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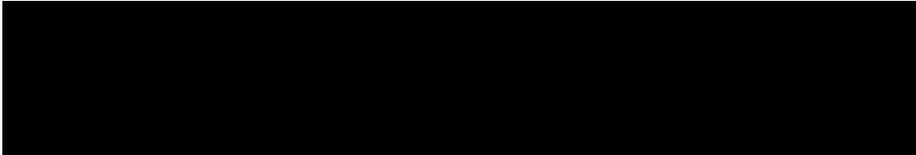


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
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JUN 15 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:

SELF-REPRESENTED

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The director subsequently reopened the petition on the petitioner's motion, and reaffirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary 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, a public university cancer research center, seeks to employ the beneficiary as a research investigator. 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 beneficiary 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 letter from one of its professors, as well as published materials regarding a shortage of qualified workers in the beneficiary's specialty.

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 filed the petition on May 10, 2007. [REDACTED], Director of the petitioner’s Office of International Affairs, described the beneficiary’s work and the basis of the waiver application:

[The beneficiary] is currently performing, with excellence, highly specialized basic research . . . directed toward prostate cancer. . . . The objective is to identify specific molecules or proteins involved in the development of prostate cancer and its progression

to aggressive and metastatic forms in prostate cancer metastasis. The ultimate goal is the development of targeted therapies. [The beneficiary] is performing a number of specific bio-molecular techniques, prostate cancer cell assays, and investigative pathology in genetically engineered mouse (GEM) models.

. . . Animal models provide critical information in translational research. . . . The rapid advances in molecular biology have also produced concomitant advances in the technology of animal modeling. . . . The development, and characterization of these models requires very specialized professionals with a wide area of expertise covering elements of molecular biology, molecular genetics, veterinary medicine and pathology. There is actually no formal training for this kind of professional in any program. . . .

Despite the importance of this area of research, and the explosive growth in this complex technology, it has been virtually impossible to recruit properly trained investigators to support these projects. [The beneficiary], by virtue of his previous training as a veterinarian and extensive training at our department in molecular pathology, has acquired a level of expertise which would be difficult, if not impossible, to replace. . . .

[The beneficiary] is not only the lead investigator on his own project, but also is collaborating with other[] investigators on various related prostate cancer projects as well as projects in skin carcinogenesis. He has demonstrated outstanding achievement in his field, attaining results unmatched by his peers as attested to in the attached letters of support from various experts.

Based on [the beneficiary's] record of accomplishment, the future promise of ongoing substantial achievement, and the critically important national interest work yet to be done in his area of expertise, we believe that he is a candidate for the National Interest Waiver of the job offer and labor certification requirements for U.S. permanent residence. . . .

Since [the beneficiary] will serve the nation to a substantially greater degree than anyone with minimum qualifications, the delay or absence from his current work would deprive the nation of his exceptional and crucial contribution and therefore damage the national interests of the United States.

(Emphasis in original.) Several witness letters accompanied the initial filing of the petition. Most of the initial witnesses work at the petitioning center, in laboratories where the beneficiary works or has worked. [REDACTED] stated:

I have known [the beneficiary] since 2004 when he joined my laboratory as a research investigator. I offered him the position after receiving outstanding recommendations from colleagues in Argentina and the USA. . . . I believe that he has become an

important player in the fight against cancer, in a field of study that is presently underrepresented. . . .

[The beneficiary] has been at our institution for almost three years. During this time he has grown intellectually and technically and has become a top scientist in cancer animal models, particularly in investigative pathology of the prostate of transgenic mice. . . .

He has already made important contributions and is on the path to becoming one of the top scientists in his field of study.

[REDACTED] Chair of the petitioner's Department of Carcinogenesis, stated:

[The beneficiary] is currently a Research Investigator in the Department of Carcinogenesis, having come to [the petitioner] in 2004. . . . We are developing a leading program in molecular mechanisms, particularly in the field of experimental animal models. There is a shortage of veterinarians trained for biomedical research and too few are working in laboratory animal medicine. [The beneficiary] possesses outstanding qualifications and experience which would be difficult, if not impossible, to replace. He is a fully trained veterinarian with research experience in microbiology, immunology, pathology and imaging technology. Since coming to [the petitioning center], he has added research experience in genetics and molecular mechanisms of carcinogenesis. Given the difficulty of recruiting veterinarians with solid research experience in molecular carcinogenesis and laboratory animal medicine, we have been training our own.

The assertion of a shortage in the petitioner's occupation is not a persuasive argument for the national interest waiver. The Department of Labor is responsible for determining whether such a shortage exists, and labor certification is the process by which an employer demonstrates that qualified United States workers are not available for the position. *See Matter of New York State Dept. of Transportation* at 218.

[REDACTED] continued:

I have recruited [the beneficiary] to work in my own laboratory in a study of prostate cancer using transgenic mouse models. We have generated a new transgenic mouse model which expresses an activated form of STAT3 in the epithelial cells of the mouse prostate. . . . [The beneficiary] will utilize these transgenic mice to answer questions about the role of STAT3 activation in prostate cancer progression. This work, supported by a DOD [Department of Defense] award to [the beneficiary], may ultimately lead to the identification of new targets and model systems for chemoprevention/intervention studies.

[The beneficiary] is rapidly progressing to an independent role, critical to this department's leadership in the development and use of animal models for cancer

research. . . . [The beneficiary] has the potential to make outstanding contributions to our ongoing effort to understand the molecular mechanisms involved in the development of cancer and to develop diagnostic and treatment procedures. His work on genetically modified mice has opened new possibilities for the understanding of the carcinogenesis process, as well as identifying new targets for cancer prevention and intervention. The ongoing nature of these projects makes it imperative to continue [the beneficiary's] participation.

discussed earlier clinical trials involving the use of finasteride to treat prostate cancer. stated that finasteride appeared to reduce the overall incidence of prostate cancer, but "the finding that a statistically significant percentage of finasteride-treated men had higher-grade cancers than those treated with placebo implied that finasteride induced the more aggressive tumors." She continued:

To understand the significance of the reported finasteride-associated change in grade, we are conducting a Phase II Chemoprevention trial for finasteride. . . . [O]ur ability to ask questions about the mechanism(s) by which finasteride promotes prostate cancer progression would be significantly enhanced by the availability of an animal model for adverse prostate cancer progression in which to conduct laboratory-based experiments.

. . . [The beneficiary] is an outstanding researcher and an invaluable collaborator on this project. His expertise in pathology and animal models of cancer has been key in allowing us to identify biomarkers for prostate cancer that can be used in the clinic or pathological laboratory to better predict disease outcome.

The only initial witness from outside the petitioning entity was of the University of California, Davis (UCD), who stated:

[The beneficiary] has made important contributions to his field in Argentina. like the beneficiary, is originally from Argentina.] In that country, [the beneficiary] produced valuable research in diseases produced by bacteria of the genus *Mycobacterium*. . . . His research has helped to improve the diagnosis of bovine tuberculosis in Argentina. . . . He is also a co-author/illustrator of a book in the Microbiology field . . . which is being used as educational material for undergraduate veterinary students in Argentina.

At present, his specialization in research pathology in the US has led him to occupy a unique and valuable position in the area of cancer research, which is of prime importance in this country as in many others.

The petitioner submitted copies of the beneficiary's published work and abstracts of conference presentations, but no evidence as to the reception and impact of this work.

On March 27, 2008, the director issued a request for evidence, instructing the petitioner to “submit evidence that establishes the beneficiary has a past record of specific prior achievement that justifies projections of future benefit to the national interest.” The director also requested “documentary evidence that, as of the petition priority date, the beneficiary had a degree of influence on his field that distinguishes him from other researchers/scientists with comparable academic/professional qualifications.” The director specifically requested evidence that other researchers have cited the beneficiary’s published work.

In response, [REDACTED] stated:

I understand that the labor certification pertains to the minimum requirements for performing the duties for an assigned job. . . . [The beneficiary’s] highly specialized position requires that an individual possess a minimum of a Doctor of Veterinary Medicine degree plus at least 4 years of research experience developing and using transgenic mouse models. . . . It is this unique combination of education and research experience-based skills that differentiates this position from a standard research investigator position. . . .

A regular veterinary pathologist is not qualified for this position. . . . For this Researcher Investigator [*sic*] position, an individual must possess an advanced degree in veterinary medicine AND extensive clinical microbiology/immunology/pathology/GEM experience in the area of transgenic mouse models.

It is not clear whether [REDACTED] means that the position actually “requires” the above qualifications, or merely that the petitioner strongly prefers those traits. If the position truly requires the above qualifications, then any applicant who lacks those qualifications is unqualified, rather than minimally qualified, because he or she lacks the minimum qualifications for the position. The labor certification process does not compel the hiring of unqualified workers.

[REDACTED] then repeats the assertion that there is a “shortage of veterinary pathologists.” If there is a shortage of veterinary pathologists, and the position is open only to veterinary pathologists, then the asserted shortage would presumably reduce competition among United States workers for the beneficiary’s position. [REDACTED] appears to concede as much, having stated “I am confident that other qualified applicants are not available.”

Eligibility for the national interest waiver generally rests on the merits of the individual alien, rather than on the importance of the alien’s duties or occupation. To this end, the petitioner submitted additional materials regarding the beneficiary, rather than the requirements for the position.

[REDACTED] referred to one of the new submissions (exhibit 30) as a “Citation index.” Exhibit 30 is a printout of an undated electronic mail message, listing two articles said to contain citations of the beneficiary’s work.

Several new witness letters accompanied the petitioner's response to the request for evidence. [REDACTED] in his second letter on the beneficiary's behalf, stated:

I have neither worked nor collaborated with [the beneficiary] but am familiar with his research based on the reputation he has acquired in the U.S. and abroad in the field of investigative pathology specializing in the use of murine models to study prostate cancer in transgenic mice and to apply the results to studies covering prostate cancer in humans. Since [the beneficiary] and I share similar outline of interest . . . , for the past several years I closely follow [the beneficiary's] investigations.

Since the use of mice to investigate prostate carcinogenesis and the pathology of the mouse prostate is a highly specialized area, only a select few experts exist in the U.S. and abroad qualified to undertake this genre of research [The beneficiary] has evidenced through his unique expertise . . . that he is an expert in this field. It is very well known that there exists a critical lack of pathologists and research scientists possessing a veterinary advanced degree together with research expertise in the use of mouse models to study human disease in the USA and abroad.

[REDACTED] of the National University of La Pampa School of Veterinary Medicine (where the beneficiary studied and worked from 1996 to 2002) stated:

Upon joining our Department, [the beneficiary] outstandingly handled every area he collaborated in including a main project involving the study of environmental mycobacterias. . . . [The beneficiary] played a pivotal role in developing and improving unique techniques of micro inoculation in the skin and mammary gland [*sic*] of the mouse. He outstandingly performed all kinds of laboratory techniques used in a highly advanced microbiology laboratory. . . .

Throughout his employment and university studies at the National University of La Pampa, Argentina, [the beneficiary] acquired a unique combination of education, training and skills in veterinary science, investigative pathology, microsurgery and microbiology. . . . Since joining [the petitioner] in the U.S., [the beneficiary] has expanded his area of specialization to include the development and study of mouse models for human prostate cancer research.

[REDACTED] stated that the petitioner "authored a book . . . that was copyrighted and used as a textbook in the National University of La Pampa, School of Veterinary Medicine." The petitioner lists this copyright as a "major prize." The available evidence does not discuss Argentinean copyright law, but it is not readily apparent that claiming a copyright for one's own work is a prize, award or comparable achievement. [REDACTED] did not indicate whether the beneficiary's textbook is in use at any other institution.

[REDACTED], Associate Director of i3, a pharmaceutical services company in Austin, Texas, previously studied at the petitioner's parent university. [REDACTED] stated:

Even though I have not collaborated with [the beneficiary], I am very familiar with his innovative research through the stellar reputation he has gained in America over the past 4 years. . . . Very few professionals are willing to dedicate their time and effort to such sophisticated research and the United States needs such high caliber research scientists to aid our country in maintaining its scientific and medical leadership.

. . . I became familiar with [the beneficiary's] unique expertise and extraordinary scientific contributions back in 2006. At that time, he had been awarded a Department of Defense (DOD) postdoctoral fellowship for the study of the specific protein Stat3 with respect to activation during Prostate Cancer Progression. . . . The fact that a federal agency awarded [the beneficiary] this fellowship clearly evidences that he has a highly specialized skill [sic] set needed for prostate cancer research.

The record contains nothing from the DOD to confirm [REDACTED] assessment of why the DOD funded the beneficiary's project.

The director denied the petition on August 5, 2008, stating that while the beneficiary's occupation has substantial intrinsic merit and national scope, the documentary evidence submitted by the petitioner indicated that the beneficiary had had minimal influence on his field. The director acknowledged the witness letters, but found that the letters "do not demonstrate why the labor certification [process] would be inappropriate in this case." The director found that the beneficiary does not merit a waiver simply because he is qualified for a highly specialized position.

On September 2, 2008, the petitioner filed a motion to reopen the proceeding. [REDACTED] stated "we have . . . been determined to attract and retain top scientists in our institution" in accordance with "[t]he National Cancer Act of 1971," and that "the need for veterinarians trained in comparative medicine have [sic] far outpaced availability."

The petitioner submitted a letter from [REDACTED] who stated that the beneficiary has spent several years obtaining rare expertise relating to the mouse model for prostate cancer. Prof. [REDACTED] repeated the assertion that there is a severe shortage of trained workers in the beneficiary's specialty.

On October 21, 2008, the director reaffirmed the denial of the petition, stating that a worker shortage is a favorable factor in the labor certification process, and therefore a poor basis for a waiver. The director also stated that simply listing the petitioner's accomplishments does not show that he stands apart from others in the same specialty.

The petitioner appealed the director's second decision on November 20, 2008. On appeal, the petitioner continues to rely on the assertion that there is a shortage in the beneficiary's field. [REDACTED]

states: “The crux of this petition is the worldwide shortage of laboratory animal veterinarians, such as [the beneficiary], who are skilled in comparative medicine and mouse pathology.” [REDACTED] adds that the beneficiary “has successfully developed several new transgenic mouse models for prostate cancer.”

The petitioner submits copies of two letters to the editors of scholarly journals, attesting to the lack of “expert comparative pathologists knowledgeable in mouse biology and human disease.” UCD [REDACTED] wrote or co-wrote both of these letters. One letter indicates: “The number of genetically engineered mouse mutants is rising substantially. . . . However, there is insufficient manpower and expertise in comparative pathology to characterize and validate these model animals effectively.”

As the petitioner has acknowledged, “[t]he crux of this petition” is not that the beneficiary has been a particularly influential researcher in his field, but rather that he possesses hard-to-find qualifications. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

The AAO is not indifferent to the petitioner’s desire to maintain continuity in its staffing, and the petitioner’s preference to retain an already-trained worker over potentially having to re-train a replacement is understandable. The petitioner, however, has not persuasively established that the matter at hand rises to the level of a national interest issue. The petitioner has relied on the seemingly contradictory arguments that, on the one hand, the petitioner cannot possibly recruit a replacement for the beneficiary because no such replacement is available; but, on the other hand, the labor certification process would inevitably displace the beneficiary from his position, in favor of a less-qualified replacement. The petitioner has been unable to reconcile these conflicting claims.

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.