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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

AUG 04 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).


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.

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 is a staff research associate at the University of California, Los Angeles (UCLA). 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.

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 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] 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 July 30, 2007. The petitioner performs neurological research using the snail species *Aplysia californica*. That species of snail is used as a model for studying learning and memory because the neural structure of its relatively simple brain has been completely mapped.

Six witness letters accompanied the petition. One witness is the petitioner’s former professor at Qingdao University in China; another witness’s studies at Tongji Medical University overlapped with the petitioner’s time there. Three of the remaining witnesses are on the UCLA faculty, and the final witness previously worked and studied in the same laboratories at UCLA where the petitioner has

conducted his work. While the letters are not identically worded, they all share the same overall structure: (1) discussion of the witness's credentials; (2) explanation of the *Aplysia* model; (3) description, in technical detail, of the petitioner's work with sensitization, long-term facilitation, the effects of 5-HT, and changes in neuronal excitability and morphology caused by injury; (4) the assertion that the petitioner's work has important implications for the study of Alzheimer's disease and other disorders that affect learning and memory; (5) the assertion that the petitioner's work has had a significant impact on the field; and (6) the assertion that the petitioner intends to submit manuscripts to *Nature Neuroscience*, *Science*, and the *Journal of Neuroscience* (usually named in that order). Because the letters follow the same basic narrative, detailed discussion of each letter individually would be redundant.

The petitioner submitted copies of one published article, and two manuscripts that the petitioner intended to submit for publication. The published article, from 2005, concerns the petitioner's earlier work in China with oral cancer. The petitioner did not claim or demonstrate that, as of the petition's filing date, he had published any journal articles relating to memory. Therefore, the petitioner's impact in the area of memory research would have been primarily through conference presentations.

The witnesses asserted that the petitioner would soon submit manuscripts to *Nature Neuroscience*, *Science*, and the *Journal of Neuroscience*, and the witnesses noted the prestige of those journals. The intent to submit a manuscript to a prestigious journal does not automatically impart comparable prestige on the manuscript. As we shall discuss below, subsequent submissions establish that only one of those journals accepted the petitioner's articles for publication.

On October 16, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence that other researchers have cited the petitioner's work in their published articles. In response, the petitioner asserted that his initial submission included "ample evidences" of his "superior qualification." That initial submission included several letters from witnesses who asserted that the petitioner's work has earned international attention, but all of those witnesses have demonstrable ties to the petitioner. Their letters are not first-hand evidence of any reputation or impact extending beyond the institutions where the petitioner has worked or studied. An international reputation, by definition, extends beyond UCLA.

The petitioner established the publication of two of his articles in, respectively, *Current Biology* and the *Journal of Neurophysiology*. The petitioner had previously submitted a manuscript entitled "The Role of Rapid, Local Postsynaptic Protein Synthesis in Learning in *Aplysia*," and indicated that he intended to submit that manuscript for publication in the journal *Science*. The manuscript was dated July 22, 2007. The *Current Biology* article submitted in response to the RFE bears the similar title "The Role of Rapid, Local, Postsynaptic Protein Synthesis in Learning-Related Synaptic Facilitation in *Aplysia*." The article was submitted for publication in September 2007, and accepted with revisions in October 2007. The published article appears to be a revision of the similarly-titled manuscript from July 2007. If the petitioner submitted the manuscript to *Science*, then it is clear that *Science* rejected the article and the petitioner re-submitted the manuscript to *Current Biology* instead. If, on the other hand, the petitioner never submitted the manuscript to *Science*, then numerous witnesses were incorrect when they stated

that the petitioner would submit the manuscript to that journal. Either way, the outcome demonstrates that witnesses' assertions regarding the petitioner's intentions carry negligible weight; neither the witnesses nor the petitioner had any control over whether *Science* would accept the manuscript.

The petitioner and witnesses had earlier mentioned a third manuscript, intended for *Nature Neuroscience*, but the petitioner did not submit that manuscript. The RFE response includes a second article that appeared in *Current Biology* in June 2008, but it is not clear whether this is the article originally intended for *Nature Neuroscience*.

The manuscript that the petitioner intended to publish in the *Journal of Neurophysiology* did indeed appear, in revised form, in that journal. The journal received the manuscript in May 2008 and accepted it in October 2008. All three of the articles described above appeared after the petition's filing date. According to 8 C.F.R. § 103.2(b)(1), the petitioner must establish eligibility as of the filing date.

The petitioner noted that another manuscript had been "submitted to *Journal of Neuroscience*." For reasons made obvious by the record, the petitioner's predictions about where his articles will appear carry little weight.

The petitioner submitted copies of various articles and online printouts which, he stated, established the reaction to his work. A "research highlight" from *Nature Reviews Neuroscience* summarized the findings in the petitioner's June 2008 *Current Biology* paper. Background information in the record indicates that "Research Highlights" are "short updates on new papers," and that *Nature Reviews Neuroscience* publishes "around 10 Research Highlights . . . each month."

A June 2008 "Science News" article from *Science Daily* reported that "UCLA cellular neuroscientists are providing new insights into the mechanisms that underlie long-term memory." The record shows that article is a word-for-word copy of a press release issued by UCLA.

The petitioner submitted a database printout identifying four citations of his 2007 *Current Biology* article. One was a self-citation by the petitioner, and another was a self-citation by a co-author, leaving two independent citations. One citation appeared in a 2008 article in *Current Biology*. The petitioner's 2007 article is also one of 336 articles cited in a 2008 article in *Behavioural Brain Research*.

The materials submitted in response to the RFE concern the field's reaction to the petitioner's published work, which did not exist until after the filing date. The petitioner did not submit any evidence to establish the international reputation that several witnesses claimed the petitioner had already earned before those publications appeared.

The director denied the petition on December 11, 2008. In the decision, the director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had documented only minimal impact of his work. The director found the witness letters unpersuasive, and observed that the petitioner's published articles appeared after the petition's filing date. The director cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971), which held that the beneficiary of

an employment-based immigrant petition must be eligible for the requested benefit at the time of filing the petition, and therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date.

On appeal, counsel asserts that *Katigbak* is not applicable because, while the citations and other articles appeared after the filing date, these materials relate to work that the petitioner had already performed prior to the filing date. Counsel states: “at the time of filing, the petitioner had already completed his experiment. The papers summarizing such experiment results had been submitted but not published, or had been published but not cited.” Neither of these assertions is true in this case. When he first filed the petition, the petitioner submitted copies of manuscripts and stated his plans to submit them to various journals. The published articles show submission dates weeks or months after the filing date.

There is some merit to the observation that the petitioner’s work had already taken place as of the filing date, but a petitioner cannot complete an experiment and then immediately file a petition, before even submitting the results for publication, on the expectation that qualifying evidence will eventually come into existence. The petitioner has documented minimal independent citation of his work. Because all of these citations appeared after the filing date, the subsequent citations do not continue a pattern of influence that was already apparent at the time of filing.

Numerous witnesses, in the initial submission, claimed that the petitioner’s work had already had an international impact, even before its publication. [REDACTED] stated that the petitioner’s “research contributions have been recognized internationally in his field.” The petitioner’s supervisor, [REDACTED] claimed that the petitioner “has received international recognition for his significant contributions to the field of learning and memory research.” The initial submission, however, contained no evidence of this claimed international recognition. **Making presentations at conferences is not international recognition.** Recognition may result from such presentations, depending on what is presented and how the field responds, but the presentation itself is not recognition, nor are the arrangements leading up to the presentation.

Returning to the petitioner’s response to the RFE, counsel lists and describes the various exhibits submitted at that time. Counsel, however, does not establish that this handful of articles and citations amounts to an unusual level of attention given to the petitioner’s work. Counsel seems to imply that the very existence of any such material is, on its face, sufficient to compel approval of the petition and waiver. We disagree. The threshold for the national interest waiver may be inherently difficult to quantify, but we will not hold that every researcher is eligible provided that his or her work is not totally ignored by the scientific community.

It may be that the petitioner’s work will attract more notice as time goes by, and the petitioner publishes and presents more of his results. At present, however, the response to the petitioner’s work appears to be too sparse and preliminary to justify a finding that he stands out from his peers to such an extent that he warrants the special benefit of a national interest waiver.

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 decision 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.