mechanism research" when consulting sources for her own work. By appearing to assert that the petitioner's own work is only of interest to researchers within a very narrow subspecialty, counsel seems to concede that the impact of the petitioner's work is limited to a small and tightly focused group of scientists. Counsel's arguments appear to be at cross purposes, as counsel simultaneously argues that the petitioner's work is of widespread importance but directly relevant to the work of only a few researchers.

After accusing the director of being "quite inflexible" with regard to citations, counsel appears to call for an inflexible standard by which the submission of independent witness letters must be construed as sure and certain evidence of eligibility. The director did not dismiss or overlook the witness letters. Rather, the director observed that the record does not appear to contain significant objective evidence that would lend strong support to the claims set forth in the witness letters. If it is alleged that the petitioner is responsible for significant breakthroughs in her field, then it is

reasonable to expect credible objective evidence that this work has attracted significant notice in the field. As it is, the record contains negligible evidence of the petitioner's impact as of the February 2007 filing date. (Independent witness letters written after the filing date praise the petitioner's "publications," plural, whereas the petitioner had only one publication at the time of filing.) At best, it appears that the petitioner filed the petition prematurely.

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.