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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 22 2009
SRC 07 202 51479

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

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 researcher at the Samuel Roberts Noble Foundation, Ardmore, Oklahoma. 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.

The petitioner filed the petition on June 22, 2007. In a statement accompanying the initial filing, counsel contended that *Matter of New York State Dept. of Transportation* “is simply inapplicable to [the petitioner’s] request for a national interest waiver and thus should not impede (or have any bearing on) the adjudication of this petition.” Counsel then argued that the petitioner has satisfied the three-pronged test set forth in that precedent decision. By doing so, counsel appears to have conceded that *Matter of New York State Dept. of Transportation* is, in fact, applicable to the present proceeding. Counsel offered no clear explanation as to why the decision “is simply inapplicable.” Under 8 C.F.R. § 103.3(c),

all precedent decisions, including *Matter of New York State Dept. of Transportation*, are binding on all USCIS employees.

Counsel protested that *Matter of New York State Dept. of Transportation* “imposes criteria on the national interest waiver process that are ultra vires of the statute.” Counsel identified no judicial ruling or other case law overturning *Matter of New York State Dept. of Transportation*, and therefore that decision remains binding precedent. At the time of the precedent decision’s issuance in 1998, the statute contained no “criteria [for] the national interest waiver process” at all; the statute simply indicated that the job offer requirement could be waived when it was in the national interest to do so. This provision of law could not possibly be implemented without some form of guidance as to the national interest. Without statutory or regulatory guidelines, a published precedent decision was the only means by which the Immigration and Naturalization Service (now USCIS) could ensure uniform and consistent standards.

Congress is presumed to be aware of existing administrative and judicial interpretations of its statutes. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In this instance, Congress clearly took notice of *Matter of New York State Dept. of Transportation*. Shortly after the issuance of that precedent decision, Congress amended the Act, adding a provision at section 203(b)(2)(B)(ii) making the waiver available to certain physicians. At that time, Congress could have made other statutory changes relating to the waiver. Because Congress made no other changes in response to *Matter of New York State Dept. of Transportation*, we can presume that Congress had no other objection to the agency’s interpretation of the statute as set forth in the precedent decision.

Counsel cited “the seminal decision of ‘Mississippi Phosphate,’” referring to an unpublished 1992 AAO decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel’s evident preference for the 1992 decision over *Matter of New York State Dept. of Transportation* does not compel us to disregard binding precedent in favor of counsel’s preferred standards.

Having established that *Matter of New York State Dept. of Transportation* is the controlling authority in this proceeding, we now discuss the merits of the petition. The petitioner submitted several witness letters describing the petitioner’s work and its importance. [REDACTED] of Oklahoma State University stated:

I knew [the petitioner] during his doctoral program in the Department of Biochemistry and Molecular Biology at Oklahoma State University. . . .

[The petitioner] has demonstrated his knowledge and exceptional research skills through his excellent work on understanding the role of septins in yeast cell division. . . . He has used molecular biology techniques to generate mutants of yeast and has used genetic and cell biology techniques to study the mutants. Finally, he has used biochemical techniques to characterize the interactions of mutant septin proteins in an attempt to understand the complexities of cellular processes in yeast that include budding, cell

polarity and cytokinesis. The potential use of understanding septin interactions and their importance in cell division are enormous. Cancer, a type of unregulated cell division, can be understood by first understanding the underlying molecular processes of cell division. . . .

Currently, [the petitioner] is working at the Noble Foundation in Ardmore, Oklahoma. He has applied his experience in proteomics to monitor the response of methyl jasmonate elicitation in *Medicago truncatula* cell culture. [The petitioner's] work adds to our understanding of the role of secondary metabolism in plant defense response. . . . [The petitioner] has initiated a project to elucidate protein-protein interactions in plant secondary metabolism by applying the novel Tandem Affinity Purification-tag (TAP-tag) technology. . . . This work can possibly aid researchers in modulating the lignin pathways to increase or decrease the lignin content in plants. A decrease in lignin content or a change in composition will result in an easier separation of lignin from cellulose. As a result of this change, an enormous impact in the bio-fuel area will potentially save millions of dollars on the exportation of petroleum products. Ecologically friendly fuel can then be developed in the form of ethanol fuel that will in turn, decrease air pollutants released by millions of automobiles and combustible engines. This same research will save billions of dollars in the timber industry by strengthening wood and making it more durable for commercial use . . . thus preventing the unnecessary deforestation that is plaguing the world today.

Functional Trait Team Lead, Yield and Emerging Technologies at Monsanto Company, Chesterfield, Missouri, stated:

The international attention given [the petitioner] is well deserved; his numerous contributions to the field are extremely important, specifically his discovery of proteins found during biotic stress.

. . . His extraordinary proteomic engineering skills and vast knowledge base place [the petitioner] at the leading edge of the fight against an ailing environment and economic decline.

In her letter, [REDACTED] did not specify how she learned of the petitioner's work. Her *curriculum vitae* indicates that she was an assistant professor of Biology and Molecular Biology at Oklahoma State University while the petitioner was a doctoral student in that department.

[REDACTED] Senior Vice President of the Noble Foundation and a member of the United States National Academy of Sciences, stated:

The project, in which [the petitioner] is a lead investigator, focuses on unveiling proteins that react to biotic stressors, particularly methyl jasmonate that acts as a mimic for wounding, which allows for [the petitioner] to single out new proteins located in defense

pathways. His expertise is essential to the fruition of research used in the development of transgenic plants, which are plants with stronger defense mechanisms. This will make it possible for plants to better survive harm, or effects of severe weather.

[The petitioner's] work with protein-protein interactions will lead to his identification of important interactions among proteins in these pathways, which then clarifies the engineering process needed to generate plants with improved defense or quality characteristics.

_____ of the University of Pennsylvania School of Medicine stated:

I am well acquainted with [the petitioner] and his work, as I have worked closely with him in a collaborative project. . . .

[The petitioner's] current work . . . will be of tremendous advantage to the economy and environment of the United States by producing transgenic plants that are nutritionally superior, environment-friendly and inexpensive "mini-factories" of medical products.

_____ a research fellow at the Australian National University, Canberra, edited a book chapter that the petitioner wrote. _____ stated: "I got to know [the petitioner] very well when I visited the Noble Foundation in 2005." Regarding the petitioner's work TAP-tag technology, Dr. _____ stated: "There is no question that this work is of high scientific interest, internationally recognized and of great application to the Agri-Biotechnology industry."

The petitioner submitted evidence of the impact factors of journals that had published or accepted the petitioner's articles. The impact factor attests to the reputation of a given journal, but it does not establish or imply that any one article in that journal has a reputation matching that of the journal overall. A printout from a citation database showed a total of six citations of the petitioner's work, a figure slightly below the 6.520 impact factor of the journal that carried the article.

The record shows that the petitioner received several requests to review manuscripts submitted for publication in books or journals. Counsel and various witnesses have asserted that these invitations are evidence of the petitioner's standing in his field, but the record contains nothing from the editors of the publications that would show that they selected the petitioner for any reason other than competence in the field to which the manuscripts pertained.

On June 26, 2008, the director issued a request for evidence, instructing the petitioner to "clarify how the beneficiary's research is greater/different from their [*sic*] peers who have conducted similar research." In response, counsel repeated the observation that the petitioner's "publications are published in journals with a high impact factor." By repeatedly raising the issue of the impact factor (which is a ratio of citations to articles published), counsel has shown awareness of the importance of citations when judging a publication's impact and influence. Nevertheless, the petitioner submitted no new citation figures to allow a comparison between the petitioner's own citation rate and the respective

journals' impact factors. Counsel, in effect, asserted that the journals' reputations ought to reflect on the petitioner's individual reputation.

A letter from Noble Foundation Director of Information Systems [REDACTED] indicated that a book chapter by the petitioner was "the most downloaded document" from the foundation's web site "between May, 2007, its website posting date, and December 2007." This information shows that the petitioner produced the most popular downloadable publication on that one web site, but it does not allow a broader comparison with the field at large. The information, for instance, does not offer comparative figures for other web sites with downloadable articles and book chapters. Also, we can safely assume that many who downloaded the article did so before they had actually read it, because those who had already read it clearly had prior access to the article and therefore probably would not have needed to download it. Download statistics show only that other researchers obtained copies of the petitioner's chapter; they do not reflect that the chapter had significant influence on the field. The petitioner and counsel are clearly aware of the significance of citation data, given their repeated reliance on impact factors, but the record is silent regarding citation of the petitioner's book chapter.

A July 22, 2008 letter from [REDACTED] of the Noble Foundation's human resources department indicated that the petitioner "has recently advanced to the position of Research Associate." Counsel cited this letter as evidence that the petitioner "is distinguished and placed above his peers." The record does not contain an organizational chart or other evidence to show that a research associate holds a particularly high rank at the Noble Foundation. Also, the petitioner has not shown that this promotion represents anything more than routine progression in the petitioner's field.

Even if the petitioner had shown that attaining the rank of research associate is a mark of distinction, which the petitioner has not done, the letter is dated thirteen months after the petition's filing date. Because the petitioner did not mention this promotion in the initial filing, and because the promotion was described as "recent" in July 2008, it appears that the promotion happened after the filing date. Under 8 C.F.R. § 103.2(b)(1), a petitioner must establish eligibility at the time of filing; future developments cannot retroactively establish eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Commr. 1971).

The petitioner submitted six new witness letters. Associate Professor [REDACTED] of the Noble Foundation stated: "I have been [the petitioner's] supervisor for the past 6 months." The letter is dated July 8, 2008, meaning that [REDACTED] became the petitioner's supervisor in early 2008. Any work that the petitioner performed in [REDACTED] laboratory took place after the petition's June 2007 filing date, and therefore, for reasons already explained, cannot establish the petitioner's eligibility as of the filing date. We must limit consideration to [REDACTED] assertions about the petitioner's earlier work. [REDACTED] stated:

During his post-doctoral tenure, [the petitioner] was the lead investigator of the project that focused on unveiling proteins that react to biotic stressors, particularly methyl jasmonate that acts as a mimic for wounding. This allowed [the petitioner] to single out new proteins located in defense pathways. His expertise was essential to the fruition of

research used in the development of transgenic plants, which are plants with stronger defense mechanisms. This made possible for plants to better survive harm, or effects of severe weather.

Compare the above passage to the following excerpt from [REDACTED]'s letter, submitted previously:

The project, in which [the petitioner] is a lead investigator, focuses on unveiling proteins that react to biotic stressors, particularly methyl jasmonate that acts as a mimic for wounding, which allows for [the petitioner] to single out new proteins located in defense pathways. His expertise is essential to the fruition of research used in the development of transgenic plants, which are plants with stronger defense mechanisms. This will make it possible for plants to better survive harm, or effects of severe weather.

The great similarity between the two passages does not appear to be inadvertent or coincidental.

Noble Foundation Associate Professor [REDACTED] stated: "In my professional opinion, [the petitioner] is among the best researchers in his respective field. . . . [The petitioner] clearly stood out as he provided novel biochemical approaches toward unraveling how septins interact with other proteins." [REDACTED] also discussed the petitioner's work in [REDACTED] laboratory, which was too recent for consideration in this proceeding.

[REDACTED] Director of the Recombinant DNA/Protein Resource Facility at Oklahoma State University, stated that the petitioner "has made groundbreaking findings and developments, which have led to national and international acclaim." Such an assertion carries somewhat less weight when the source has close ties to the petitioner. The petitioner need not demonstrate international acclaim to qualify for the waiver. Nevertheless, if the petitioner chooses to assert that he is internationally acclaimed, then the petitioner ought to submit first-hand evidence of such acclaim from international sources. Failure to provide such evidence diminishes the credibility of the witnesses' claims, and suggests that such claims may be exaggerated.

letter contains a familiar passage:

He has functioned as the lead investigator on a project that focuses on unveiling proteins that react to biotic stressors, particularly methyl jasmonate that acts as a mimic for wounding. This allows [the petitioner] to then single out new proteins located in defense pathways. Such research is significant to the development of transgenic plants with stronger defense mechanisms. This makes it possible for plants to better survive harm, including the dramatic effects of severe weather.

[REDACTED] of Oklahoma State University stated that the petitioner's involvement "is pivotal to the outcome of [his current] project" at the Noble Foundation, and that the petitioner's "expertise and impact in the field are further evidence[d] by the fact that he has published extensively in peer reviewed journals and authored book chapters."

██████████ of Pennsylvania State University, Philadelphia, stated that the petitioner's "research has led to real-world use that has already had an impact on our agriculture," but ██████████ did not elaborate. Regarding the petitioner's published work, ██████████ stated: "While it is true that all researchers are expected to publish their work, few publish so frequently and so consistently in such highly ranked journals." We note that, at the time the petitioner filed the petition, the petitioner had published two journal articles, eight years apart. The earlier article, from 1998, did not relate to agriculture; it concerned the skin disease *pityriasis versicolor*. None of the petitioner's research at the Noble Foundation appeared in print before the filing date.

██████████, Research Plant Molecular Geneticist at the United States Department of Agriculture, Madison, Wisconsin, stated that the petitioner "has and will continue to play an important role in research on important problems in agriculture."

The director denied the petition on August 21, 2008, stating that the evidence submitted does not sufficiently distinguish the petitioner from others in his field. On appeal, counsel stated that the petitioner "has provided evidence establishing his accomplishments are more significant than those of his peers. Additionally, he has presented evidence confirming his position among the top researchers in his field." Nearly every piece of evidence that counsel identifies on appeal is a witness letter, rather than documentary evidence. Witness letters are not, themselves, proof of the assertions in those letters.

Counsel once again stresses the impact factors of the journals that have published the petitioner's work, without providing evidence to show that the citation rate of the petitioner's own work is comparable to the overall citation rates that yielded those impact factors. Counsel does not explain why the citation rates of other articles merit more emphasis than the citation rates of the petitioner's own work. We reject the assertion that an alien qualifies for a waiver simply by publishing in influential journals (as thousands of researchers do each year), but this appears to be the heart of counsel's position.

Witnesses claim that, by the filing date, the petitioner had earned an international reputation as a highly regarded researcher at the top of his field. Other witnesses "hedged their bets," so to speak, by asserting confidence that the petitioner's work would eventually result in international recognition. The record simply does not support these exaggerated claims. At the time he filed the petition, the petitioner was a postdoctoral researcher, subsequently promoted to research associate. The record indicates that the Noble Foundation has assistant professors and associate professors, as well as directors and department heads. Hierarchically at least, the petitioner appears to be closer to the bottom than the top of the Noble Foundation, let alone the field as a whole. Also, as we have noted, the petitioner has documented the publication of only two of his articles prior to the filing date, one of which is a 1998 article on a skin disorder that appears to have little relevance to his more recent work in the United States.

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.

We note that, on December 15, 2008, the Samuel Roberts Noble Foundation filed a petition on the beneficiary's behalf (with receipt number SRC 09 800 06788) seeking to classify the beneficiary as an outstanding researcher under section 203(b)(1)(B) of the Act. The director approved that petition on April 18, 2009. The AAO has not reviewed the record of proceeding relating to the approved petition, and therefore the AAO will not comment on the merits of that petition.

ORDER: The appeal is dismissed.