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U.S. Citizenship  
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Services

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FILE:

SRC 07 800 17807

Office: TEXAS SERVICE CENTER Date: MAR 04 2009

IN RE:

Petitioner:

Beneficiary:

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.

*Mari Johnson*

John F. Grissom, Acting Chief  
Administrative Appeals Office

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

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 research associate at the University of Southern California (USC). 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 and copies of previously submitted 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] 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.

Several letters accompanied the petitioner’s initial submission. of China Agricultural University, who worked with the petitioner during the mid-1990s, stated:

[The petitioner’s master’s] dissertation focused on the genetic analysis of wheat yellow mosaic virus (WYMV). . . . Since the 1970s, this disease has been reported in more than eight provinces and spread gradually during the following years. [The petitioner] was a pioneer in this field, because she was the first person to research WYMV at the molecular level and her research resulted in the discovery of WYMV in China. . . . WYMV is transmitted by *Polymyxa graminis*, a vector fungus that is an

obligate parasite on the host plants and can survive in soil for many years and can resist fungicides. This facet has proved extremely difficult to discover an efficient method for managing the virus, except for resistant varieties of wheat. [The petitioner] proved to be the leader in the endeavor to prevent this disease by doing the groundbreaking work of identifying the disease and several important characteristics. . . . [The petitioner] successfully produced antiserum of WYMV. Her work not only made it possible for regular practitioners to identify individual cases of WYMV, but also made the further studies of this virus much easier and faster. Most importantly, the work of [the petitioner] has generated a lot of interest among scientists in this field.

██████ did not explain in what sense the petitioner's "research resulted in the discovery of WYMV in China" during the 1990s, if the disease caused by WYMV had already been widespread in China "[s]ince the 1970s."

██████, now a Research Director at France's *Institut National de la Santé et de la Recherche Médicale*, previously worked with the petitioner at the Max Delbrück Center in Berlin, Germany. ██████ describes the petitioner's work in Germany:

[The petitioner's] studies were focused on sex determination, and her research findings were nothing short of extraordinary and embarked the field into exciting territory. . . . Mutation studies have identified several genes essential for early gonad development. The role of these genes in sex determination is not always clear. . . . [The petitioner's] results indicated that the formation/survival of the gonadal primordium [the embryonic, undifferentiated reproductive organ] clearly requires the action of the Wilms' tumor suppressor gene *Wt1* and this function is conveyed through the action of KTS variants. [The petitioner's] research led to a hypothesis for a model of the gonad formation and sex determination process, which introduced a novel and promising development in the relatively new field of sex determination research. [The petitioner's] results uncovered an important role of *Wt1* in sex reversal or genital tract anomalies in Wilm's [*sic*] tumor and Denys-Drash syndrome patients. . . . Using [the petitioner's] research, we are employing mouse models to analyze the molecular pathways leading to the diseased state and explore possibilities of therapeutic interventions.

██████, <sup>1</sup> who leads the petitioner's research group at USC, stated:

My group's work . . . is focused on molecular mechanism and genetic engineering of early lung development. . . . Our research will eventually lead to uncover the role of homeodomain transcriptional regulators in neonatal chronic lung disease,

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<sup>1</sup> Although ██████'s first name is spelled '██████' on the letter, the AAO has elected to use the spelling '██████' for consistency, because the latter spelling appears frequently throughout the record, including numerous published articles and ██████'s own *curriculum vitae*.

bronchopulmonary dysplasia (BPD) and the role of inflammatory and anti-inflammatory cytokines in development of BPD. . . .

[The petitioner's] studies are focused on two major molecular factors of BPD, surfactant protein B and transforming growth factor- $\beta$ . [The petitioner] used red fluorescent protein labeling of surfactant protein B expressing cells and further generated a transgenic mouse model. This model is not only a great tool for studying lung cell proliferation, differentiation and apoptosis in embryonic stages, but also progenitor cell differentiation during injury and repair. [The petitioner's] research on transforming growth factor- $\beta$  indicated that transforming growth factor- $\beta$  inhibits branching and proliferation in early embryonic stages. In addition, she has established the regulation between transforming growth factor- $\beta$  and downstream targets. [The petitioner] not only discovered the function of surfactant protein B and transforming growth factor- $\beta$ , but also opened a new field for BPD research. This is a significant impact in the field, which sets [the petitioner] at the top of the research community. Meanwhile, [the petitioner] is also working on the functions of some tumor related genes.

Also at USC, [REDACTED] stated:

It is my expert opinion that [the petitioner] is one of the very few that can truly be categorized as an important geneticist as evidenced by her outstanding achievements and publications. . . .

There is still no specific treatment for BPD. However, [the petitioner] has made great strides and contributions toward understanding the pathogenesis of BPD. [The petitioner's] research found that a specific signaling molecule controls the formation of the alveoli, the tiny air sacs in the bronchial tubes that exchange oxygen for carbon dioxide. This outstanding finding made it possible to control lung growth by adjusting the amount of the specific molecule. This may be a potential future target in developing effective treatments and/or preventative strategies aim[ed] at attenuating BPD.

[REDACTED] of Case Western Reserve University stated: "I do not personally know [the petitioner] but am aware of her significant and original contributions from interacting with other experts in the field." After cataloguing the petitioner's research activities in China, the United Kingdom and the United States [REDACTED] stated that the petitioner's "excellent research record and contributions exemplifies that of an exceptionally skilled and productive scientist whose future work will continue to contribute to the field and society at large."

[REDACTED] of Harvard Medical School's Dana-Farber Cancer Institute stated:

I have never worked nor collaborated with [the petitioner], therefore my opinions are [those] of an independent expert who has followed and knows [the petitioner's] r[e]search and contributions. I met [the petitioner] at the annual meeting of the "Western Regional Meeting at a Glance," in February 2006 in California. . . . [The petitioner] presented her original findings relating to the interactions of Fibroblast growth factor 10 and transforming growth factor- $\beta$ 1 in a developing lung. . . . [The petitioner's] novel idea and outstanding results created a new tool for molecular mechanism studies in gene regulation and pathway. . . .

[The petitioner] brings her creative culture system into Bro[n]chopulmonary Dysplasia (BPD) research and her contributions to this field are of high significance. . . . Each year, 10,000-15,000 newborns develop BPD which is a chronic lung disease that follows ventilator and oxygen therapy for acute respiratory failure after premature birth. So far, it still lacks effective treatment strategies. By using [the petitioner's] culture system, she found that transforming growth factor- $\beta$  is an important regulator of cellular differentiation and proliferation in early lung development and that its level is increased in BPD patients. [The petitioner's] results not only uncovered the function of transforming growth factor- $\beta$ 1 in BPD, but also opens a new field for BPD treatment, such as using anti-transforming growth factor- $\beta$ 1 antibody to control transforming growth factor- $\beta$ 1's level, which may be an effective therapy for preventing BPD in newborns.

The petitioner submitted printouts from the Google Scholar search engine, <http://scholar.google.com>, indicating a total of 29 citations of two of the petitioner's published articles. Counsel asserted that none of these citations are self-citations, but at least four are self-citations by the petitioner's co-authors.

On December 6, 2007, the director issued a request for evidence (RFE), stating in part:

The record does not establish the beneficiary has conducted successful research in the area of importance for the United States. The research conducted to date, and the proposed research has proven it will not have an impact on the United States nation wide, but rather a small segment.

Submit documentary evidence to establish that the beneficiary is unique within her field. How will the beneficiary serve in the National Interest to a greatly substantial degree than would an available US worker or her peers? The beneficiary's research and accomplishments in biomedical field of molecular biology, does not distinguish or place him above her peers who do similar work. Many of the letters submitted testifying to her ability were from individuals who know or have worked with the beneficiary. The Service understands the beneficiary has done successful research as it relates to lung development and genetic function, but this research nor does her accomplishment rise to a national interest wavier.

(*Sic.*) In response, the petitioner submitted a new Google Scholar printout showing 44 citations of a single article relating to Wilms' tumor suppressor Wt1, meaning that the count provided in response to the RFE did not include existing citations of other articles.

Four new letters accompanied the petitioner's response to the RFE. One of the petitioner's collaborators, [REDACTED] of Mattel Children's Hospital at UC Los Angeles, stated that the petitioner's "previous work in kidney development and sex determination is . . . recognized throughout the world." [REDACTED] stated:

[The petitioner's] identification of the function of the TGF- $\beta$  pathway in lung cancer and stem cell differentiation provide the practicing clinician a thorough review of this molecule and its associated signaling partners in the context of its duplicitous role and behavior in patients with cancer and further pinpoints its potential use as a drug target. The ability to regulate the level of TGF- $\beta$  protein in cancer patients can be used to control the growth of tumor cells and increase cell injury reparation. . . . Her remarkable discovery is strong evidence of her extraordinary ability, and clearly demonstrates that [the petitioner] has risen to the top of her field with great future promise.

[REDACTED] a Research Molecular Biologist at the United States Department of Agriculture's Western Regional Research Center, stated: "Although I do not know [the petitioner] personally, nor have I ever worked with her, I am familiar with her contribution to the field of lung disease from her outstanding publications." [REDACTED] deemed the petitioner "an emerging pioneer in her field [who] plays a leading role in lung cancer and stem cell studies."

[REDACTED] of Harvard Medical School stated:

In the course of her studies of pulmonary cells, [the petitioner] developed a three dimensional (3D) culture system for the study of tumorigenesis. I have followed this work closely, as her method represents a new and exciting way of analyzing tissue development and disease. In [the petitioner's] system, pulmonary cells form airway ducts in a culture dish, similar to the ducts they normally form in the lung. When [the petitioner] inactivated the TGF- $\beta$  pathway in the cultivated ducts, they lost their ductal structure and metamorphosed into tumor spheroids. Hence, [the petitioner] created a model for the transformation of specialized pulmonary tissue into tumorigenic masses. This transformation had never been witnessed before, as it cannot be induced and observed in real time using animals or standard culture systems. This transformation could only be seen with an exposed 3D system such as [the petitioner's]. . . .

I can attest that [the petitioner's] culture system has already proven valuable to my own research program. By applying [the petitioner's] work to cutaneous biology, we

have generated 3D cultures using skin cells, thus creating a model of the skin. At present, we are using this model to screen for genes that control the growth and differentiation of human epidermis. Such screening would simply not be possible with other systems.

The director denied the petition on April 17, 2008. The director stated that the petitioner's work has intrinsic merit and is national in scope, and that the petitioner's "achievements to date are notable." Nevertheless, the director found that the petitioner failed to "persuasively establish that the work being performed by the self-petitioner could not be accomplished by a U.S. worker possessing the same minimum qualifications."

On appeal, counsel protests that the director's decision is "devoid of any reasoning or applicable basis for its conclusion." The AAO, upon review of the record, essentially agrees with counsel. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). The director, in the present decision, did not meet this obligation. The director, in the denial notice, did not discuss the petitioner's evidentiary submissions in any detail. Indeed, apart from a few references to "the biomedical research field," the decision contains few specific references to the petitioner at all. Instead, the decision consists mostly of the guidelines and requirements for the waiver, followed by the conclusion that the petitioner has failed to establish eligibility for the benefit sought.

Counsel discusses the petitioner's journal articles, and asserts: "The fact that these highly selective peer-reviewed journals only accept the most promising and innovative discoveries in the entire field establishes [the petitioner's] work to be **beyond the usual activity** of one in [the petitioner's] profession." The record contains no supporting evidence or statements from the publishers or editors of the journals in question. Counsel offers similar unsubstantiated claims regarding the significance of the petitioner's other activities, such as peer review of article manuscripts. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO must render its decision based on the evidence itself, rather than on counsel's claims regarding the importance of that evidence.

The evidence in the record includes documentation of substantial and increasing citation of the petitioner's published work. The director did not even acknowledge this evidence, much less explain why it is inadequate to establish eligibility. Similarly, while the petitioner acknowledged the submission of independent witness letters, the director did not discuss their strengths or shortcomings.

While the submission of independent witness letters does not automatically establish eligibility, in this instance a number of the letters in the record provide specific and credible information relating to the influence that the petitioner's work has had outside of her immediate circle of collaborators.



The rapidly increasing citation of the petitioner's work serves as further objective evidence of this influence. The petitioner's claims are effectively un rebutted by the director's vague denial notice.

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.