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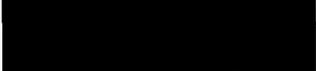
U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER Date: JAN 07 2009

SRC 07 800 09503

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.

A handwritten signature in cursive script that reads "John F. Grissom".

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.

In this decision, the term “prior counsel” shall refer to attorney Jerry Zhang, who represented the petitioner prior to the denial of the petition. The term “counsel” shall refer to the present attorney of record.

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. At the time she filed the petition on March 30, 2007, the petitioner was a doctoral student and graduate research assistant at the University of Texas M.D. Anderson Cancer Center, Houston. The petitioner received her Ph.D. on August 15, 2007, and subsequently undertook postdoctoral training at the same institution. 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.

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] 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.

In an introductory statement accompanying the initial filing of the petition, prior counsel stated that the petitioner “has extensive experience in the nationally critical field of molecular biology and hematology, particularly in lymphoma and cancer research.” Prior counsel asserted that “leading

researchers in her field have submitted letters of support testifying that [the petitioner] is among the elite researchers in her specialized field.” All of the initially submitted letters are from current or former faculty members of the M.D. Anderson Cancer Center. Dr. [redacted] an assistant professor there, described the petitioner’s research:

Through her Ph.D. research studies, [the petitioner] has made significant contributions to our understanding of the B-lymphocyte stimulator (BLyS) function in non-Hodgkin lymphoma (NHL)-B cell survival. She found the BLyS and NF- κ B, a transcription factor critical for cell survival, form a positive feedback loop, which promotes and sustains NHL-B cell growth and survival. . . . This work is considered a major breakthrough in the field of cancer biology in general and lymphomagenesis in particular. . . . [The petitioner’s] other work on the BLyS receptor, BR3 or BAFF-R, was equally impressive. She demonstrated that BR3 and some NF- κ B components form a complex to regulate some anti-apoptotic gene expression. This work is an extraordinary achievement as it further delineates the current understanding of the molecular mechanisms underlying the survival of NHL-B cells.

[redacted], who supervised the petitioner’s doctoral training, stated that the petitioner “has adopted a creative new approach to address an extremely important problem: B cell stimulatory signal pathway in NHL.” Prof. [redacted] stated that the petitioner’s identification of transcriptional regulators “is an important first step in determining the molecular pathway of BLyS that [is] important in both normal B cells development and disorganized growth occurring in lymphoma. It is anticipated that this finding will ultimately greatly enhance our understanding of the oncogenesis of lymphoma.” [redacted] concluded that the petitioner “is certainly a top researcher in her field.” Other M.D. Anderson Cancer Center researchers echoed the assertion (in varying degrees of technical detail) that the petitioner has discovered important information regarding lymphoma-afflicted cells.

The petitioner submitted copies of four articles co-written by her and published in the United States and China. The petitioner also established her participation in numerous scientific conferences. The petitioner did not, at the time, submit documentary evidence to distinguish her published and presented work from that of others in her field.

On September 28, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit further evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. In response, the petitioner submitted additional letters and documentation which, according to prior counsel, establish that the petitioner “has, without a doubt, made important accomplishments that have greatly influenced her field as well as the national interests of the U.S.”

The first of the new letters is from Prof. Ford, who elaborated on his previous letter. [redacted] stated:

[T]he quality and importance of [the petitioner’s] work is far beyond the level of accomplishment of our average post-doc graduates, in novelty, conceptualization, and technical acumen. . . .

The BLyS protein in immune B cells has been shown by [the petitioner] to control cell survival in mature lymphocytes of the B lymphocytes (i.e. B cells), and therefore the key cellular component of the humoral or antibody-producing arm of the immune system. What [the petitioner] has done in the past two years is to delineate how this normal, highly-regulated B cell survival and growth mechanism, is de-regulated and perverted in neoplastic B cells which blocks normal apoptotic mechanisms and immortalize the transformed B cells. . . . [The petitioner] has also identified the identity and molecular conformation of the B/B receptor (BR3) in the tumor cell plasma membrane, as well as the NF- κ B uniquely dys-regulated signaling pathways that are utilized by lymphoma (NHL-B) cells to extend their growth and survival. . . .

Since the above initial phase of [the petitioner's] laboratory program, she has made two additional seminal findings regarding the cellular and molecular biology of the BR3 receptor in lymphoma cells. These findings are both novel and important, in that they define a new paradigm in our understanding of the BLyS-BAFF system in lymphocytes. . . . This work is truly remarkable and indicates, in my opinion, that [the petitioner] ranks in the top tier of young scientists in this field of cancer research, and that she has outstanding potential for a very productive career in cancer research.

Prior counsel characterized the remaining witnesses as "independent and objective." Dr. [REDACTED] [REDACTED] associate professor at the Mayo Clinic in Rochester, Minnesota, described the petitioner's discovery of the BLyS-NF- κ B feedback loop as "a major breakthrough in the field" and concluded that the petitioner "has contributed more significantly to lymphoma research than the vast majority of her peers and other experienced researchers."

[REDACTED] of the University of Pennsylvania stated:

[The petitioner] delineated a new network of signal transduction molecules, including B lymphocyte stimulator (BLyS), NF- κ B, and NF-AT, which work together to promote the proliferation and survival of lymphoma cells. [The petitioner] found that blocking this network results in significant inhibition of lymphoma cell growth and survival. This is a major breakthrough in the study of lymphoma cell growth and survival. . . .

Recently, [the petitioner] has been doing research on the cellular and molecular biology of the BR3 receptor in neoplastic human B cells. [The petitioner] has defined a new model of the BlyS/BAFF system in the human B-cell lineage. She discovered that the BR3 receptor not only signals from the cell surface, but also migrates through the cytoplasm and is present in the cell nucleus, where it binds to promoters of several known survival genes and activates transcription in a unique fashion. This finding is another breakthrough in the basic research of signal transduction pathways in lymphoma cells.

a senior lecturer and researcher at the University of Lausanne, Switzerland, stated that the petitioner's "findings will lead to further understanding of how lymphoma occurs and will contribute toward establishing effective therapeutic regimens against lymphoma."

The petitioner documented citations of three of her articles. Prior counsel asserted that one article had 16 citations (14 independent), the second had seven citations (six of them independent) and the third had four citations (none identified as independent). The record appears to document only some of these articles. The AAO has been able to identify seven published articles and one manuscript independently citing one of the petitioner's articles, and five published articles independently citing a second article. Other submitted articles are either incomplete, or in Chinese without the translations required by 8 C.F.R. § 103.2(b)(3), and as such they are not *prima facie* evidence that these articles independently cite the petitioner's past work.

The director denied the petition on January 22, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had failed to establish the extent of her impact in her field. The director noted that the witnesses who provided letters "do not . . . provide any examples of specific resources that they have adopted or expressed interest in adopting" from the petitioner's work. The director also found the petitioner's documented citation history to be minimal. The director concluded that the record shows that the petitioner has "potential to influence the field," but not that she has yet realized that potential.

On appeal, counsel states that the petitioner's "influential research articles have already been downloaded from subscription-based scientific journals more than 2200 times and have been cited in at least thirty (30+) peer-reviewed scientific articles by researchers around the world." Evidence submitted on appeal supports these assertions. Counsel also asserts that the AAO has granted waivers to "researcher[s] with significantly fewer citations than [the petitioner]." The AAO adjudicates appeals on a case-by-case basis; a low number of citations does not necessarily doom an appeal to dismissal, nor is a high number of citations an absolute guarantee of approval.

The AAO notes that counsel claims that the director failed "to properly acknowledge . . . evidence of . . . thousands of downloads" of the petitioner's first-authored article in the journal *Blood*. This assertion, variously worded, appears numerous times in counsel's appellate brief. Counsel specifically asserts that "evidence of . . . downloads [was] submitted as part of [the petition], and as part of the response to the RFE." The petitioner, however, did not submit "evidence of . . . thousands of downloads" prior to the appeal. (Comprehensive exhibit lists submitted with the initial filing and the RFE response do not list any such evidence.) The director's failure to anticipate the future submission of previously unmentioned evidence cannot be construed as error in any rational sense of that word. Counsel fails to provide any sort of comparative evidence that would show that the article's download history is unusual. Nevertheless, given the emphasis counsel places on this issue, the AAO will devote some space to the subject.

Counsel specifically and repeatedly claims that the director, both in the RFE and in the subsequent decision, ignored evidence that the petitioner's article from *Blood* was "downloaded" more than 2,200

times. The petitioner's own evidence submitted on appeal utterly refutes this claim in several ways. First, the "Total Accesses" of the article did not cross the 2,200 mark until December 2007. At the end of March 2007, when the petitioner filed the petition, the article had been accessed 1,478 times. At the time the petitioner responded to the RFE, the total was 1,947. It is simply false to claim that the petitioner's article had already been accessed 2,200 times either at the time of filing or at the time the petitioner responded to the RFE.

Even then, "accessing" and "downloading" the article are two different processes. Of the 2,287 "accesses" as of the end of January 2008, 383 accessed only the article's abstract, not its full text. If a researcher accessed the abstract and then chose to access the full article, this would count two times toward the "total accesses" figure. Similarly, multiple accesses by the same person would also count multiple times. In August 2007, the article was accessed 61 times, but from only 28 "Unique IP Addresses"; repeat visits from those 28 addresses account for the total of 61 accesses. There is no cumulative total for "Unique IP Addresses," but their monthly totals average 54% of the "Total Accesses" for each respective month. This indicates that over 1,200 of the 2,287 "Total Accesses" were repeat visits from the same IP address. The figure of 2,287 "Total Accesses" is, therefore, significantly inflated. Counsel addresses none of this, simply asserting that the "2200+" figure, devoid of context, warrants approval of the petition. Counsel's arguments have little weight in this proceeding; the petition will stand or fall based on the available evidence, rather than on the sometimes unreliable claims of counsel.

The available evidence, in this instance, includes reliable documentation showing significant citation of the petitioner's published work in major journals. Available citation evidence suggests that the petitioner's work is growing in influence. The empirical citation evidence mutually reinforces the letters from independent witnesses, who have credibly and consistently explained why the petitioner's findings are of particular significance in the ongoing efforts to fight lymphoma. The record is not without flaws, but as a whole, the body of evidence supports the assertion that the petitioner has already had a disproportionate influence in her field that is likely to continue to expand.

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.