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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
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Services

EXHIBIT FC COPY

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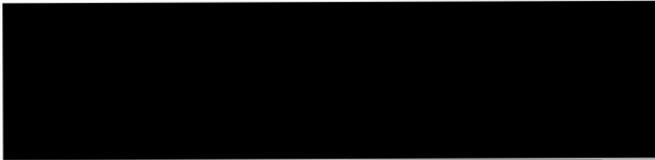
FILE [redacted] Office: TEXAS SERVICE CENTER
SRC 08 059 52758

Date: NOV 23 2009

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office 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 fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment 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, counsel submits a brief and additional evidence, including letters from independent references confirming the significance of the petitioner's work. We are persuaded that the petitioner has overcome the director's concerns.

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

(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 requirement 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 petitioner holds a Ph.D. in immunology and protein chemistry from the University of Queensland. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor 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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

The Service 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

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. *Id.* at 219. 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. *Id.*

The director did not contest that the petitioner works in an area of intrinsic merit, immunology, and that the proposed benefits of his work, improved understanding of malaria and progress towards a malaria vaccine, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner supported the petition with letters from his immediate circle of colleagues, his patent, his published articles and conference presentations and his citation record. The petitioner also submitted evidence of limited value, including evidence that he is a member of large professional associations that are open to most professionals in the petitioner's field, evidence that he has served as an internal judge for his employer as well as at a local high school and recognition limited to those who are just beginning their careers.

The director noted that the petitioner was only the "primary contributor" on two of his articles and found the citation of these two articles to be insufficient to establish his influence in the field. The director further noted that the letters submitted were all from the petitioner's immediate circle of close colleagues. Finally, the director concluded that merely adding to the general body of knowledge and securing a patent cannot establish eligibility for the benefit sought. On appeal, counsel asserts that the director did not consider the totality of the evidence, including the prestige of the journals in which the petitioner's work appeared, such as the *Proceedings of the National Academy of Sciences (PNAS)*, *Nature*, the *Journal of Experimental Medicine* and *Infection and Immunity*. While counsel acknowledges that the petitioner is not the first author listed for many of his articles, counsel notes that the petitioner's collaborators attest to the petitioner's key role in this research. The petitioner submits new letters from references stated to be independent of the petitioner.

[REDACTED] of the Queensland Institute of Medical Research, discusses the petitioner's work at that institute as follows:

[The petitioner] was successful in generating protective T cell clones to malaria, successful in using proteomics to identify target antigens of these clones, and was successful in using a recombinant form of the major target antigen to induce protective immunity in mice. Subsequently, this antigen, HGXPRT, has been shown to be the major target antigen recognized by the T cells of semi immune adolescent individuals in Papua New Guinea.

[REDACTED] of the Antigen Discovery Section of the Malaria Vaccine Development Branch at the National Institutes of Health (NIH), discusses the petitioner's fellowship at that institution. Specifically, the petitioner coauthored a "significant paper" in *Nature* and published another article that reported "the first study to demonstrate a correlation between a variant surface antigen and protection against severe disease."

██████████ to the U.S. Agency for International Development (USAID) Malaria Vaccine Development Program, asserts that he recently worked with the petitioner on a project seeking to develop a new malaria vaccine in collaboration with Maxygen, Inc. While the record would have been bolstered by more information about this project, ██████████ letter demonstrates that the petitioner is collaborating with major vaccine developers.

On appeal, the petitioner provides more information about his work at NIH. Specifically, ██████████ ██████████ of the Malaria Program at the Seattle Biomedical Research Institute (SBRI), asserts that the petitioner demonstrated that monkeys immunized with cysteine-rich interdomain region (CIDR1) domains were able to delay the growth of malaria parasites in first infections and protect monkeys against severe anemia during reinfection. According to ██████████ this work has implications for designing vaccines with broader protection against variants. ██████████ further explains that the petitioner's coauthored article in *Nature* involved a study of a human red blood cell polymorphism in the haemoglobin protein that confers protection to malaria. According to ██████████ this study "showed that Haemoglobin C may protect from malaria because it reduces the expression of [malaria erythrocyte membrane protein 1] proteins at the infected erythrocyte surface."

Significantly, ██████████ an Assistant Professor at the Uniformed Services University of the Health Sciences, confirms that his laboratory is utilizing reagents developed by the petitioner at his previous laboratory.

Regarding the citations of the petitioner's work, as stated by the director, the petitioner's articles which have received the most attention are not those for which he is listed as first author. That said, the articles listing the petitioner as first author have been moderately cited and one of them appeared in *PNAS*. In general, we will not infer the significance of an article from the journal in which it appears; it is the petitioner's burden to demonstrate the significance of the individual article. The petitioner's article in *PNAS*, however, has not been ignored and, in fact, has been moderately cited. While not decisive by itself, the petitioner's article in *Nature* was the magazine's cover story. Finally, we acknowledge the submission on appeal of a new article in *PNAS* acknowledging the petitioner's contribution of malaria lines used in that study.

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 above evidence, and further 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 alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment 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.