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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JAN 13 2009**
SRC 07 800 22662

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:

[REDACTED]

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).

Mai 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 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. At the time she filed the petition, the petitioner was a doctoral student and research assistant at the Bloomberg School of Public Health at Johns Hopkins University (JHU), Baltimore, Maryland. The record shows that the petitioner completed her doctorate in early 2008 and then applied for a postdoctoral fellowship at the National Institutes of Health (NIH). 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 (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.

Six witness letters accompanied the petitioner’s initial filing. Five of the witnesses are current or former faculty members of JHU or Iowa State University in Ames (where the petitioner studied before her time at JHU). [REDACTED], supervisor of the petitioner’s doctoral studies at JHU, described the petitioner’s work there:

At Hopkins, [the petitioner's] research focuses on obesity and its related chronic diseases. Her ongoing research is addressing the role of drinking beverages, including soda, fruit drinks, fruit juice, coffee, tea and alcoholic drinks in the development of obesity. . . .

One major component of [the petitioner's] research is to find how consumption of beverages influences weight gain or weight loss. The result of the study, which has already been accepted by the Obesity Society (NAASO) annual conference, provides innovative evidence to show that reducing the intake of soft drinks that provide no nutritional benefits could be a simple but effective strategy to reduce energy intake, manage body weight, and maintain adequate micronutrient intake. She will continue her research by expanding her findings from the above study to a broader socioeconomic and politic context. In particular, she will continue to explore the socioeconomic factors that influence American's [*sic*] beverages consumption and the impact of reducing soft drink consumption on obesity prevalence. . . . [The petitioner's] groundbreaking research would be a vital component in preventing and providing treatment for obesity nationwide.

. . . [The petitioner] made many remarkable contributions to new methodologies in nutritional epidemiology. She proposed innovative approaches for developing a dose-response curve in meta-analysis (an advanced statistical method for qualitative summary of existing data in the literature). She also combined several models such as GEE, Mixed Effect, and Change Score models in longitudinal data analysis. . . .

Because of her unique combination of skills in the fields of clinical medicine, nutrition, physiology, epidemiology, and biostatistics, I invited her to be a key researcher in my new \$1.5 million research project, which focuses on multiple components of intervention of childhood obesity, targeting children from 0 to 2 years of age.

[REDACTED], now an associate professor at the Medical University of South Carolina, was formerly an assistant professor, and then an associate professor, at JHU until 2006. [REDACTED] stated:

[The petitioner] and I worked together on a systematic review of the literature on diet and cancers of the lung and nasopharynx, and through this collaboration I have come to know [the petitioner] very well during the past three years. . . . [The petitioner's] primary interest is addressing issues related to how beverage consumption impacts human health. . . . [The petitioner's] research indicates that alcohol may not be related to nasopharyngeal carcinoma risk at low levels of consumption, but that risk does become apparent at heavier levels of consumption. . . .

The composite picture painted by this record of achievement is that [the petitioner] will have an outstanding research career. Clearly, [the petitioner] is progressing along a path

that shows a highly favorable career trajectory. She shows all the indications of developing into an outstanding nutritional epidemiologist.

[REDACTED], an assistant professor at JHU, stated:

Since 2001, I have had many opportunities to interact with [the petitioner] both as a member of her doctoral dissertation committee and in other occasions in our program.¹ I have found that she is a very gifted young researcher with unique and outstanding skills in the fields of nutrition, epidemiology, and biostatistics with a focus on identifying the risk factors for obesity, cancer, and other chronic diseases. . . .

[The petitioner] is one of the scholars who are working on the front line of this area. . . . [The petitioner's] recent research shows that reducing consumption of sugar-sweetened beverages such as soda, fruit drinks, fruit punch, and ice tea can have significant impact on weight loss. Most significantly, her study will be among the first that provide solid scientific evidence to indicate that reducing soda drinking is a simple and effective lifestyle change that will help reduce the risk of obesity in adults.

[REDACTED], an associate professor at Iowa State University, directed the petitioner's master's studies at that institution. [REDACTED] stated that the petitioner's "research project advanced our understanding as to the mechanism by which lutein, a naturally-occurring yellow carotenoid pigment in dark green vegetables, may prevent" age-related macular degeneration. [REDACTED] asserted: "The depth, breadth, and quality of [the petitioner's] training in the United States are . . . truly impressive and unique."

Another associate professor at Iowa State University [REDACTED] "was quite impressed with [the petitioner's] dedication to research, but [REDACTED] letter contains few details about the petitioner's work except to observe that her "work on a protein purification method requires expertise in biochemistry and considerable time commitment. She was proactive in receiving assistance and advice from the experts to complete the project with the most efficient results."

The last of the initial witnesses is [REDACTED] Research Director at the Primary Care Coalition of Montgomery County (Maryland), Inc. An exhibit list accompanying the initial submission listed [REDACTED]'s letter as an "independent advisory opinion." [REDACTED], however, is a JHU School of Public Health alumna who stated that the petitioner "worked and contributed her dedicated efforts to one of my research projects." [REDACTED] asserted that the petitioner's "work is significant in the battle against obesity in the United States."

The petitioner submits copies of her published articles and conference presentation materials. A number of the petitioner's articles are review articles, which summarize the previously published

¹ We note that, according to the record, the petitioner did not arrive at JHU until 2003. In 2001, the petitioner was a student at Iowa State University, and [REDACTED] was on the faculty of the University of Illinois at Chicago.

findings of other researchers rather than report new research findings. A printout from a citation database indicates that one of the petitioner's articles, published in 2004, has been cited seven times as of the petition's July 2007 filing date. One of these seven citations is a self-citation by co-author S. Rodermel.

The petitioner submitted a copy of an article that contains a citation of another article by the petitioner. The cited article is a review article from 2004, interpreting prior research, rather than original scientific research conducted by the petitioner. The article containing the citation cited the petitioner's article as part of a joint citation with six other articles dating from 1989 to 2000.

The petitioner submitted background evidence to establish the importance of studying the link between beverage consumption and obesity. The evidence shows that a 2002 draft report by the World Health Organization linked soft drink consumption to obesity. The petitioner clearly did not discover this link, as she did not begin to study this particular issue until she arrived at JHU in 2003. The petitioner's further exploration of this link has substantial intrinsic merit and national scope, but her very involvement is not presumptive evidence of eligibility for the waiver.

On January 8, 2008, the director issued a request for evidence, instructing the petitioner to establish that she meets the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director also requested "letters of recommendation from independent sources." In response, the petitioner submitted new letters and additional evidence. One of the petitioner's collaborators, JHU Professor [REDACTED], stated that the petitioner "has continued to impress me as a very intelligent and dedicated young scientist." [REDACTED] stated that the petitioner "found that reducing sugar-sweetened beverage intake by 1 serving per day was associated with weight loss. This is a relationship that has been difficult to prove despite its conceptual appeal." [REDACTED] added that the petitioner "was also the first to report, using data collected in humans, that . . . a reduction in liquid calorie intake could result in more effective weight loss (2-3 times) compared with reduction in solid calories."

The remaining witnesses claim not to have met the petitioner personally. an assistant professor at Harvard Medical School and Harvard School of Public Health, stated:

I do not know [the petitioner] personally and have never met her. However, I am quite familiar with the published studies based on her excellent research, and have commented on some of her publication manuscripts. . . . She has already made a number of significant contributions to our understanding of the ways in which dietary patterns influence obesity and related co-morbidities such as hypertension and metabolic syndrome, and her research has influenced the way scientists in our field think about certain types of beverages.

. . . [The petitioner's] research has resulted in several notable discoveries. First, she found that individuals who consume larger amounts of calories from beverages more easily gain weight than those otherwise similar persons who consume a smaller percentage of their calories from beverages. . . . Second, [the petitioner] found that

reducing consumption of sugary drinks is significantly associated with weight loss. . . . Third, she found that reducing sugary drink consumption can result in significant reduction in blood pressure, independent of weight loss. . . . Last, she clarified that there is a J-shaped relationship between alcoholic beverage intake and risk of nasopharyngeal cancer.

[REDACTED], an associate researcher at the Cancer Research Center of Hawaii, University of Hawaii, “became aware of [the petitioner’s] research when she sent her publication manuscripts for my comments.” [REDACTED] states that the petitioner’s “research is groundbreaking, because it is the first study that I know of that conclusively demonstrates that reducing sugary beverage intake has such a drastic effect on obesity and hypertension.”

[REDACTED], Program Director at the Fogarty International Center at NIH, “found [the petitioner’s] publications via PubMed, and then contacted her for more literature.” [REDACTED] stated that the petitioner’s “research record identifies her as a special asset to our field. Her research is truly outstanding.”

[REDACTED], an investigator at the NIH’s National Institute of Child Health and Human Development (NICHD), stated:

I came to know [the petitioner] when she applied for the Intramural Research Post-doctoral Training (IRTA) Fellowship position at Epidemiology Branch, NICHD, NIH. . . . [The petitioner] stands out among the applicants by her excellent training and knowledge in nutrition, biochemistry, epidemiology, clinics and statistics, and extraordinary research achievements and skills.

stated: “As a post-doctoral IRTA Fellow at NICHD, NIH, [the petitioner] will continue her research on nutrition, obesity, and chronic diseases.” This seems to imply that the petitioner had already been selected for the fellowship. Elsewhere in the letter, however, [REDACTED] stated that the petitioner “has been selected as a candidate for an IRTA Fellowship.”

Most of the above witnesses appear to have learned of the petitioner’s work when the petitioner submitted her manuscripts for comment, or when the petitioner applied for a postdoctoral fellowship at NIH. The letters do not establish that the petitioner’s work had had significant impact as of the petition’s filing date.

Also failing to show significant impact, an updated citation database printout indicates that two of the petitioner’s articles have garnered 14 citations in the aggregate – one cited ten times from 2004 to 2007, the other four times from 2006 to 2007. The petitioner did not establish that this citation rate stands out in the petitioner’s field.

The director denied the petition on April 14, 2008, stating that the petitioner had not established widespread impact of her work, either through significant citation or through other evidence that the petitioner's findings have been independently applied. On appeal, counsel states:

A requirement that the alien beneficiary's work be cited frequently or at all is certainly quite inflexible. Moreover, such a standard fails to take into account factors such as how long the alien beneficiary has been working in the field, how many publications (if any) have been made, and how long the published work has been available to the scientific community.

There is no codified, formal requirement regarding citations, but *Matter of New York State Dept. of Transportation* at 219 indicates that an alien seeking a waiver must demonstrate a prior history of achievement that would justify expectations of future benefit to the United States. For aliens engaged in published scientific research, citations are a quantifiable, objective measure of the extent of the alien's impact on others in the field. With respect to "how long the alien beneficiary has been working in the field," experience alone does not qualify an alien for the waiver, but it is certainly true that a more experienced researcher will have had more opportunities to influence his or her field. This is not evidence against bias against younger researchers, however. If a researcher's very first published article has a substantial impact in the field, this evidence will be duly considered. On the other hand, a researcher could work for decades without producing work of a caliber that warrants a national interest waiver. In any event, the timing of the waiver request is up to the petitioner, not USCIS. It was the petitioner who initiated this proceeding while she was still a student, and it was the petitioner who chose to introduce citations of her work into the record, first in the initial filing and then again in response to the request for evidence. Only after the director found the petitioner's unrequested citation data wanting has the petitioner, through counsel, protested the director's reliance upon citation of the petitioner's published work. There is no justification for imposing a more lenient burden of proof on aliens who have had less time to establish themselves in their respective fields.

Counsel's asserts: "It is reasonable to expect that experts in the field would have taken note of her work but had not yet published work citing the relevant publication." 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). The record does not show a significant surge in citation of the petitioner's work between July 2007, when the petitioner filed the petition, and May 2008, when she filed the appeal. As of May 2008, several of the petitioner's articles had been in print for two to four years. One of the petitioner's own articles, submitted for publication in 2003, cited articles published in 2002. More fundamentally, the existence of even one citation of the petitioner's work proves that enough time has elapsed for citations to appear. Counsel's speculation that many more citations could be imminent is not a basis for approval of the waiver. Indeed, it was the petitioner, not USCIS, who determined the timing of the present petition. By choosing to file when she was still a student with a minimal publication record, instead of waiting for the expected burst of citations to appear, it is the petitioner who established the conditions under which the petition would be considered. We must consider the

petition based on the existing evidence, rather than on potential future evidence that counsel claims may be “reasonable to expect.”

Furthermore, notwithstanding counsel’s allegation of inflexibility, a lack of heavy citation is not invariably fatal to a national interest waiver petition. The petitioner must, however, produce some form of reliable evidence of impact and influence on his or her field. Here, the petitioner has relied largely on letters from mentors, collaborators, and others who had significant prior contact with the petitioner (including one self-described collaborator who was put forward as an independent witness).

On appeal, counsel argues that the petitioner “has made major contributions to nutritional epidemiology,” and then proceeds to list these accomplishments. The list merely identifies the petitioner’s achievements, however; the significance thereof is not self-evident. The witnesses have argued that the petitioner has made significant contributions to nutritional epidemiology, but the record does not establish the extent to which the petitioner’s findings have affected research, public policy, or other areas of endeavor relevant to her work. The mere existence of influence is not sufficient, as every researcher who interacts with others has some degree of influence simply by virtue of that interaction. The key is to establish the degree of that influence, and to show that the petitioner stands out as a result of that influence.

Counsel notes that [REDACTED], in his letter submitted with the initial filing, stated:

When the Beverage Guidance Panel was established to propose a “New Guideline System for Beverage Consumption in the United States” (published in American Journal of Clinic Nutrition in 2006), I recommended [the petitioner’s] literature review to each member in the panel, resulting in a significant amount of her work being used in the new guideline.

The record does not contain “the new guideline” itself, and therefore the petitioner did not establish the extent to which the panel relied on the petitioner’s “literature review.” Furthermore, there is no evidence that the panel relied on the petitioner’s own original research. Because [REDACTED] himself was a member of the panel, it is not surprising that one of [REDACTED] students would have served in some supporting capacity.

Counsel asserts that the petition is supported by “independent expert” testimony, but we have already shown, above, that the independence of these witnesses has been exaggerated. We will not repeat that discussion here.

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.