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U.S. Citizenship
and Immigration
Services

B3-

FILE:

SRC 07 800 12477

Office: TEXAS SERVICE CENTER

Date: FEB 23 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).

Mari Plurson

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 dismissed.

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 researcher at the University of California, Irvine (UCI). 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 and various exhibits, some previously submitted.

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’s initial submission included five witness letters. Three of the witnesses knew the petitioner from her graduate studies in Houston, Texas. [REDACTED] of the University of Houston (UH) stated:

[The petitioner] is one of the best graduate students I have ever had during my career. She did her PhD research in my group from September 2001 to August 2005, during

which she worked on the research projects funded by NIH. Our research aimed at elucidating the mechanism of the light emission catalyzed by *Vibrio harveyi* luciferase, which is a great model for flavin-dependent monooxygenases. . . . [The petitioner] performed site-directed mutagenesis of a number of luciferase residues to investigate their possible functional roles and to delineate the makeup of luciferase active site. Her creative and productive research made significant contributions in the research field of luciferase biochemistry.

who served on the petitioner's dissertation committee, stated:

In [the petitioner's] dissertation, she discovered that a hydrophobic microenvironment is crucial to the light emission reaction catalyzed by bacterial luciferase. She used enzymatic studies and three dimensional structures to demonstrate that the amino acids residues around the proposed active center provide a hydrophobic barrier for the reaction. This barrier effect greatly stabilized the intermediates of the light emission reaction and hence the strength of the light emitted.

, an assistant professor at the University of Texas M.D. Anderson Cancer Center in Houston, stated: "In the summer of 2005, I interviewed with [the petitioner] and offered her a post-doctoral associate position in my group." described the petitioner's work with bacterial luciferase genes, and stated that the petitioner "demonstrated excellent technical skills in biochemical research such as purification of recombinant protein, *in vitro* protein kinetic assays, stopped-flow spectroscopy, Fast Protein Liquid Chromatography, and High Performance Liquid Chromatography." added that the petitioner's subsequent work at UCI "has greatly enhanced our knowledge of hereditary breast cancer."

Although the UH faculty members quoted above have all acknowledged the petitioner's more recent breast cancer research, they have not explained the significance of her earlier bacterial luciferase research or explained how, if at all, the two areas of research are related other than that they both involve genetic research.

an assistant specialist in the Neurobiology Department at UCI, stated:

I used to be one of the colleagues of [the petitioner] in the same laboratory working on cancer development research. . . .

Most of [*sic*] hereditary breast cancers are due to mutations in a gene named BRCA1. BRCA1 mutation carriers have increased risk for cancer in hormone-responsive tissues involving breast and ovary. Only recently, progesterone receptor was found to be involved in regulation of Brcal associated breast cancer. Since [the petitioner] joined lab in the University of California, Irvine in 2006, she has been making huge progress in breast cancer research. [The petitioner] developed a mouse colony carrying conditional knockout p53/Brcal, which mimics the physiological condition in

human, as well as a reporter gene that can give readout of the progesterone receptor activity. [The petitioner's] research aimed at a better understanding of Brcal mediated tumorigenes in order to develop better treatment for breast cancer. In addition to that, she also studies hormones on the regulation of mammary stem cells (MaSCs). It has been suggested that MaSCs are involved in breast tumorigenesis. [The petitioner] found that mutation in Brcal leads to three folds [sic] increase in the mammary stem cell population. [The petitioner] is extending these studies to human breast epithelial cells and human mammary stem cells. Only within one year, [the petitioner] has already made some important progresses [sic]. Her study and findings provide novel insights into the regulation of mammary stem cell proliferation and the roles of cancer stem cells in chemo resistance.

██████████, now of California Stem Cell, Inc., previously worked with the petitioner at UCI. ██████████ stated:

Since [the petitioner] joined ██████████ lab at UCI, she has made remarkable contributions in a [sic] breast cancer field. Individuals with mutations in BRCA1 are predisposed to breast and ovarian cancers, yet it is unclear how BRCA1 suppresses carcinogenesis of female hormone-sensitive tissues. . . . [The petitioner] developed a mouse model carrying mutant Brcal genes and progesterone receptor activity reporter genes. . . . Using this model, [the petitioner] has observed that the progesterone receptor's activities are not only up-regulated but also last longer when activated by synthetic progestin. . . .

Another important project [the petitioner] has been working on is about mammary stem cells (MaSCs). . . . Using the same mouse models mimicking that of BRCA1 carriers, [the petitioner] has discovered that it is the mutations of Brcal that lead to enriched population of mammary stem cells. . . . [The petitioner's] findings also support the cancer stem cell hypothesis[,] i.e., cancer may originate from stem cells and will provide more hints toward the therapies of cancers.

The petitioner submitted copies of two articles she published in *Biochemistry* relating to her luciferase studies at UH. She did not establish the impact of these articles, or show that her subsequent breast cancer research has produced any published work.

On January 8, 2008, the director issued a request for evidence (RFE) instructing the petitioner to submit further materials to show that the petitioner meets the guidelines set forth in *Matter of New York State Dept. of Transportation*.¹ The director instructed the petitioner to provide "evidence that clearly shows that others in the field are adopting [her] research findings." The director indicated that such evidence could include citations by other researchers and "letters of recommendation from independent sources."

¹ The RFE is misdated "January 08, 2007," but that date is clearly in error because the petition was filed in May 2007.

In response, the petitioner submitted copies of four articles that contain citations of the petitioner's published work. One of the petitioner's articles was cited three times; another was cited twice. One citing article cited both of the petitioner's articles, so that the five citations appeared in four articles. All the citations refer to the petitioner's prior work with bioluminescent bacteria. The petitioner did not show that four citations demonstrates a particularly significant level of impact in the field, and these citations do not show that the petitioner has had any impact whatsoever in the field of cancer research. Counsel stated: "Given [the petitioner's] publication and citation record . . . it is clearly established that her findings . . . have had a substantial impact and influence on the field." At that time, the petitioner had documented two articles of her own, cited in a total of four articles. Given these low numbers, it is not clear what sort of "publication and citation record" would not "clearly establish . . . substantial impact and influence."

The petitioner also submitted three new letters, all from UCI assistant professors. [REDACTED] who has collaborated with the petitioner, stated that the petitioner's "achievements are far above those of others with similar training and experience." [REDACTED], who "met [the petitioner] in a stem cell biology class in 2006," asserted that the petitioner's "profound work has led her to discover the mechanism responsible for the recurrence of breast tumors in breast cancer patients." [REDACTED] who "served on the external oversight and advisory committee of [the petitioner's] Post-Doctoral Fellowship," stated: "it is important for [the petitioner] to remain in the US to continue her research because her continuing study will reveal more significant clues in developing effective therapeutic strategies against BRCA-1 associated breast cancers."

The petitioner's RFE response, like her initial submission, contained no first-hand evidence that her work with breast cancer stem cells has had any impact outside of UCI.

On April 10, 2008, the director denied the petition, acknowledging the intrinsic merit and national scope of cancer research, but concluding that the petitioner had not established significant impact in that field. On appeal, counsel argues that the director gave insufficient weight to descriptions of the petitioner's past achievements. Counsel observes that the petitioner "was the first" to make certain findings. Scientific research, however, is generally of little value if it simply repeats prior findings. A degree of originality is typically expected if such research is to have any significance (an exception being replication of questionable results). If an alien could qualify for the waiver simply by being the first to make a given highly specialized finding, then it would seem that the great majority of productive researchers would qualify under that standard. Such a policy would be contrary to the intent of Congress, which structured the statute in such a way as to make it clear that the job offer requirement is the default arrangement for alien members of the professions holding advanced degrees.

Counsel asserts that the petitioner's two articles, both published in *Biochemistry* in 2005, "have . . . **garnered much attention**" and "been cited by other scientists" (counsel's emphasis). The petitioner has not established that her articles have been especially influential when compared with articles by other researchers in the field published around the same time. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of*

Laureano, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, the petitioner submitted letters from two of the authors who had cited her publications. (The petitioner did not explain why, when the director specifically asked for independent letters, she was able only to produce letters from the university where she has been working.) [REDACTED], an associate professor at Texas A&M Health Science Center, and [REDACTED], an associate professor at National Taiwan Ocean University, explain how they applied the petitioner's findings to their own research. It is significant that neither of these individuals mentions cancer or cancer research. They had cited work that the petitioner performed as a graduate student at UH. While counsel has repeatedly implied that the petitioner's work at UH constituted "cancer research," the record offers no evident support for such a claim. [REDACTED] works in the Department of Microbial and Molecular Pathogenesis, and does not claim to work with genetically-caused cancers. Rather, [REDACTED] asserts that the petitioner's "contributions . . . potentially provide more clues to the treatment of monooxygenase [*sic*] diseases," "such as Parkinson's disease, Huntington's disease, Menkes disease, heart disease and liver disease," all diseases never mentioned until the appeal. [REDACTED] works in the Department of Food Science, and claims to have relied on the petitioner's work with enzymes.

Essentially, the petitioner has described what she is doing, while counsel insists that the importance of the petitioner's efforts should be obvious from the evidence presented. The record indicates that the petitioner's past work at UH has been minimally cited, and there is no evidence that the petitioner continues to perform that particular research. There is still, on appeal, no evidence that the petitioner's cancer research – supposedly the linchpin of her waiver claim – has even led to any publications, let alone had any discernible impact or influence outside of UCI. (A reference to a manuscript "in preparation" in 2007 has not been followed by evidence of publication.)

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.