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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 026 50402

Office: TEXAS SERVICE CENTER Date:

FEB 10 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.

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 appeal will be sustained and the petition will be approved.

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 fellow at the University of Texas Health Science Center at San Antonio (UTHSCSA). 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 had 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 the 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’s initial submission included several letters, mostly from witnesses at the University of Florida (UF), where the petitioner earned his doctorate, and UTHSCSA. [REDACTED] who supervised the petitioner’s training at UF, stated:

Our work together focused on the neural mechanisms of respiratory sensation. In particular we studied the areas of the brain that are responsible for the distressing sensations that arise from difficulty in breathing. . . . [The petitioner’s] research revealed the relationship between the strength of respiratory obstruction and cortical brain activity

mediating respiratory sensation. Determining this relationship is important for us to understand the abnormal perception behavior in some asthma patients. [The petitioner] also identified neurons in the thalamus that form a key relay for cerebral cortical perception of respiratory inputs. Furthermore, [the petitioner] systemically studied respiratory control from the brain stressor region, the midbrain periaqueductal gray matter. . . . [The petitioner] provided clear evidence that respiratory symptoms contributed to both the conscious awareness of breathing and the distressing feeling that arises from difficulty in breathing.

[REDACTED] who served on the petitioner's doctoral committee, stated that the petitioner's "pre-doctoral studies revealed crucial neural mechanisms of respiratory sensations, and the modulatory effect of cortical and subcortical sections of the brain on breathing."

[REDACTED] who supervises the petitioner's work at UTHSCSA, stated:

[The petitioner's] primary investigations have been on a project called "Chemoreceptor input to non-respiratory cells in the nucleus of the solitary tract." . . . The major goal of this project is to examine the central nervous system network response to hypoxia, and the neuronal adaptive mechanisms within this network after chronic exposures to hypoxia. . . .

Once [the petitioner] joined my lab, he quickly developed into the main researcher in my group. . . . In just a few months, he made important progress on a project that had been stalled for several months due to technical difficulties. . . . His studies have directly influenced the research of a number of investigators in this area. . . . [The petitioner] has also made a significant contribution to another NIH funded project in my lab that is focused on how the central nervous system regulates blood pressure in hypertension. . . . [The petitioner] has found that central neuronal responses to inhibitory neurotransmitters, specifically drugs that activate GABA_B receptors, are enhanced in chronic hypertension. A number of theories have arisen over the years to try and explain why the central nervous system does not regulate blood pressure properly in hypertension. [The petitioner's] studies provide the *first direct evidence* that after chronic hypertension, inhibitory mechanisms within the central nervous system are enhanced that could reduce the ability of the central nervous system to regulate blood pressure.

Other UF and UTHSCSA researchers offered similar endorsements of the petitioner's work.

Three of the initial witnesses claimed no close ties to the petitioner. [REDACTED] of Oregon Health Sciences University stated:

I have known [the petitioner] since 2005 through his work with brainstem neurons both from the literature and through professional interactions. . . .

[The petitioner] has made significant contributions in the field of brainstem synaptic transmission. In particular, [the petitioner's] newest work on alpha andrenergic and GABAergic mechanisms in the nucleus of the solitary tract stand out as major contributions at national meetings in the field. These research discoveries were a part of [the petitioner's] work aimed at understanding how the brain adjusts blood pressure and the effect of hypertension. [The petitioner's] work is unique in its relevance to the central control of cardiovascular system during the genesis of high blood pressure and has important applications for the development of new strategies for the treatment of hypertension. . . . The approach and accomplishments of [the petitioner] are of unique value within the scientific and preclinical community.

Harvard Medical School Associate [REDACTED] stated:

I have never worked with [the petitioner], but I am familiar with his research both from the literature and from professional interactions at national and international conferences in the field. . . . [The petitioner's] leading research has substantially improved our understanding of the sensation of respiratory stress. Such research has provided new opportunities to investigate the abnormal arousal mechanisms in those OSA patients, and will greatly help clinicians to develop new treatment strategies.

. . . [The petitioner's] new research has revealed cellular mechanisms of the physiological response to hypoxia and its modulation by chronic hypoxia. . . . [T]he uniqueness and novelty of his work have brought him national and international recognition by other physiologists. [The petitioner's] findings constitute a significant contribution to our understanding of the mechanism of autonomic dysfunctions in those sleep disorder patients.

[REDACTED] of Lovelace Respiratory Research Institute, Albuquerque, New Mexico, stated:

I met [the petitioner] several years ago at a Neuroscience Meeting, and since then, I have interacted with him through annual national scientific conferences. . . .

[The petitioner] discovered that midbrain periaqueductal gray, a representative central affective neural structure, is important in modulating respiratory and cardiovascular activities. Furthermore, his research showed that this neural structure can modulate physiological reflexes, especially the response to hypoxia. . . .

[The petitioner's] leading research has demonstrated autonomic response to respiratory stresses and relevant neural mechanisms, [and has] thus revealed new target for drug treatment. . . .

His work is having a significant impact in respiratory physiology research, with important applications for the health care of patients in this country.

The petitioner also submitted copies of his published articles, documentation of awards from various gatherings, and other evidence of his work.

On July 13, 2007, the director issued a request for evidence (RFE) instructing the petitioner to submit further documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director instructed the petitioner to submit evidence to establish the particular significance of the petitioner's work. The director listed the various requirements for the waiver, without specifying which of those requirements (if any) that the petitioner had already met. In response, counsel protested that the director's "broad brush" notice lacked specificity, and that the director failed to acknowledge that the petitioner's "initial submission included sufficient documentation clearly establishing his eligibility for a national interest waiver."

The petitioner submitted evidence that four of the petitioner's articles have been cited an aggregate total of seven times. Of these seven citations, three are self-citations by the petitioner and/or his co-author, No article had been cited more than twice, independently or otherwise.

The petitioner also submitted several new letters. [REDACTED] asserted, in his second letter, that the petitioner's "significant achievements" show that the petitioner cannot easily be replaced by a minimally qualified worker.

[REDACTED] of Michigan State University stated:

Although I haven't had the chance to collaborate with [the petitioner], I am familiar with his research and achievements since I follow the latest developments in our field. . . .

[The petitioner's] important study found that in hypertension, there is enhanced GABA_B receptor-mediated inhibition in the NTS, which is an important neural structure in blood pressure regulation. This work is very unique because it extended hypertension research into the inhibitory GABAergic mechanism of blood pressure regulation. . . . This finding has significant impact on hypertension research.

University of Nebraska [REDACTED] stated:

Although I have never worked with [the petitioner], I am very familiar with his research from his published literature and his presentations at many international conferences. It is my impression that [the petitioner] is an outstanding and accomplished neurophysiologist. He has revealed important findings on the function of the sympathetic nervous system in the control of blood pressure and cardiac function and its impact in the development of high blood pressure and heart failure.

[REDACTED] of the University of Florida stated:

I know [the petitioner's] research activity mainly from his publications in peer-reviewed journals and presentations at international scientific conferences. During this year's Experimental Biology meeting, where I was the organizer of [REDACTED], I had a great opportunity to have a personal discussion with [the petitioner] about his research. From hundreds of eligible conference abstracts in the field of neural control of autonomic function, [the petitioner's] research report stood out and was selected as one of six presentations. We only choose those reports with the most original ideas and representing the most cutting-edge research at the frontier of the field.

The director denied the petition on October 22, 2007, stating that the petitioner had failed to establish eligibility for the waiver. On appeal, counsel states that the director, in the RFE, "did not identify any particular evidence that is missing, insufficient or lacking in persuasiveness, but instead, merely inserted a generic template for requested items that had already been clearly established in his initial submission." Counsel adds that the director, in the denial notice, "failed to specifically identify how [the petitioner] did not sustain his burden of proof. . . . Instead, the USCIS denial simply summarizes the general criteria for a national interest waiver, and only makes a cursory reference to [the petitioner's] case." In a supplementary brief, counsel states that the director "failed to provide [the petitioner] with an individualized determination on the merits of his petition." Counsel then reviews some of the letters and evidence previously submitted in support of the petition.

The AAO cannot disagree with counsel's complaint that the decision, like the RFE before it, lacks specificity. The word "physiology" appears twice in the director's decision, but there is no discussion of the petitioner's work or the evidence submitted in support of the petition. Counsel accurately describes the denial notice as a discussion of basic eligibility requirements and an unelaborated summary finding that the petitioner has failed to meet those requirements.

The petitioner has not established significant independent citation of his published work. While citations are a valuable gauge of a researcher's impact, they are not the only available tool. The petitioner has produced substantial independent witness statements that explain, in a specific but comprehensible manner, the nature of the petitioner's contributions and influence on his field. The witnesses have not simply asserted that the petitioner conducts research in an important subject area, or that his value lies primarily in his mastery of complicated laboratory equipment. Rather, the witnesses have shown that the petitioner has produced particular findings of unusual value in setting parameters for further progress in the petitioner's field. The petitioner has, in this way, established that his impact is not largely limited to his own circle of collaborators and mentors. The petitioner appears to have satisfactorily established eligibility for the waiver and overcome the vague and generic findings set forth in the denial notice.

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 field of research, rather than on the merits of the individual alien.

That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.