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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
LIN 07 106 53321

Office: NEBRASKA SERVICE CENTER

Date: JUN 05 2009

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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

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 Texas Southwestern Medical Center (UTSMC). 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, witness letters, and other exhibits.

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. Similarly, aliens who are professionals with an advanced degree are also not exempt from the job offer/labor certification requirement by virtue of their higher education. 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 or education significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on February 28, 2007. In a statement accompanying her initial submission, the petitioner stated:

I have been conducting advanced biomedical research as a Postdoctoral Researcher in the Department of Molecular Genetics at the University of Texas Southwestern Medical Center since September 2003. . . .

I am currently exploring the fundamental mechanisms of atherosclerosis, the primary cause of death in the United States. . . .

Our pioneering research work in atherosclerosis has captured the attention of other researchers worldwide. I am also involved in a broad collaboration with the Department of Pathology and Laboratory Medicine at the University of Cincinnati, the Department of Biochemistry and Molecular Biology in the University of Maryland School of Medicine, the Department of Internal Medicine at the University of Michigan, the Department of Biochemistry at the University of Wisconsin-Madison and the Department of Cardiology at the University of Cologne in Germany in various projects.

The petitioner submitted several witness letters with the petition. [REDACTED] of Peking Union Medical College, where the petitioner earned her doctoral degree, stated that the petitioner's work with rats at that college "sheds new light on the molecular mechanism of atherosclerosis."

UTSMC Professor [REDACTED] stated:

While cholesterol is the main driving force that initiates the degenerative changes in the artery walls we general[ly] refer to as arteriosclerosis, we still know very little about the signals to which the cells in the artery wall respond as the disease begins or while it progresses. Clearly, understanding how these beacons instruct the artery wall to harden, eventually occluding blood flow, would allow us to develop entirely new classes of drugs that would complement those designed to lower cholesterol levels. . . .

Moreover, as we have begun to realize only recently, cancer cells often employ the same molecular mechanisms that drive arteriosclerosis to promote their own uncontrolled growth. Thus, it is possible that in the coming years we will uncover not only novel ways to prevent heart disease, but also novel and hitherto unsuspected new strategies in the fight against cancer.

As it turns out, [the petitioner's] former training in China combines the skills necessary for investigating these common mechanisms with our expertise in studying complex genetic mechanisms in genetically mutant mice in an ideal manner. About 3 years ago, I recruited her to my laboratory to begin an ambitious project that involves the generation of a series of genetically targeted mouse strains of a hitherto unprecedented complexity. In these animals, which took over two years to produce, we can now switch on and off those proliferative signals in the artery wall that control atherosclerosis at will. This in turn will provide us with unprecedented insight into cholesterol-independent signals that might be pharmacologically exploited.

It . . . is essential . . . to retain [the petitioner] as the lead scientist of the project. Her skills and expertise are essential for completing this work successfully. If she had to leave the country, enormous investment costs would be lost.

. . . [The petitioner] has . . . made two other important contributions to science. First, she showed that the signaling pathways that are critically important for atherosclerosis involve the activation of a molecule called PI3 Kinase. . . . In another study . . . we were able to show that fat accretion, and in fact fat loss, are both also regulated and controlled by the same molecules that are involved in atherosclerosis.

In a joint letter, UTSMC Professors [REDACTED] and [REDACTED] stated:

We know [the petitioner] since she has worked for the past 3 years as a postdoctoral fellow in the department that we head at the University of Texas Southwestern Medical Center. . . . In a word, her work has been excellent.

In 1985 we shared the Nobel Prize in Medicine for our discovery of the fundamental mechanism by which the body controls the level of cholesterol in blood, and the pathologic mechanism by which certain genetic defects lead to a buildup of cholesterol in blood and produce premature heart attacks. [The petitioner] is contributing the next chapter to this important work.

[The petitioner] is studying the fundamental mechanism by which cholesterol produces the arterial plaques that block blood vessels, causing heart attacks and strokes, and triggering more than one-third of all deaths in the United States. [The petitioner] has made fundamental advances by showing that this disease is accelerated by proteins on the surfaces of cells in the artery walls. These proteins, called lipoprotein receptors, regulate the growth of the cells in the artery wall. When these receptors are nonfunctional, the cells of the wall overgrow, and they protrude into the channel of the blood vessel, blocking the channel and causing heart attacks and strokes.

[The petitioner] is one of the most talented postdoctoral fellows to have worked in our department over the past 30 years. She is an excellent experimentalist, and often achieves results where others have failed. She is a tremendous force in our battle against heart disease.

[REDACTED] of the University of Cincinnati, one of [REDACTED] collaborators, stated:

I believe [the petitioner] is an extraordinarily talented researcher in the field of cardiovascular diseases. . . . She has made novel discoveries that give me some insights on my own research. . . . [Her] research results, once [they have] appeared in publications, will open a new paradigm in the cardiovascular research area, potentially offering novel strategies for the prevention and treatment of cardiovascular diseases.

of the University of Wisconsin-Madison (another of the universities involved in the “broad collaboration” mentioned by the petitioner) stated that the petitioner “has made a seminal discovery that connects a receptor previously associated with cholesterol metabolism, with the proliferation of cells in the arterial wall. This process is central to the development of coronary heart disease.”

of the University of Michigan (another participant in the “broad collaboration”) stated that the petitioner “has made several important discoveries in her field, including the further characterization of the low-density lipoprotein (LDL) receptor gene family which protects humans against atherosclerotic disease.”

Editor-in-Chief of *Experimental Aging Research*, stated: “It is clear that [the petitioner’s] accomplishments and achievements in the field of atherosclerosis represent a professional legacy which has and will continue to contribute to the public health interest of the United States.”

On August 6, 2008, the director issued a request for evidence (RFE), instructing the petitioner to provide documentary evidence showing that other researchers have cited the petitioner’s published work. Much of the petitioner’s response relates to developments that took place after the petition’s February 2007 filing date, such as a paper published in the *Journal of Clinical Investigation (JCI)* in November 2007, a postdoctoral fellowship awarded in May 2008, and a promotion she received in July 2008. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, we cannot consider developments after the filing date.

Although the director’s primary request had been for evidence of citation of the petitioner’s work, only three of the petitioner’s eleven exhibits in response to the RFE directly related to citation of her work. Two of these exhibits are database printouts, showing minimal citation of the petitioner’s published work. The petitioner also submitted a copy of one article, published in July 2008, citing the petitioner’s *JCI* article. The citing article indicated that the *JCI* article provided “some insight into [LRP1’s] function in [adipocyte] tissue. . . . Although many questions remain, the study reveals a prominent role of adipocyte LRP1 in modulating energy metabolism and sensitivity to diet-induced obesity.”

The director denied the petition on September 29, 2008. The director found that the petitioner’s work has substantial intrinsic merit and national scope, but that the petitioner had not distinguished herself from others in the field. The director found the petitioner’s citation rate to be minimal, and also noted that the initial witness letters were from the petitioner’s mentors and collaborators.

On appeal, counsel asserts that the petitioner’s “atherosclerosis related work has been **quite influential to her field as a whole**. As shown . . . with the citations of her work, the influence has been on an **international level**.” The petitioner documents further citations of her work on appeal. The moderate

number of citations reflects influence, but the petitioner must show that this influence is at a level that distinguishes her from other qualified researchers in her field.

In an effort to establish this influence, the petitioner submits five new witness letters. In a new letter, states:

My decision to recruit [the petitioner] to Dallas was primarily influenced by two factors in her CV. First, [the petitioner's] expertise in PDGF signaling, the most important signaling pathway in the vasculature that is activated on the road to atherosclerosis, i.e. coronary artery disease. The second item on her CV that caught my eye, and made her one of very few possible candidates in the world with that particular combination of skills, is her previous experience in Alzheimer's disease research, specifically her prior work with the amyloid β protein. . . . [The petitioner's] expertise in both of these areas was instrumental for accelerating our research progress in both fields.

Assistant Professor [REDACTED] of the University of Cologne, Germany, states:

The first and only time that I met [the petitioner] was in front of her excellent poster at the American Heart Association (AHA) Scientific Sessions in 2006. Prior to meeting her, her research work had already attracted my attention. . . . [The petitioner] uncovered that aging, as an important part in the development of atherosclerosis, plays its role by upregulation of PDGF expression. Her study markedly illuminates the molecular mechanisms of aging-associated increase of atherogenesis and leads to a better understanding of the sophisticated mechanisms of atherosclerosis.

. . . [The petitioner's] study points to a potential targeting site for developing pharmaceutical drugs in preventing and treating atherosclerosis.

[REDACTED] of the University of Barcelona, Spain, who has cited the petitioner's work, states:

One of my research groups sought to investigate the influence of ageing on signal transduction, and the effects of two commonly used lipid-lowering drugs, gemfibrozil (GFB) and atorvastatin (ATV), on these signal transduction pathways in rats. When we were searching publications in PubMed for up-to-date information about transcription factors and ageing, [the petitioner's] 2003 paper in *Experimental Gerontology* caught our attention. In this paper, [the petitioner] has nicely shown that a transcription factor, nuclear factor-kappa B (NF κ B), is activated by hypercholesterolemia, a key risk factor atherosclerosis, in the endothelial cells *in vivo*. In addition, NF κ B accelerates the formation of atherosclerotic lesions. . . . She also detected that NF κ B activation is more remarkable in the old rats in response to a high-cholesterol diet, suggesting that NF κ B is a critical transcription factor in ageing as well as in hypercholesterolemia-induced

atherosclerosis. . . . [The petitioner's] discovery serves as one of the important bases for our research. . . .

In my expert point of view, [the petitioner's] research of ageing and atherosclerosis is significant and inspiring.

[REDACTED] Principal Scientist at Wyeth Research, Cambridge, Massachusetts, states that the petitioner "has nicely elaborated recent progress in study of the molecular mechanisms of" Alzheimer's disease.

[REDACTED] of the University of Oklahoma states:

I have never worked with [the petitioner], although I have had the pleasure of meeting her at the American Heart Association 2006 Scientific Sessions in Chicago. . . . I was amazed at her idea of using a genetic mouse model to study protein interactions in the development of atherosclerosis. . . . [The petitioner] has shown that these mice are almost completely protected from atherosclerotic lesion development. . . . Her findings are important for improving our understanding of how atherosclerotic lesions [form] and what determines the susceptibility of an individual.

When the director issued the RFE, the director only asked for evidence of citations. While citations are one way to gauge a researcher's impact, they are not the only way, nor are they always necessarily the best way. If an alien has produced a large number of poorly-cited publications, with one single heavily-cited exception, that one exception may not be the best gauge of the petitioner's likely future impact.

Independent witness letters are another means to establish an alien's impact on his or her field. This is not to say, of course, that every alien who manages to obtain independent witness letters is entitled to a national interest waiver. We must judge each letter by the caliber of the source, the specificity and clarity of the claims, and credibility and consistency with the other evidence. For example, if an alien's work has accumulated very few citations, then the claim that the alien's work is heavily cited is not credible, no matter how many witnesses make such a claim. Letters from professors and department heads can carry greater weight than letters from postdoctoral researchers and low-level staff scientists. A witness's failure to disclose prior connections with an alien, in order to appear more independent, will reflect poorly on that witness's credibility.

We can also envision other means, beyond letters and citations, to establish an alien researcher's impact. For instance, if an alien holds a patent on an invention or process, the alien could produce documentary evidence that this invention or process is now in widespread use. Also, the alien's work could be the subject of independent media coverage (as opposed to promotional press releases). In each instance, the burden is on the petitioner to produce credible evidence in support of the petition, and the director must give full and fair consideration to the evidence presented.

The petitioner has submitted letters from independent witnesses, explaining clearly and credibly the nature of the petitioner's contributions in her field of endeavor. Also, as counsel notes, the credible assertions of two Nobel laureates in the petitioner's field carry significant weight.

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.