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

U.S. Citizenship
and Immigration
Services

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FILE:

SRC 08 221 55307

Office: TEXAS SERVICE CENTER Date:

MAR 27 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.

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 an alien of exceptional ability and as a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist at the University of Texas M.D. Anderson Cancer Center (MDACC), Houston. 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 additional 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. Additional discussion regarding the petitioner's eligibility for classification as an alien of exceptional ability in the sciences would serve no constructive purpose, as the petitioner's doctoral degree and the nature of her occupation readily qualify her for the classification sought. 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.

The petitioner is a biological researcher focusing on hematology and cancer biology. Several letters, mostly from the petitioner’s mentors and collaborators, accompanied the petitioner’s initial submission. supervised the petitioner’s doctoral studies and postdoctoral training at Pavlov State Medical University, St. Petersburg, Russia. He stated:

Under my guideness [*sic*] [the petitioner] investigated [the] efficacy [of] interferon-alpha therapy in patients with CML [chronic myeloid leukemia]. She conducted the clinical trial testing the new drug Reaferon. . . . As a result of her clinical trial Reaferon-based therapy was included as a standard protocol for treatment [of] patients with CML. . . .

She was one of the first in Russia who introduced imatinib as a first line treatment in CML. Imatinib is the rationally designed drug that provides almost unlimited survival in this formerly fatal disorder. Her activity became the basis for creating [an] all-country registry of CML patients, multicenter Russian trial and educational program for patients with CML and physicians all over Russia. . . .

[The petitioner also] participated as an investigator in two clinical trials . . . [of a] new antiemetic drug, an essential component of supportive care of cancer patients. The significance of this research work is difficult to underestimate [*sic*].

MDACC Associate [REDACTED] who supervised the petitioner's early postdoctoral work at that institution, stated that the petitioner "for the first time created reliable murine model that can be used for testing novel target therapeutics [for myeloid leukemias] before trying them in clinical trials in patients. Therefore I can conclude that [the petitioner] made a crucial contribution in the field of studying leukemias."

[REDACTED] Chief of the Section of Molecular Hematology and Therapy at MDACC, supervises the petitioner's work at that institution. Prof. [REDACTED] praised the petitioner's past accomplishments and, with regard to her latest work, stated:

[The petitioner] established breast, ovarian and pancreatic cancer murine models in order to test the efficacy of novel anti-cancer agents which provides critical information for approval of these agents for human clinical trials. . . . She showed for the first time that synthetic triterpenoid CDDO and its derivatives can reduce tumor mass and increase survival of the mice bearing tumors. As a result of her and her co-workers titanic work currently these compounds are undergoing phase I clinical trials at MD Anderson Cancer Center. . . .

[The petitioner] is currently working as an investigator on a vital research project entitled "Diabetes and Impaired Glucose Tolerance in Cancer Patients." . . . After only one year [the petitioner] has already made very significant contributions. Specifically, she is investigating the role of hormonal and metabolic determinants of tumor cell survival and chemoresistance in acute lymphocytic leukemia (ALL). . . . Her results suggest that upregulation of glycolysis via AKT/mTOR/HIF1 α pathway may be an important mechanism of chemoresistance in ALL, and that mTOR inhibition and glucose normalization may represent a new therapeutic modality in ALL. This is a very unique, break-through finding that has never been reported before, which for the first

time links metabolic alterations and resistance to chemotherapy that remains till now the “gold” standard therapy of ALL. . . .

Her discoveries stem not from following established protocols or recipes, but rather from looking at things in new ways and exploring them such that it has never been done before.

University of Nevada [REDACTED] a University of Texas alumnus who has collaborated with the petitioner, stated: “She has made major contributions to our joint research by discovering the new application of novel anti-leukemic drugs CDDO and CDDO-ME in GHVD treatment. Her finding is very important to the future clinical trials that will benefit to cure patients with different tumors by using stem cell transplantation.”

Baylor College of Medicine [REDACTED] stated:

In collaboration with [REDACTED] at the MD Anderson Cancer Center, we have been studying hematopoietic disorders. We have established a xenograft model for human leukemias using immunodeficient strains of mice. As a member of Dr. [REDACTED] research group, [the petitioner] is currently the leading person working on this particular model. Since 2005, I have been working closely with [the petitioner] on a collaborative study on radiation-induced leukemias, a project sponsored by NASA. . . .

Under my guidance, [the petitioner] is actively involved in a NASA sponsored study on effects of distinct types of irradiation on human hematopoietic stem cells selected from voluntary cord blood donors. The primary radiation sources in the outer space [sic] are the galactic cosmic rays (GCR), protons and electrons trapped in the earth’s magnetic field, and the solar particle events (SPE). . . .

The main goal is to provide the information required to develop a rational scientific basis for estimation the risks [sic] of leukemogenesis in humans from exposure to radiation during space flight. . . .

[The petitioner’s] participation in the model establishment is crucial.

Beyond the petitioner’s mentors and collaborators, [REDACTED] Editor-in-Chief of *Cell Cycle* and Senior Scientist at Ordway Research Institute, Albany, New York, stated:

I have not personally worked with [the petitioner] but had the pleasure of meeting her at the most recent American Society of Hematology Annual Meeting (2006 in Orlando, FL). First of al, I was greatly impressed by her poster presentation of her research – well articulated and insightful. . . .

Secondly, I was impressed by [the petitioner's] focused efforts on understanding how metabolic alterations in cancer cells can lead to tumor progression and resistance to chemotherapy. . . . [The petitioner's] study is the first that specifically aims to identify biologic mechanisms of metabolic alterations in the ALL cells.

. . . .In her current project [the petitioner] is pursuing several important goals. First she demonstrated that leukemic cells from patients and lymphoid cell line exhibit greatly increased glycolytic metabolism when the cells grow under high glucose and hypoxic conditions. Then she discovered that pro-glycolytic conditions, such as high glucose or hypoxia, promote chemoresistance of ALL blasts to conventional chemotherapy. This is indeed a very interesting finding, which for the first time links proglycolitic conditions and chemoresistance in ALL. . . .

[The petitioner] has spent a lot of time and effort and finally, the results of her experiments were striking: inhibition of the PI3/AKT/mTOR signaling pathway in the setting of pro-glycolytic conditions such as hypoxia or high glucose, results in chemosensitization via downregulation of glycolysis. These data are indeed very novel and exciting and have tremendous potential.

The petitioner submitted copies of her peer-reviewed published articles, and documentation showing 14 citations of her published work. The petitioner was the seventh of 15 authors of a 2006 article cited once, the fifth of ten authors of a 2006 article cited three times, and the fourth of five authors of a 1997 article cited ten times. The petitioner also documented the impact factors of numerous journals that have published her work. The impact factor of a given journal is calculated based on the average citation rate of the articles in that journal. An article in a high-impact journal is not, itself, presumed to be high-impact by virtue of where it appeared; the impact of an individual article depends on its own citation history, not that of other articles in the same journal.

On January 16, 2008, the director issued a request for evidence, stating "the record does not convincingly establish **you personally** have been responsible for groundbreaking discoveries and/or changes in the battle with leukemia or any other biologically-related endeavor" (emphasis in original). The director also stated that the petitioner was not a principal author of the cited articles submitted previously. The director instructed the petitioner to submit evidence of her impact and influence on her field, including but not limited to independent witness letters.

In response, the petitioner submitted additional exhibits, including letters. Prof. [REDACTED] in his second letter, stated:

[B]ased on her pioneering experiments [that showed] the novel drug CDDO possesses multiple activities the clinical trial aimed at prevention of graft versus host disease is being prepared in the Department of Stem Cell Transplantation and Cellular Therapy. The goal of this trial is to treat the most dangerous and deadly complication of stem cell

transplantation – graft versus host disease. If the goal of this trial is reached thousands of cancer patients will be cured and it would have direct impact on the US economy.

[The petitioner] is currently working as the main investigator on a very competitive and timely research project entitled “Diabetes and Impaired Glucose Tolerance in Cancer Patients.” . . . The main goal of [the petitioner] in the current project is to improve the success rate of leukemia treatment by development of new treatment modalities [that] are less toxic for the patients and more effective in eradication of the disease.

of East Carolina University stated:

I have known [the petitioner] since 2004, when I first met her at lab and then at an international meeting and have been impressed with her outstanding contributions ever since. . . .

As a Postdoctoral Fellow she made a number of significant contributions to cancer research as follow: (i) establishment of a principal new mouse model of human acute myeloid leukemias . . . ; (ii) identification of MAPK and AKT kinases as constitutively activated proteins in primary leukemias that contribute critically to progression and chemoresistance of leukemias . . . ; (iii) discovering a new approach to treat graft versus host disease and [at] the same time conserve antileukemic effect of stem cell transplantation using administration of novel drug – synthetic triterpenoid CDDO and its derivatives which exhibit anti-inflammatory, anticarcinogenic, and antiproliferative properties.

Her contributions in these three related yet distinct areas of cancer research are highly significant and appraised by peers. . . .

[The petitioner] is one of the principal investigators in the Multidisciplinary Research Program entitled “Diabetes and Impaired Glucose Tolerance in Cancer Patients.” . . . Why cancer cells adopt glycolysis as a means of producing energy is still unclear. [The petitioner] hypothesized that the alterations . . . provide a survival advantage for the leukemia cells. . . . [S]he found that malignant cells cultured under pro-glycolytic conditions . . . [possess an] advantage in cell proliferation and survival. Moreover later she discovered that malignant cells [that] underwent proglycolytic conditions become resistant to chemotherapeutical agents that implement in ALL treatment. . . .

[The petitioner] for the first time found that mTOR inhibition of HIF-1 α -mediated glycolysis may play an important role in chemosensitization and improved outcomes in ALL.

[The petitioner's] current ex[c]iting findings provide evidence that metabolic alterations of leukemic cells present a major challenge in cancer treatment. . . . However, the

increased dependency of leukemic cells on glycolysis for energy generation also provides a biochemical basis to preferentially kill the malignant but not normal cells by inhibition of glycolysis.

[REDACTED] of the University of Pennsylvania, who first met the petitioner at a 2006 conference, stated:

The most ground-breaking part of [the petitioner's] current . . . research came from her challenging quest to find how to target the regulatory mechanisms that affect the expression or functions of protein molecules that are directly or indirectly involved in leukemia cells['] metabolism. . . . This is a very exciting area of investigation which has tremendously advanced our knowledge about metabolic alteration in cancer and provides us with the molecular tools to fight cancer with targeted therapy that does not affect normal cells. . . .

She has made major contributions to the field of signal transduction and metabolic pathways, which . . . are critically involved in the leukemogenesis and chemoresistance, and she has truly risen to the top level in this field.

Principal Clinical Scientist at Nottingham University Hospital in the United Kingdom, stated:

[The petitioner's] unique and valuable expertise in Molecular Biology is essential to the success of the current research activities at M.D. Anderson Cancer Center. . . .

Although I have not worked directly with [the petitioner], I have come to know her through her outstanding work in the field and her presentations at the international meetings [and] thus I can independently evaluate her research work. . . .

[The petitioner] has already made, and will continue to make, an important contribution towards deciphering the molecular basis [of] metabolic alterations in cancer.

The petitioner documented 23 citations of her work, divided between four articles with eleven citations for the most-cited article. (The submitted documentation lists 25 citing articles, but two of these are duplicates.)

The director denied the petition on June 10, 2008, stating that while the petitioner had clearly earned respect through her work, her citation history did not indicate significant impact on the field. The director also observed that the petitioner was not a principal author of her cited work. The director stated that the petitioner had identified only one cited article, with six citations. The director also stated that the petitioner's RFE response discussed projects that the petitioner did not undertake until after the petition's filing date.

On appeal, counsel correctly observes that the petitioner's citation history is not limited to six citations of one article. As noted above, the record documents 14 citations of the petitioner's work at the time of filing, and 23 citations at the time of the RFE response. We also find merit in counsel's assertion that the director mischaracterized witness descriptions of ongoing projects as entirely new endeavors.

The petitioner, on appeal, documents an aggregate total of 38 citations of three of her articles. While the petitioner's cited articles were published before the petition's May 2007 filing date, most of the citations appeared after the filing date. In this instance, the primary significance of the citation information is not the number as such. Rather, the accelerating rate of citation of the petitioner's pre-2007 articles corroborates witnesses' claims about the significance of the petitioner's work. New citations continue to appear, at an increasing rate, indicating that interest in the petitioner's pre-2007 work at MDACC is building rather than subsiding.

We acknowledge the director's concern that the petitioner was only one of multiple authors of the cited papers, and not the primary author, which can indicate that the petitioner was a lesser contributor to those papers. A waiver would likely not be in order if the petitioner's contributions to those projects had been limited simply to mastery of complex laboratory equipment or techniques developed by others. Here, however, the petitioner has shown that the project leaders consider the petitioner's contributions to have been original and vital to the various projects, and independent witnesses have attested to the importance not only of the projects overall, but to the nature and significance of the petitioner's specific input into those projects.

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.