

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

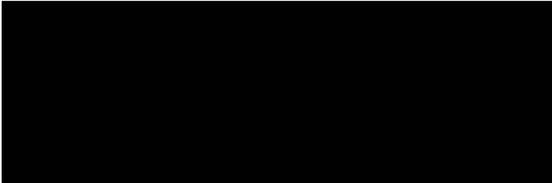
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5



FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 24 2009
LIN 07 171 52802

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).

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 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 postdoctoral research fellow at Louisiana State University, Baton Rouge. 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 May 30, 2007. In a statement accompanying the initial submission, counsel stated:

[The petitioner] is a **leading scholar in leprosy (Hansen’s Disease) research at the only lab in the world capable of differentiating Mycobacterium leprae live bacteria from dead bacteria. . . .**

[The petitioner's] expertise is also evidenced by his **close collaborations with the National Hansen's Disease Program (NHDP) (a federal program and division under the US Department of Health and Human Services) which is respected worldwide as the best leprosy research facility in the world. NHDP has adopted [the petitioner's] methods** for *Mycobacterium leprae* to improve the quality of the harvested bacteria for research purposes. This is particularly illustrative of [the petitioner's] expertise as **NHDP is the sole supplier of *Mycobacterium leprae* for research purposes worldwide.**

. . . [The petitioner] is **one of the few people in the world who can grow and maintain live *Mycobacterium leprae*.** He is also working to develop skin tests as an early diagnostic test.

(Counsel's emphasis.) Counsel asserted that a waiver would be in the national interest because the petitioner's employer would likely be unable to list many of the petitioner's specific qualifications on an application for labor certification, whereas it is important to the United States for the petitioner to remain at LSU performing nationally significant work for NHDP:

Certainly, an employer who is engaged in research requiring a unique skill set that is only found in a handful of scientists worldwide has the right to demand one of those few specialists and should not be compelled to employ persons who are "minimally qualified." This was the whole purpose of creating the National Interest Waiver.

Counsel did not cite legislative history or any other source to support counsel's interpretation of "the whole purpose of creating the National Interest Waiver." In the very next paragraph of the introductory statement, counsel stated:

[T]he limitations imposed by the labor certification process will place an unreasonable constraint on [the petitioner's] ability to conduct research in his field. . . . As the beneficiary of an employer-sponsored petition, [the petitioner] would have no options for changes in employment during this period, and thus would not be able to pursue other research opportunities. In this, he is effectively deterred from pursuing promising opportunities to conduct important research in his field.

Thus, in the same brief, counsel has put forth two contradictory arguments: (1) the waiver will ensure that the petitioner's employer will not have to replace him; and (2) the waiver will allow the petitioner to seek other employment instead of force him to stay with his present employer. Counsel did not explain why it would be in the national interest for the petitioner "to pursue other research opportunities" if it is supposedly a matter of critical national importance for him to continue working for his current employer.

Several letters accompanied the initial filing of the petition. Louisiana State University Professor stated:

Leprosy is an ancient disease and the causative agent has been known for some time. Drugs are currently available to treat the condition. However, the mode of transmission continues to be a mystery and new cases continue to be reported throughout the world, including in the U.S. . . . [T]here is as yet no vaccine available for this important disease. The obvious and easy studies have been done and more difficult in depth work is required. . . .

In his studies, [the petitioner] is one of the few people who can culture the agent of this disease and distinguish between living and dead organisms. . . . Without these agents and [the petitioner's] efforts this progress will cease.

[REDACTED] stated:

From 1994 – 2005 I was Chief of the NHDP's Laboratory Research Branch located at Louisiana State University overseeing the largest, multidisciplinary and most comprehensive leprosy research group in the world. . . . In 2002 it was my good fortune to recruit [the petitioner] into my own research group. . . .

There are 2 other labs in the U.S. with leprosy research interests and one can count the total number of U.S. leprosy researchers outside our lab on one hand. [The petitioner's] unique experience that makes him so valuable to our lab and thus the world of leprosy research stems from his experience and knowledge in Cell Biology. . . .

130 years after its discovery as the causative agent of leprosy, *Mycobacterium leprae* has yet to be cultured in the laboratory and thus these organisms have not been readily available for study. . . . [The petitioner] has developed a method of growing and purifying [an] enormous number of highly viable *M. leprae* in a unique strain of immunosuppressed mice and for the past 3 years we have served as the sole source of live leprosy bacilli shipping suspensions around the world on a weekly basis. He is currently working with me in developing an objective diagnostic test for detecting preclinical leprosy and testing an effective, combined vaccine for both leprosy and tuberculosis.

[REDACTED] Chief of the NHDP's Laboratory Research Branch, stated:

[The petitioner] has achieved success utilizing a special technique to monitor bacterial growth in the foot pads of specially bred mice. He has developed and validated a method for differentiating live bacteria from dead bacteria. His findings have been published in the scientific literature and form the basis for redefining optimal conditions for studying *M. leprae*, thereby, impacting almost all laboratories in the world engaged in leprosy research.

. . . [The petitioner's] methods for monitoring the viability of *M. leprae* have been adopted by the NHDP to improve the quality of harvested bacteria for research purposes. This is particularly exemplary for [the petitioner] as the NHDP is the sole supplier of this unique resource worldwide. The NHDP has also adopted [the petitioner's] published mouse foot pad classification system.

In addition to [the petitioner's] important work in leprosy, his work is also gaining notice in the tuberculosis field. He has recently published work exploring the mechanism of action of a new compound active against dormant and active forms of tuberculosis.

There remain three letters: (1) a September 18, 2006 letter signed by [redacted] of Colorado State University, Fort Collins; (2) a January 24, 2007 letter signed by [redacted] Director of the Institute for Tuberculosis Research at the University of Illinois at Chicago, and (3) a January 30, 2007 letter signed by [redacted] of the Rockefeller University, New York, New York. These three letters share several identically- or similarly-worded passages in common. All three letters, for instance, contain the following passage, sometimes with minor variations:

[The petitioner] is one of very few people in the world that can grow and maintain live *Mycobacterium leprae*, which is critical to leprosy research and drug screening. He has achieved success utilizing a special technique to grow the bacteria in specially bred mouse foot pads. In addition, he has developed and validated a method for differentiating live bacteria from dead bacteria.

The use of common language belies the supposedly independent origin of the letters. We grant that the witnesses essentially endorsed the letters by signing them, but they have diminished weight as independent evidence.

A passage unique to [redacted] letter reads:

[L]ong-term infection within the peripheral nerve, particularly Schwann cells, the accessory neural cells of the peripheral nerves, is crucial for the spread of the disease and clinical manifestation of nerve injury in leprosy. For this, leprosy bacterium needs to maintain its viability within the Schwann cells. [The petitioner] is currently collaborating with my group to determine an important aspect of this nerve pathology and that is how Schwann cells provide the support to maintain the viability of leprosy bacteria and what critical host cell factors [are] involved in maintaining such viability inside Schwann cells. . . . [The petitioner] has performed an excellent job and fulfilled the goal of this proposed project with his skillful and meticulous planning of the experiments.

A passage found only in [REDACTED] letter indicates that the petitioner “is also working very closely with our laboratory to develop skin tests as an early diagnostic test.”

The passages unique to [REDACTED] letter tend to be general in nature, except for portions that focus on [REDACTED]’s own credentials.

The petitioner submitted copies of his articles that had appeared in various journals, but no evidence (such as citation data) to establish the impact of his published work.

On August 18, 2008, the director issued a request for evidence, instructing the petitioner to submit documentary impact of the impact and influence of his work. The director specifically requested documentary evidence of independent citation of the petitioner’s work.

In response, counsel stated:

[The petitioner’s] field of research is a small and slow-moving field. . . . In 2005, there were a total of 108 publications in the field of leprosy; those publications had a mean of 1.5 citations per article. [The petitioner] had over five citations to his work that year, thus placing him in the 90th percentile of citations for that year.

Printouts from the Scopus database appear to corroborate counsel’s assertions, although not all the terms in the printed table are explained. The petitioner documented six citations of one article from 2005, and two citations of an article from 2006. The petitioner submitted copies of eight citing articles. [REDACTED] was a co-author of three of these articles, citing his own prior work with the petitioner, leaving five independent citations of the petitioner’s work. Most of those independent citations appeared well after the petition’s May 2007 filing date.

The petitioner submitted three new witness letters, all from prior witnesses. [REDACTED] in his second letter, repeated portions of his first letter and stated:

[The petitioner’s] contributions have had a major impact on our own basic research goals of understanding the pathogenesis of the disease. . . .

It is no exaggeration to state that because of [the petitioner’s] efforts enormous numbers of purified leprosy bacilli, 100x more viable than previously available, can now be routinely supplied to investigators around the world. . . . Because of his efforts our lab is the sole source of this unique leprosy research reagent.

(Emphasis in original.) [REDACTED] also stated that the NHDP had shipped samples “to 17 different workers in 10 cities in the U.S.,” notwithstanding his earlier claim that there are no more than five leprosy researchers in the United States outside of the NHDP’s laboratory in Louisiana.

A new letter from [REDACTED] consists mostly of language from his previous letter, with the order of the paragraphs rearranged. In one new passage, [REDACTED] asserted that “**there are only three laboratories in the United States engaged in leprosy research**” (emphasis in original). This seems to contradict [REDACTED]’s assertion that the NHDP has distributed samples to “10 cities in the U.S.”

[REDACTED] in his new letter, stated:

[T]here are now only two major laboratories devoted to leprosy research within the USA, the one under the auspices of the National Hansen’s Disease Program, and our own program at Colorado State University. . . .

The obstacles in conducting modern day immunological research towards immune-based diagnosis, the goal of [the petitioner’s] research, are near insurmountable, due to inability to grow the organism outside a living mammalian host, the extraordinarily long incubation period, the complex clinico-immunological picture, severe nerve damage and disabilities, utter confusion over the epidemiological picture, etc. In partial answer to some of these problems [the petitioner] and colleagues developed the mouse foot-pad model for producing large numbers of viable *Mycobacterium leprae*. In fact the NHDP is now the only source of viable *M. leprae* world-wide and [the petitioner’s] research contribution has led to development of this precious facility into an almost production-line top quality facility to support laboratories throughout the world-wide leprosy research community.

One passage from [REDACTED] letter is of particular interest:

[The petitioner,] in conjunction with [REDACTED], has had a major breakthrough in achieving a dream of leprosy research for over a century, in vitro/laboratory-grown *M. leprae*; the simple act of including glycerol in a synthetic medium will allow the organism to survive for several generations.

Because of [REDACTED]’s ambiguous wording, it is not clear whether the petitioner actually grew *M. leprae* “in a synthetic medium . . . for several generations,” or simply demonstrated that it is theoretically possible for the bacteria to survive under such conditions.

The record contains no documentary evidence (such as a published article attributed to the petitioner and [REDACTED], or a published bulletin, either in print or online) to corroborate [REDACTED]’s assertion that the petitioner either grew *M. leprae* in vitro, or at least made a major step toward doing so. Also, the other witness letters submitted in response to the RFE do not contain any mention of what Dr. [REDACTED] called the petitioner’s “major breakthrough.”

The director denied the petition on November 4, 2008, stating that the petitioner’s citation was minimal and did not indicate significant influence in his field. The director added that the witness “letters fall short of demonstrating the petitioner’s influence in the field beyond his past or present academic

institutions and circle of colleagues or work acquaintances. . . . [t]here is no evidence that independent researchers view the petitioner's individual work as particularly significant or influential." The director also stated that, if the petitioner had made particularly significant or noteworthy contributions in his field, these achievements "ought to be verifiable by objective documentary evidence."

We note that, on appeal, counsel asserts: "*Mycobacterium leprae*, the cause of leprosy, cannot be cultured." Counsel does not mention [redacted] claims about the petitioner's progress in this area. This is not the only apparent inconsistency in the record. Counsel also quotes [redacted] assertion that "[t]here are 2 other labs in the U.S. with leprosy research interests and one can count the total number of U.S. leprosy researchers outside our lab on one hand." Later in the same brief, counsel quotes the same witness as stating that his laboratory provided *M. leprae* samples "to 17 different workers in 10 cities in the U.S." These two sets of figures seem to contradict each other. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The inconsistencies and shared language in the letters illustrate the limitations of relying on witness letters as primary evidence of key claims, rather than as secondary tools to illustrate and explain objective documentary evidence.

Counsel states:

The Service places undue emphasis on an arbitrary number of citations to [the petitioner's] work and disregards the specific examples of reliance upon his work. If citations were the only acceptable evidence of impact on a field or in some way a barometer for approval for a national interest waiver, then the engineer in NYSDOT would never qualify for a national interest waiver.

The engineer in *Matter of New York State Dept. of Transportation* did not, in fact, qualify for a national interest waiver; the precedent decision was a dismissal of his appeal. Leaving aside counsel's poor choice of an example, it has never been the position of USCIS that published citations are the only acceptable "barometer for approval for a national interest waiver." The waiver is available to aliens in a broad range of occupations, many of whom (such as civil engineers) may not produce scholarly articles at all. For researchers, however, citations offer one objective way of measuring the extent to which one researcher's work has influenced the work of other researchers.

There are other means of objectively showing the petitioner's impact. For instance, a press release from a prominent third party such as the Centers for Disease Control or the World Health Organization, crediting the petitioner with significant advances in *M. leprae* research, would carry significant weight. The petitioner, however, has not provided such evidence. Also, the AAO has never denied that witness letters can have significant evidentiary value, but factors already discussed have compromised the value of the letters submitted in support of the present petition. Counsel's arguments, too, have been

inconsistent, as shown by counsel's simultaneous assertion that the petitioner must remain at the NHDP, but also must be free to leave the NHDP.

Counsel argues that the director relied on "a vague indeterminate standard of exceptional ability confused with extraordinary ability." Counsel identifies nothing in the director's decision that improperly required evidence of extraordinary ability, as set forth at 8 C.F.R. § 204.5(h) and its constituent sections. Counsel correctly notes that an alien need not qualify as an alien of exceptional ability to qualify for the waiver. The director, however, did not state that the petitioner must meet the specific requirements of exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Rather, the director, following *Matter of New York State Dept. of Transportation*, noted that an alien cannot qualify for the waiver simply by showing substantial prospective benefit to the United States. This is so because, by the plain wording of the statute, substantial prospective benefit is not automatic grounds for the waiver.

Counsel claims that the petitioner's "advancements in the field of leprosy research have already had a significant impact on our nation's well being." Counsel does not explain this assertion. Counsel provides no documented statistics showing that the petitioner's work has reduced the incidence or transmission of leprosy in the United States, and the petitioner's work appears to be unrelated to the actual treatment of the disease.

Witnesses have credited the petitioner with significant advances in leprosy research, and it may be that they are correct in their assertions. The current state of the record of proceeding, however, does not persuade us that the petitioner has made his case.

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.