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U.S. Citizenship
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Services

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FILE:

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Office: TEXAS SERVICE CENTER

Date:

JAN 06 2009

IN RE:

Petitioner:

Beneficiary:

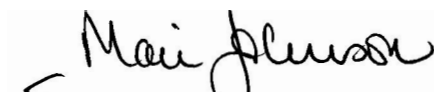
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, 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 senior scientist at [REDACTED], Morrisville, Pennsylvania. 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.

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 (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.

Several witness letters, describing the petitioner’s work and its claimed significance, accompanied the initial filing of the petition. [REDACTED], under whose direction the petitioner studied for his doctorate, stated:

During his Ph.D. studies, [the petitioner] synthesized two important biologically active oligosaccharides, in the course of which he developed a remarkable synthetic methodology that fundamentally contributed to the development of a powerful reagent that has been marketed and widely used in both academic and industrial research.

[The petitioner's] first scientific contribution was the total synthesis of one of the most challenging oligosaccharides, a beta-1,2-mannan with potential as a vaccine against *Candida Albicans*, a yeast-like fungus that causes *candidiasis*, or *Moniliasis*. *Candidiasis* is one of the most prevalent hospital-acquired and mycotic infections. . . . The preparation of vaccines against *candidiasis* had been severely hampered by the chemical difficulties in the synthesis of the extremely challenging beta-mannoside linkage that constitutes the core of the beta-mannans. [The petitioner] was the first to synthesize a beta-mannan in my research group, and presented a promising approach toward preventing *candidiasis*. . . .

[The petitioner] used his newly established methodology to synthesize an antigenic oligosaccharide found in *Escherichia hermannii* ATCC 33650 and 33652, an atypical bio-group of *Escherichia coli*, which causes a wide variety of infections.

[redacted], also of the University of Illinois, stated that the petitioner "developed a very popular chemical reagent used in organic synthesis. This chemical, called TTBP, . . . [is] used widely in both academia and industry." [redacted] stated that the petitioner's isolation of oligosaccharides, described above by [redacted], "is original, novel and at the forefront of this important field."

[redacted] who supervised the petitioner's postdoctoral training at the Ohio State University, stated:

[The petitioner] has demonstrated himself to be an extraordinary chemist in the field of carbohydrates who has made significant contributions greatly impacting the field of carbohydrate and new drug development. . . .

[the petitioner's] research has had a profound and lasting influence on the field of chemistry and pharmacy and has directly benefited the United States in terms of national health and economy.

. . . [The petitioner] worked on the development of an anti-norovirus drug. Norovirus is a major virus that causes acute gastroenteritis. . . . In just a few months, [the petitioner] designed and synthesized trisaccharide-containing hydrogels that have proven to efficiently trap noroviruses in the *in-vivo* assay, and will undergo animal trial in the coming future. . . . This new drug has great potential to control diseases caused by norovirus. . . .

Recently he made a breakthrough discovery by synthesizing an anti-cancer drug. Surprisingly, this drug can effectively stimulate the immune system to kill tumor cells. . . This discovery is a significant milestone in anti-tumor immunotherapy.

[redacted] of the University of Basel, Switzerland, stated:

I collaborated with [REDACTED] laboratory, which is how I met [the petitioner]. In our collaboration, we did bioassays for the new drugs which [the petitioner] had so remarkably designed and synthesized. . . .

I can attest that [the petitioner's] postdoctoral achievements in this field have been seminal and important to our field.

The most independent initial witness appears to be [REDACTED], a senior research scientist at deCODE genetics, Inc., who has met the petitioner but "never collaborated or worked" with him. Dr. [REDACTED] reprised the descriptions of the petitioner's various efforts found in other letters, already discussed above, and concluded that the petitioner "is the ideal scientist to perform these anti-HIV, anti-cancer and biodefense related anti-virus projects that are certainly in our nation's interest."

Although the petitioner began working at [REDACTED] a year before he filed the petition, none of the initial letters discussed the petitioner's work for that employer. Judging by the petitioner's initial submission, it is not clear whether the petitioner continues to perform research for publication and dissemination now that he has left academia. This is significant because the national interest waiver is concerned with prospective national benefit; it is not simply a reward for now-completed past work. The impact of a given alien's past work is a vital ingredient of a successful waiver application, but there must be some reasonable assurance that the alien will continue to have such impact into the future. Science news articles in the record reflect a burst of attention to the petitioner's work in mid-2001, but there is no comparable evidence from more recent years.

A citation database printout indicates that the petitioner's articles have been cited 128 times between 2000 and 2007. Handwritten annotations on the printout indicate that 114 of these citations are "non-self cites." This latter figure does not appear to take into account self-citations by the petitioner's co-authors, which are no more evidence of wider impact than self-citations by the petitioner himself. The most-cited article, with 48 citations, shows only four self-citations by the petitioner, but co-author [REDACTED] cited that article 19 times, accounting for almost 40% of the article's citation history. For another article, [REDACTED] accounts for 13 out of 21 citations, nearly 62%. The true number of independent citations appears to be closer to 65 than to the 114 claimed. The lower total is still a respectable figure, but we note that the petitioner's most recent work does not appear to have yielded any published work.

On September 26, 2007, the director issued a request for evidence, instructing the petitioner to demonstrate not only the significance of his past work, but also to show that "the benefits of the employment will be national in scope and benefit more than a particular sector." The latter request clearly relates to the petitioner's intended future work, and references to the petitioner's now-completed doctoral studies and postdoctoral training cannot suffice to address this concern.

In response, the petitioner submitted additional information about his past work in [REDACTED] laboratory, and five new witness letters. One witness is [REDACTED], founder and chief executive

officer of [REDACTED] Most of his letter is devoted to the petitioner's doctoral and post-doctoral research, which we have already discussed. There is only one paragraph specifically devoted to the petitioner's current work, and it is rather vague. The paragraph begins: "In my company, [the petitioner] is currently developing a library of building blocks and reagents for carbohydrate synthesis. This project will directly speed up the oligosaccharide synthesis in the pharmaceutical industry and in academic research." The petitioner's employer asserted that the petitioner's background makes him not only well-suited but "unique and irreplaceable" in his current position. The letter did not indicate that the petitioner continues to engage in research as such, as opposed to making materials available for researchers at other institutions. The national scope of the petitioner's work is not evident from this letter.

The remaining letters, from independent witnesses, focus on the petitioner's work at the University of Illinois and the Ohio State University, with no discussion of the petitioner's current work.

The director denied the petition on January 22, 2008. In denying the petition, the director acknowledged the intrinsic merit and national scope of the petitioner's work but found that the petitioner has not shown that his continued achievements justify approving the national interest waiver. On appeal, counsel lists some of the petitioner's past achievements, adding: "all of the above contributions were made prior to the filing of the immediate I-140 petition." All of the achievements were, likewise, made before [REDACTED] hired the petitioner. This is not a trivial observation; counsel, on appeal, acknowledges the requirement for prospective benefit to the United States. The petitioner underscores this issue on appeal by submitting an article from <http://www.drugdiscoveryonline.com> describing his work. The article is from 2001. Likewise, two further witness letters submitted on appeal follow the established pattern of highly praising the petitioner's student and postdoctoral research while ignoring anything the petitioner has done since April 2006.

Witnesses have consistently and persuasively described the usefulness of the petitioner's work in the area of drug design, but the record is devoid of evidence that the petitioner is, in fact, engaged in drug design, or even that any potential employer has expressed an interest in retaining the petitioner's services for such a purpose. The record suggests that the petitioner synthesizes "intermediate" materials that [REDACTED] then sells to client companies for further processing. While not insignificant, the petitioner's work developing a "library" of such compounds (as his employer put it) does not readily compare to the earlier published research upon which the petitioner has predicated his waiver claim. Therefore, the petitioner has not established that his present and intended future work in the United States warrants 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 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.