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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: AUG 14 2009
SRC 07 233 50289

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
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. The petitioner seeks employment as a postdoctoral research associate at the University of Texas Health Science Center (UTHSC), San Antonio. 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.

Several witness letters accompanied the initial filing of the petition. We discuss examples of these letters here. [REDACTED] of the University of Texas M.D. Anderson Cancer Center, who met the petitioner in 2007 while visiting UTHSC, described the petitioner’s work:

Her current work is focused on determining the cytoskeletal changes initiated by PELP1 and identifying the mechanism behind it. PELP1 is a novel scaffolding protein and its expression is found to be required for optimal cytoskeletal rearrangement. She has demonstrated how the absence of PELP1 in ovarian cancer cell lines leads to

cytoskeletal defects and is currently working on how it occurs and also its implications. She is also working on other interacting proteins which help in establishing connection and communication with the extracellular matrix (ECM). Cell adhesion to ECM is an important process that controls cell shape change, migration, proliferation, survival, and differentiation.

In her first project she ingeniously established the oncogenic potential of PELP1 in ovarian carcinoma. She is also currently working on a project to decipher the role of PELP1 in tumor metastasis in ovarian carcinoma. . . . [The petitioner's] study will definitely result in a clearer understanding of the molecular pathways involved in metastatic ovarian cancer, ultimately determining clinically relevant predictive gene expression patterns that will guide therapy for the individual patient.

UTHSC Associate [REDACTED] described the petitioner's work in his laboratory:

In my lab, [the petitioner] is examining the role of Nuclear Receptor (NR) Coregulators as master genes in the development of breast and ovarian cancers. . . . During this short span in my laboratory, she took on a scientifically risky and very labor intensive project of **establishing model cells that uniquely lack novel NR coregulators** and established the proof of principle that NR coregulators play a critical role in the proliferation of ovarian cancer cells.

. . . [The petitioner] proposes an interesting line of research that holds great promise in elucidating important molecular mechanisms of resistance seen in hormonal therapy. . . .

[The petitioner] did an outstanding job intellectually in my laboratory during her first year. [The petitioner] has carried out important cancer research for more than 6 years and made very successful accomplishments. Her superior performances convincingly demonstrate her outstanding ability to do research especially in the field of cancer.

[REDACTED] of the M.D. Anderson Cancer Center stated that the petitioner "has already made several remarkable contributions and has also established the oncogenic potential of PELP1 in ovarian cancer."

The witnesses represent a variety of institutions. [REDACTED] for example, is an Assistant Professor at Louisiana State University. [REDACTED] stated:

Although I have never worked with [the petitioner] and never know her personally, I know her based on her excellent research which might in the long run help identify markers and diagnostic tools for cure of cancer. . . . [The petitioner] has made tremendous strides towards understanding the function role of PELP1 in breast and ovarian cancer.

Many of the witnesses attested to the petitioner's talent and/or the importance of her research with PELP1, but offered few details unique to their letters. Several witnesses assert that ovarian cancer is often not diagnosed until after metastasis, which increases risk to the patient and complicates treatment. The witnesses assert that the petitioner's work may assist in diagnosing the cancer at earlier, more easily treatable stages. In terms of the petitioner's published output, the witnesses indicated that the petitioner had published one book chapter and one first-authored article, with several other articles awaiting publication.

On October 17, 2008, the director issued a request for evidence. The director praised the petitioner's "fine research work," but found that the record lacked evidence of the petitioner's influence in her field. The director stated that there was no evidence that other researchers have cited the petitioner's work, or that the petitioner had "originated any major idea that has changed the way many similarly employed scientists think about or approach any type of challenge in biology or any other related scientific field."

In response to the notice, counsel observed that most of the petitioner's published work had only recently appeared in print, and therefore there had not been sufficient time for citations to follow. In making this argument, however, counsel must also concede that the petitioner had a minimal publication record at the time she filed the petition. Citations are not the only possible evidence of how others in the field have reacted to the petitioner's work, but alternative evidence must carry significant weight and directly show the petitioner's influence. It cannot suffice to claim that a given piece of evidence silently implies the petitioner's impact. For example, evidence of the petitioner's attendance at a particular conference, or her receipt of a scholarship, does not corroborate claims about the importance of the conference or the scholarship.

Counsel asserted that "many **independent and renowned scientists** in the field attest to [the petitioner's] impact on the field based on her research result" (counsel's emphasis). The petitioner submitted five letters from what were said to be independent witnesses, along with a follow-up letter from Prof. Vadlamudi, who stated that the petitioner's "**discovery** that PELP1 is [a] novel oncogene of ovarian cancer is instrumental in understanding the molecular basis of ovarian cancer initiation" (emphasis in original).

Three of the five witnesses identified as "independent" are, like the petitioner, employed at the University of Texas and all have ties to UTHSC. Two are UTHSC faculty members, and a third is a UTHSC graduate. [REDACTED] stated: "Innovative studies like [the petitioner's] are critical to provide important information on the therapeutic value of knocking down PELP1 for cancer prevention. [The petitioner's] research has tremendously advanced our understanding of the molecular mechanisms of cancer." We take particular note of the following passage from Prof. Li's letter:

[The petitioner's] ground-breaking work is well recognized nationally and internationally, which is apparent from the following: [The petitioner's] work has been published in peer-reviewed scientific journals with high impact factors and recognition in the field; her work has lead [*sic*] to some research and development collaboration from companies; [the petitioner] has been awarded the Scholar in Training Award of

AACR, a prestigious international honorary society and also received the SABCS Novartis Oncology Basic Science Scholars award from Novartis (2007) in recognition of her work on the non genomic functions of PELP1 in breast cancer metastasis. [The petitioner] has also been invited to present her work at prestigious Cold Spring Harbor Meeting on Nuclear Receptors: Bench to Bedside, 2008.

The listed factors are not persuasive. The publication of the petitioner's work in well-regarded journals is a nod to the promise and potential of the work, but an article does not become important or influential merely by appearing in such a journal. The reference to "high impact factors" reiterates the importance of citation as an objective gauge of impact and influence. The vague reference to "research and development collaboration from companies" begs the question of how common such collaboration is. One would assume that any research relating to the detection or treatment of cancer would ultimately be commercialized to some extent, because tests and treatments are not of any widespread use until they become available to the public.

Regarding "the Scholar in Training Award," the related certificate in the record reads, in part:

AACR American Association for Cancer Research
proudly presents this certificate of achievement to
[The petitioner]
Recipient of the
2006 Avon Foundation-AACR
International Scholar-in-Training Grant
for young investigators from countries where opportunities for scientific advancement
are limited and whose proffered papers, related to breast and other female-related
cancers, were selected for presentation at the 97th Annual Meeting of the Association.

Background materials from the AACR, included with the petitioner's submission, indicate that "Scholar-in-Training Awards provide financial support for early-career scientists to attend the AACR Annual Meetings." While the AACR takes the "novelty, quality and significance" of submissions into account, the emphasis is clearly on applicants' lack of experience. The petitioner was one of 26 recipients of Avon Foundation-AACR International Scholar-in-Training grants in 2006. The petitioner's submission lists a smaller number of Scholar-in-Training "awards" (as opposed to "grants").

The other factors listed by [REDACTED] (including the Novartis Oncology Basic Science Scholar certificate signed by a UTHSC professor) did not come into existence until well after the petition's filing date. 8 C.F.R. § 103.2(b)(1) requires the petitioner to be eligible for the benefit sought as of the petition's filing date. *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Between the materials from late 2007 and 2008, and counsel's assertion that the petitioner's work is too recent to have been cited, the implied argument seems to be: the importance of the petitioner's work will eventually become apparent, and the director should not presume ineligibility simply because evidence of the petitioner's impact has not yet had time to appear. The flaw in this presumption is section 291 of the Act places the burden of proof on the petitioner. This necessarily means that the director must begin

with a presumption of ineligibility, against which the petitioner must make an affirmative showing of eligibility.

UTHSC Professor [REDACTED] Chair of the Department of Obstetrics and Gynecology where the petitioner works, stated:

I have been following the progress of [the petitioner] for the last two and a half years and am happy to report that she has made remarkable contributions to the field of cancer research through her dedicated efforts. . . .

Her seminal work published in the prestigious journal *Cancer Research* this year [2008] has clearly demonstrated that PELP1 is over-expressed in ovarian cancers and blocking PELP1 functions can reduce ovarian cancers.

[REDACTED] of the University of Texas M.D. Anderson Cancer Center earned his Ph.D. at UTHSC from 1987 to 1994. [REDACTED] stated that the petitioner “has made remarkable contributions to our understanding of novel breast cancer and ovarian cancer therapeutics. . . . Her influence and contributions to the field of cancer research have been significant.”

The remaining two witnesses are from institutions other than UTHSC. Associate Professor [REDACTED] of the University of Colorado contended that the petitioner is “among the top biomedical researchers worldwide and [I] firmly believe that her groundbreaking work has a lasting impact on the entire international scientific community.” [REDACTED] stated that the petitioner’s “seminal work led to the characterization of the role of PELP1 in ovarian tumorigenesis. . . . Currently [the petitioner] is utilizing novel methods to target PELP1 expression. . . . Her preliminary studies indicate that she is headed towards a major breakthrough.”

Associate Professor [REDACTED] of the University of Tennessee, Memphis, asserted that the petitioner “has earned international and national recognition for her significant contributions in deciphering the role of nuclear receptors and coregulators in gynecological cancer,” but did not elaborate as to the nature of this recognition. [REDACTED] listed the same conferences and certificates mentioned in [REDACTED] letter.

A section of the petitioner’s submission is labeled “Citations and comment on [the petitioner’s] articles.” A number of the documents in this section are neither citations nor comment. Rather, they are entries in bibliographic databases, which do little more than make known the existence of the petitioner’s articles.

An article in *OBGYN & Reproduction Week* mentioned a 2008 article by the petitioner. The petitioner submitted only the first four sentences of the article, and most of the excerpt consists of quotations from the article itself. The importance of this fragment is not self-evident.

The “citations and comment” section also included copies of two published articles citing her work, both published after the petition’s filing date. One article, by three researchers in Hong Kong, cited an article by the petitioner to support the assertion that “the level of ER β is significantly decreased in higher grade endometrial cancers.” Among the authors of the second article is [REDACTED] citing his own prior work with the petitioner. The cited references in that article show that [REDACTED] had published articles about the link between PELP1 and cancer as early as 2005, before the petitioner had arrived in the United States. This appears to diminish the significance of claims that the petitioner discovered the link between PELP1 and ovarian cancer.

The director denied the petition on December 4, 2008. The director acknowledged the petitioner’s submission of forcefully written witness letters, but found that the overall record does not support the claim that the petitioner’s work has been especially important or influential in comparison with the work of others in the specialty. The director was not persuaded by counsel’s assertion that, while the petitioner’s work is very new, evidence of her influence will grow with time.

On appeal, counsel states: “Notwithstanding [the petitioner’s] limited citation record to date, there is no doubt that [the petitioner] has established that her involvement has already had a significant impact on the field and will undoubtedly continue to impact the field substantially for many years to come.” There is, on the contrary, considerable doubt about the petitioner’s impact. We acknowledge that witnesses have claimed that the petitioner has earned international recognition for her work, even though her output at the time of filing was apparently limited to one article, one book chapter and two poster presentations, but the objective documentary evidence in the record fails to lend credence to those claims. When witnesses have provided specific details about the petitioner’s asserted recognition, those details have not been persuasive. Evidence such as documentation of travel grants to cover conference fees does not readily compel the conclusion that the petitioner’s admittedly minimal output has significantly affected the course of ovarian cancer research in the United States and elsewhere. A number of witness letters are marked by hyperbole, which diminishes their credibility.

Furthermore, the record amply demonstrates that the field considers the petitioner to be in training rather than fully established as a researcher in her own right. This in itself does not inevitably disqualify the petitioner, but her waiver claim seems to rest almost entirely on her PELP1 research. The record amply shows that her mentor, [REDACTED] has been studying PELP1 long before the petitioner arrived in his laboratory. There is little reason to believe that the petitioner’s work with PELP1 will continue after she completes her temporary postdoctoral training (which is already covered by H-1B nonimmigrant status). By tying her claim almost entirely to a single project, the petitioner has raised the question of how she will continue to serve the national interest once she completes her training in [REDACTED] laboratory.

It may be that, as counsel claims, the petitioner had already performed highly important work before she filed the petition, and the rest of the field simply has not yet caught up with her significant advances, but this does not excuse the lack of persuasive, objective evidence. If, in the future, stronger evidence of the petitioner’s influence should come to light, such evidence would warrant

consideration as part of a new petition. Such evidence is not yet apparent, however, and we must conclude that the petition was, at best, filed 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 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.