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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 800 21476

Office: TEXAS SERVICE CENTER

Date:

MAR 11 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.

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

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 dismissed.

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 Texas Southwestern Medical Center (UTSMC) in Dallas. 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, a statement from the petitioner, and other exhibits.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to 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’s initial submission included five witness letters. Counsel identified three of these letters as “independent advisory opinions,” but four of the witnesses are on the faculty of either UTSMC or the University of Texas Medical School-affiliated Texas Heart Institute in Houston, where the petitioner worked from August 2003 to December 2006.

Both witnesses at the Texas Heart Institute wrote their letters while the petitioner was still working there. Texas Heart Institute [REDACTED] wrote on November 1, 2006:

Among the beneficiaries of [the petitioner's] gene therapy research would be individuals who suffer from cardiovascular disease. . . . During the last years, novel insights into the processes responsible for vascular repair ha[ve] raised the potential for therapeutic applications, namely the transplantation of endothelial progenitor cells (EPC) for the improvement of vascularization. Gene therapy could supplement stenting with more widespread protection. . . .

[The petitioner's] work in our Gene Therapy Department focuses on a couple of target genes. . . . [The petitioner's] research with atherosclerotic rabbits for the first time showed that by injecting these genes via catheter into the rabbits' damaged arterial walls, or by transferring them into vein grafts used for bypasses, we can improve blood flow and reduce scarring and narrowing of the arteries. This procedure has direct applications for the prevention of atherosclerosis and blockage of arteries for cardiovascular patients who have undergone a catheter-based intervention of a bypass to restore blood flow. There is also potential for regional therapy to improve blood flow in entire areas, for example, in the lower limbs of a diabetic who has circulation problems. Earlier work to deliver the genes has been done in animal models with a common adenovirus. However, I feel that there is a need for an even longer-term expression of the transgenes which could be achieved only by using an adeno-associated virus (AAV) vector or a lentivirus vector.

[The petitioner's] expertise enables our lab to employ gene therapy with AAV vectors. AAV have a number of features that make them unique as gene delivery vehicles. They have the ability to integrate into the host genome, ensuring stable, long-term expression of the delivered transgene. In contrast to adenovirus, AAV are native to humans and other primates and have no known pathogenic potential for causing clinical sequelae. . . .

[The petitioner] has made several original discoveries to the field of AAV-based gene transfer of atherosclerotic vessels during his research in our Gene Therapy Department. [The petitioner] has demonstrated recombinant AAV vectors predominantly transducer the media smooth muscle layer of the atherosclerotic artery, eliciting transgene expression in a longer period up to 3 months in the disease vessels. [The petitioner] was the first to discover that AAV-mediated gene therapy functions not only on injured, but also on uninjured atherosclerotic arteries. [The petitioner] also developed and validated an assay system to evaluate transduction efficacy of AAV-based gene transfer of blood vessels with great sensitivity, reliability and convenience. Those original findings from [the petitioner's] research works have been prepared for publication.

[The petitioner] is currently a Principal Investigator for a pre-clinical study project . . . [that] focuses on the development of a novel gene therapeutic approach for the treatment of Hemodialysis Vascular Access Dysfunction.

In his October 30, 2006 letter, [redacted] of Molecular Biology and Proteomics at the Texas Heart Institute, described the same projects discussed above, but in greater technical detail.

the UTSMC's Division of Renal Pathology, provided an overview of the petitioner's work:

Over the past 15 years, [the petitioner] has made several important contributions and discoveries in the following areas:

1). Pathogenesis and novel therapy of atherosclerosis associated with heart transplantation: [The petitioner's] novel findings provided not only the insight into the molecular mechanism of atherosclerosis in heart transplant but also of revealing new therapeutic strategies for this condition at the molecular level. In addition, he discovered a novel anti-fibrosis drug. . . .

2). Gene therapy for cardiovascular disease: While working at the Texas Heart Institute, [the petitioner] showed for the first time that gene transfer . . . can improve blood flow and reduce scarring and narrowing of the vessels in atherosclerotic rabbits. This procedure has direct applications for the prevention of atherosclerosis and blockage of arteries for cardiovascular patients who have undergone a catheter-based intervention or a bypass to restore blood flow. . . .

3). Role of oxidative stress in the pathogenesis of hypertension: Since joining the Department of Pathology at UT Southwestern [M]edical Center, [the petitioner] has taken a key role in an important long-term project – to investigate the role of oxidative stress and nitric oxide in the pathogenesis of hypertension. . . . Recently, we have created a new model of ROS [reactive oxygen species]-induced hypertension and provided irrefutable evidence that oxidative stress can cause hypertension. In order to discover how ROS cause hypertension, [the petitioner] is now using this new model of hypertension as a study tool. He has extended our earlier findings by demonstrating that rennin-angiotensin system is upregulated in this model. He is actively working on using a variety of antioxidants to treat high blood pressure. . . .

4). Genetic dissection of cardiovascular disorders in systemic lupus erythematosus: In collaborating with [redacted], a leading immunologist in the world, [the petitioner] had made seminal discoveries in the genetic dissection of cardiovascular diseases associated with lupus with far-reaching implications for our understanding and clinical management of this disease. . . . He is currently leading the efforts to elucidate

the pathogenesis of cardiovascular diseases associated with lupus that, in turn, will lead to the development of new therapeutic strategies for these disorders.

(Emphasis in original.) An exhibit list submitted with the petition referred to [REDACTED] letter as an “independent advisory opinion,” but both [REDACTED] and [REDACTED] plainly stated that [REDACTED] is the petitioner’s collaborator at UTSMC. Prof. [REDACTED] stated:

[The petitioner] is presently collaborating with my group to explore the genetic contributions to the development of CVD [cardiovascular disease] found in systemic lupus erythematosus (SLE) patients, and genetic influences on conventional CVD therapeutics for SLE. . . . [The petitioner] is studying (1) the effects of lupus susceptibility loci of Sle1, Sle3 and yaa, and their interplay on cardiovascular phenotypes by using recombinant congenic lupus susceptibility animals and (2) the therapeutic potentials of SOD [superoxide dismutase] in preventing lupus-prone mice from developing cardiovascular complications, and the influences of lupus susceptibility loci on SOD’s therapeutic effects. Susceptibility to SLE is believed to be mediated by complex genetic and environmental interactions. Exploring genetic contributions to the development of cardiovascular complications found in SLE patients is of great significance not only for fully understanding the initiation and progression of these lesions, but also for the development of unique diagnostic approaches and novel personalized therapeutic strategies. [The petitioner’s] work is essential for such purposes.

The only initial witness outside of the University of Texas system is [REDACTED] of Cardiff University School of Medicine in the United Kingdom. Prof. [REDACTED] stated:

I have met [the petitioner] a few times in my occasions when attending scientific conferences in the US for the past few years. The [most] recent meeting that I had with [the petitioner] was in December 2006 in Houston, weeks before [the petitioner] took his current post. . . . [The petitioner’s] recent appointment in Dallas . . . will further strengthen our potential collaborations. . . .

It is his expertise in the viral vector for gene therapy and in endothelial biology that has made us to collaborate. He is unique and has international standing in these areas of vital medical research. . . .

[The petitioner] is currently working at Texas Heart Institute. . . . In his current work, [the petitioner] is studying adeno-associated virus (AAV)-mediated gene transfer in atherosclerotic vessels.

Although [REDACTED] mentioned the petitioner’s “recent appointment in Dallas,” he repeatedly indicated that the petitioner’s “current work” took place at the Texas Heart Institute and involved AAV-mediated gene transfer. The record shows that the Texas Heart Institute is in Houston, and that the petitioner’s

work with AAV-mediated gene transfer ended when, as [REDACTED] stated, the petitioner “took his current post . . . in Dallas.” Prof. [REDACTED] did not mention the petitioner’s later work at UTSMC. It appears that [REDACTED] initially wrote the letter while the petitioner was still in Houston, and later revised the letter to acknowledge the petitioner’s relocation to Dallas.

The petitioner submitted copies of some of his scholarly writings, all under his original name, rather than the Japanese name he adopted in 2003. The copies consist of a book chapter published in China in 1993, 15 scholarly articles published in Japan from 1996 to 2003, and a 2007 article that had been submitted for publication but not yet published as of the filing date.

Documentation submitted with the petition established 50 citations of the petitioner’s published work. A document of unspecified origin indicated that there had been 71 citations, but this document is not direct evidence of those citation. While the figure of 50 citations is impressive, the record shows that the petitioner’s output has been inconsistent.

A “total publications list” showed 27 articles and the book chapter. This list did not indicate that the petitioner had produced any published work during the nearly four years between his August 2003 arrival in the United States and the petition’s July 2007 filing date. All of the articles that the petitioner had published as of the filing date had been published or submitted for publication while the petitioner was in Japan. Furthermore, the publication dates show a very uneven rate of publication, with nearly two thirds of his published articles appearing in a two-year period from 1998 to 1999:

Year	Articles	Year	Articles	Year	Articles
1996	1	1999	10	2002	4
1997	2	2000	1	2003	0
1998	7	2001	1	2004	1

The article published in 2004 was submitted for publication in April 2003, while the petitioner was in Japan. The petitioner did not claim that any of his articles had been published in 2005, 2006 or 2007, or that he had submitted any articles for publication in 2004, 2005 or 2006.

On December 31, 2007, the director instructed the petitioner to “[s]ubmit further evidence that demonstrates the beneficiary’s specific prior achievements which would justify the projected future benefit of her [sic] work to the United States.” The petitioner submitted three new letters, all from witnesses within the University of Texas. [REDACTED] of the University of Texas Medical Branch, Galveston, stated:

I have known [the petitioner] for over twenty-eight years since we both enrolled as medical students in Beijing University School of Medicine. In the past four years, I had the opportunity to interact again with [the petitioner] frequently and exchange information particularly on adeno-associated viral vector (AAV)-mediated gene delivery and gene therapy. . . .

The unique combination of both in-depth clinical and basic research expertise in cardiovascular disorders made [the petitioner] an extraordinary scientist to creatively and productively tackle critical problems in the cardiovascular research field. This is evidenced by his original findings . . . that: 1) preconditioning showed protective effects on long-term cardiac preservation after heart transplantation; 2) profiling globe gene expression pattern and validating targeted molecular mediators in cardiac transplant-derived arteriosclerosis animal models provided important insights into developing new therapeutic approaches; 3) recombinant AAV predominantly transduced the media smooth muscles of the atherosclerotic artery, and AAV-mediate gene transfer were stable and [sic] both for injured and un-injured atherosclerotic arteries. . . .

Based on his superb scientific performance, there is no doubt that [the petitioner] will continue to make seminal contributions in the field of cardiovascular research.

The remaining two witnesses, [REDACTED] and [REDACTED] are both assistant professors at UTSMC. Portions of their respective letters are nearly identical to one another. For instance, [REDACTED] letter contains the following passage:

The other research theme that [the petitioner] is presently conducting at UTSW aims to explore genetic contributions to the development of CVD associated with systemic lupus erythematosus (SLE) patients. SLE is the prototypical autoimmune disorder affecting as high as 1 in 2000 in certain populations with a 10:1 female predominance. It affects multiple organs, including the kidneys, displays a broad spectrum of clinical and immunological manifestations and is a significant risk factor for atherosclerosis independent of the traditional cardiac risk factors.

[REDACTED] letter includes the same passage, with only scattered cosmetic changes:

The other research theme that [the petitioner] is presently conducting at UTSW is aimed to explore genetic contributions to the development of CVD found in systemic lupus erythematosus (SLE) patients. SLE is the prototypical autoimmune disorder affecting as high as 1 in 2000 in certain populations with a 10:1 female predominance. It affects multiple organs and displays a broad spectrum of clinical and immunological manifestations. SLE is commonly associated with renal disease. It is also a significant risk factor for atherosclerosis independent of the traditional cardiac risk factors.

The evident common origin of the two letters quoted above reduces their evidentiary value and refutes counsel's characterization of [REDACTED] letter as an "independent and objective evaluation."

The director denied the petition on June 2, 2008, stating that the witness letters did not "provide any examples of specific resources that have adopted or expressed interest in adopting [the petitioner's] methodologies." The director acknowledged the citation information in the record, but observed that "the Petitioner first authored only five out of the 26 published articles provided," accounting for only 17

of the documented citations. The director also noted “there is no evidence of the petitioner[']s authorship of a single article that has garnered more than 20 independent citations.”

On appeal, the petitioner asserts “most of my second-author articles were related to my research works at Tokyo Women’s Medical University. This situation . . . directly resulted from an agreement which . . . [was] a precondition for me to commence my study and research at the university.” The petitioner submits a translated copy of a memorandum from the Clinical Immune Laboratory at Tokyo Women’s Medical University, indicating that “Mitsushiro Hachida is the primary (first) author of all publications in overseas countries other than Japan and China. [The petitioner] is entitled to publishing research work as the primary (first) author should such work be published in Japan or China.” The petitioner also submitted a letter from [REDACTED] listed as first author of two of the petitioner’s articles, who stated that the petitioner was “an equal contributor to the methodology described in these papers.” The AAO does not generally stress primary authorship of research articles, but the above materials submitted on appeal indicate that the petitioner’s second-author credits do not always fully establish the extent of the petitioner’s contributions to the articles in question.

Printouts from a citation database show 70 “Total Citing Articles without self-citations.” The AAO does not ignore this figure, or regard it as narrowly as the director did in the denial decision. Nevertheless, we will not ignore the context of the figures provided. The great majority of the documented citations relate to the petitioner’s work in Japan before 2004.

As discussed above, the record demonstrates that, while the petitioner’s work in Japan has attracted significant attention, the petitioner’s work in the United States appears to have been substantially less productive and influential. The petitioner went from producing ten articles in 1999 to a four-year span from 2003 to 2007 in which the petitioner’s work in the United States produced no published work. Similarly, the witnesses commenting on the petitioner’s recent work are almost all from the University of Texas or affiliated institutions where the petitioner performed that work. The wording of [REDACTED] letter, while ambiguous, seems to suggest that [REDACTED] is yet another of the petitioner’s collaborators, rather than an independent witness whose letter shows that the petitioner’s reputation extends to the United Kingdom.

While a record of past achievement and influence is an essential factor in a national interest waiver claim, a peak in that record does not create a permanent entitlement to the waiver. When, as here, the record clearly shows that the petitioner’s productivity and influence has significantly tapered off over several years, then this decline is inextricably part of the petitioner’s record of achievement and influence. The witnesses who provided letters in support of the petition are either UT researchers or, apparently, the petitioner’s self-identified collaborators. The available evidence, therefore, leads us to conclude that the petitioner’s recent work in Texas is neither as productive nor as influential as his now-completed work in Japan. While the AAO cannot rule out the possibility that the petitioner’s work may eventually reclaim the status it enjoyed a decade or so ago, the documentation in the record does not support the conclusion that the petitioner’s recent and current work is of the same caliber as his best-known earlier work.

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.