

identifying data deleted to
prevent identity information
invasion of 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

35

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 05 2009
LIN 07 218 52790

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.

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).


Perry Rhew
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 an AIDS researcher. 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, copies of previously submitted exhibits, and a magazine article about HIV/AIDS in the District of Columbia.

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 regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or equivalent sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

The petitioner filed the petition on July 26, 2007. Counsel indicated that the petitioner "currently works on preventive health medicine and acts as a consultant on medical issues. She became very interested in researching low cost HIV/AIDS treatment and is currently testing her hypothesis in four clinical studies. The results of her ongoing research have appeared in several publications."

Counsel identified exhibits D1-D12 as publications of the petitioner's research, but only two of those exhibits show the petitioner's name. The other exhibits are the cover pages of various publications, with no evidence that the petitioner's work appeared in those publications. The exhibits that do not show the petitioner's name are, for the most part, publications that appear to be informational in nature, rather than research reports.

In a June 21, 2006 letter, [REDACTED] of the Institute for International Cooperation and Development (IICD), Dowagiac, Michigan, invited the petitioner "to come to IICD Michigan in [her] capacity as Chief Medical Officer for Humana People to People's medical headquarter[s] . . . from July 2006 to July 2009 to assist Development Instructors being trained at our institute in setting up community research programs."

The petitioner documented her active membership in the American Academy of Anti-Aging Medicine, and [REDACTED]; identified as a "consultant for a row of boarding schools for special needs youth," stated that the beneficiary achieved "prominence" "as the director and medical officer in a boarding school (Small School) in Baaring Vig, Denmark" from 1986 to 1991. The petitioner did not explain how these activities relate to her stated goal of pursuing AIDS research.

Witness letters accompanied the petition. [REDACTED] who identified himself as a "journalist in scientific research" with a "background [in] clinical physiological psychology," stated:

I met [REDACTED] a virologist based in East Berlin/GDR [German Democratic Republic, or East Germany], sometime in the early 1980's. His approach to treatment of HIV and AIDS was unique and because of that in 1986, I began working with him on a[n] HIV project. . . . [REDACTED] held unconventional views on the proper treatment of HIV and AIDS.

. . . [REDACTED] deducted [sic] that aspirin would be effective against the replication of HIV and its attack on the immune system. Unfortunately [REDACTED] died months before our book was completed. I finished it and published a book titled "AIDS can be conquered."

Years later, I . . . [learned] about the clinical studies of [the petitioner] who was conducting [research] on HIV with aspirin in Zimbabwe. I found it very important and unique that someone was working along the lines of our work. . . .

Although about 30 different papers have been published on aspirin and HIV, only few people like [the petitioner] are conducting clinical research in this area. That [the

petitioner] approached her research studies from an unconventional angle only points to her abilities as a researcher. That her studies were successful in prolonging the lives of individuals infected with HIV/AIDS only secures her position as an outstanding researcher.

[REDACTED] of Humana People to People Botswana, stated:

[The petitioner has] served on the Board of Trustees of Humana People to People Botswana as one of its 6 members since 2002. The purpose of the organization is to help countries in the developing World to create genuine development for the resource poor parts of the population. Currently, its major programs consist of the implementation [of the] Total Control of the Epidemic program (TCE) and HIV/AIDS prevention program introduced in Botswana in 2000, as well as Child Aid and HOPE projects.

[The petitioner] was asked to join by [t]he Board of Trustees, because of her expertise on HIV and AIDS and her extensive background in understanding the needs of the local population. Her ability to suggest innovative projects such as the knowledge-attitude-behaviour change concept in the population is well proven and her evaluation of any program's impact on the country is right on target. Her experience and knowledge in medical, social and psychological HIV and AIDS issues makes [the petitioner] invaluable to the Board of Trustees. Her recognition as an expert in the HIV and AIDS area assists the Board in meeting its objectives and brings prestige and resources to the organization.

[The] TCE – Total Control of the Epidemic – program is a community based mobilization program for taking control of the HIV/AIDS epidemic in Africa and Asia. This program started in 2000 in Zimbabwe covering 100.000 people and is today covering more than 4 million people in Zimbabwe, Botswana, Namibia, Angola, Mozambique and Malawi.

I. [REDACTED] in Africa for Humana People to People, stated:

TCE was developed through the efforts of a five person programs-development-team [the petitioner] being one of them between January and April 2000. This program presently serves more than 4 million people in Africa and employs a staff of over 1,500 individuals. . . .

In April 2000 [the petitioner] was instrumental in establishing a TCE Medical Headquarters in Zimbabwe.

As a medical professional working with HIV and AIDS victims, she soon realized that conventional treatment, not being available, was not an option in African countries.

Searching for an alternative, she conducted research in the effectiveness of supplementary substances and successfully developed a range of supportive medicines and supplements. These substances have proven to be effective in prolonging the lives of those with HIV, who[] otherwise have no access to treatment.

. . . The initial objective of the study was to determine whether Selenium, Aspirin and Multivitamins in different doses and combinations would positively [a]ffect the human immune system in turn prolonging the lives of such HIV victims on an average of 6 years.

The Significance of these studies is that conventional treatment can be successfully postponed for an average of 6 years, allowing people with no access to conventional treatment at all to live much longer.

On November 13, 2008, the director instructed the petitioner to submit documentary evidence of independent citation of the petitioner's published research. The petitioner's response did not include any such evidence. (The petitioner submitted printouts showing that her work appears in various scholarly databases, but these listings are not citations of her work.) Instead, the petitioner submitted other materials in an effort to establish the significance and impact of her work.

The petitioner claimed that, since 2007, she has been "[a]ppointed to oversee [the] Danish Governmental Development Aid HIV program in Zimbabwe," but the record contains no evidence from the Danish Government to support this claim. The petitioner also claimed to have "[d]eveloped the concept of TCE," which she claimed is "currently the world's largest preventive health program."

The petitioner's submission included several witness letters.
University of Zimbabwe stated:

of the

I had the opportunity of offering immunological/virological assessments of some 20 of those HIV infected individuals who were under the care of [the petitioner]. I was impressed by their physical appearance and mental tenacity. There were all in a very stable and good condition. . . . I then learnt that the patients were taking an unconventional combination of Selenium, Aspirin and Multivitamins.

[The petitioner] later requested my participation in the evaluation of the effectiveness and mechanisms of action of the selenium/aspirin/multivitamin combination in a formal clinical trial that she had designed. . . .

[T]he results of our work have been published in peer reviewed journals.

During the years 2000 – 2007, in collaboration with [the petitioner], we have conducted 5 research projects aimed at finding affordable, accessible and sustainable means of

enhancing the quality of life of HIV infected individuals. Some have been published[,] two manuscripts are in preparation and the fifth project is still ongoing.

Our studies, which were really initiated by the introspection of [the petitioner], have uniformly shown that aspirin is beneficial to HIV infected patients and can delay the need to initiate antiretroviral therapy. . . . I find our studies of utmost significance in the fight against HIV/AIDS. Furthermore[,] our studies in Aspirin and HIV/AIDS have clarified some important mechanisms in the pathogenesis of AIDS and should be understood as a significant contribution to the scientific world.

The petitioner submitted a copy of the abstract of a paper presented at a 2002 conference, of which the petitioner was one of four authors, reporting the results of a study involving 20 HIV-positive subjects and urging a larger study. The petitioner did not submit evidence to show how much impact, if any, this paper has had in the more than six years since its release.

[REDACTED] of the Humana People to People Staff Clinic in Harare, Zimbabwe, stated that the petitioner established the clinic in 2006. She further stated:

[The petitioner] identified 4 indigenous herbs which had anti-inflammatory effects like aspirin, anti-oxidant effects like the micronutrients plus additional anti-malarial, anti-fungal and anti-Worm effects. [The petitioner] grew these herbs [on a] large scale and manufactured a tea which provided the same benefits to HIV positive patients as aspirin and micro nutrient[,] tablets. This concept won a first prize in the regional World Bank competition for innovative approach[es] to HIV management.

Later on [the petitioner] developed the herbal tea into a tablet.

Chicago physician [REDACTED] stated:

It was in connection with the Anti-Aging Conferences that I got to know [the petitioner]. [The petitioner] was like me deeply engaged in the fact that it seems we would be able to prevent most aging diseases by simple means namely correcting imbalances and/or eliminate inflammation. By doing so we would prevent cancers, heart[]diseases, dementia and rheumatic diseases and more.

I learned that [the petitioner] herself had been working with managing HIV disease in Africa by eliminating or minimizing inflammation in HIV positive individuals by means of ingestion of aspirin together with micro nutrients. . . .

Using aspirin at the early stages [of HIV infection] seems to add several years to the lives of HIV positive individuals, to increase quality of life and also to reduce costs of medicine for the individuals as well as at a national level.

The petitioner submitted copies of documents relating to Total Community Mobilization (a public information campaign in Botswana). Because her name does not appear on these materials, the documents do not show the nature or extent of the petitioner's involvement.

The petitioner's name does appear in a German-language publication, *Info des Förderverein Neue Wege in der HIV-Therapie*, but the petitioner did not submit the complete, certified translation required by 8 C.F.R. § 103.2(b)(3). The petitioner submitted only an uncertified capsule translation, stating that the intent of the article was to report "that there could be an affordable and immediate therapy to alleviate" the HIV epidemic in Africa and to urge donations "for the purpose of supporting a clinical trial with a larger number of people." The record does not indicate that a larger trial has taken place.

The director denied the petition on February 21, 2009. The director stated that the petitioner "has a modest publication record," with no evidence of citation of her published work. The director acknowledged the petitioner's witness letters, but found that these letters did not establish widespread adoption of the petitioner's methods. The director reasoned that if the petitioner's work had made significant inroads in the fight against HIV/AIDS in Africa, then there ought to exist substantial independent evidence of the petitioner's impact.

On appeal, counsel discusses the intrinsic merit and national scope of AIDS research, and asserts that the United States would benefit significantly from the low-cost, aspirin-based regimen described in the record. The director, in denying the petition, did not dispute the intrinsic merit or national scope of AIDS research. At the same time, the overall importance of AIDS research does not require the approval of every waiver application relating to AIDS research. A petitioner cannot establish qualification for a national interest waiver based solely on the importance of the alien's occupation. It is the position of the Service to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dept. of Transportation* at 217.

Counsel claims: "Contrary to the conclusion of the USCIS, petitioner's publications have been cited and the research recognized in the Google Scholar." The petitioner resubmits copies of printouts intended to support this claim. The printouts, however, do not show citation of the petitioner's articles. They show that the articles themselves are listed on the Google Scholar database at <http://scholar.google.com>, but they do not establish that any other researchers have used the petitioner's work and identified it in the bibliographies of their own articles. Counsel has not shown that Google Scholar weighs the merits of scholarly publications to decide whether or not to include them in the database.

One Google Scholar printout in the record for the search terms "Aspirin+HIV+management" shows citations for other works. For instance, under the listing for the book *Pandemic: Facing AIDS*, appears the notation "Cited by 1," which links to a separate page that identifies the citing publication.

Another printout used the words in the title of the petitioner's article as the search terms. The articles listed in the search results, however, are not articles that cite the petitioner's work. They are simply articles that contain the words used in the search terms. If the search terms are surrounded by quotation

marks, then the search engine treats the words as a connected phrase, and will only search for the words together, in that order. Because the petitioner's search did not use quotation marks, the search engine merely found every instance of those words, adjacent or not, regardless of order. The allegedly cited article appeared in 2004, years after many of the articles that supposedly cite that article. One "citing" article appeared in 1993.

In disputing the director's finding that there is little evidence that other researchers have relied on the petitioner's work, counsel states: "This conclusion . . . is not supported by the record. The source of this confusion may be that the petitioner's research is more likely to be found in the 'nutrient' category since the basis of the treatment is nutrients." It is not clear what counsel means by "the 'nutrient' category." It remains that the burden is on the petitioner to submit evidence of eligibility; the director is under no obligation to locate such evidence on the petitioner's behalf. The director specifically instructed the petitioner to submit evidence of the impact of her work, and the director based the decision on what the petitioner submitted. The director's supposed failure to seek supporting evidence in "the 'nutrient' category" does not invalidate the director's decision.

Counsel asserts that the petitioner has received various honors for her work with HIV management in Africa, but the record lacks direct evidence to support many of these claims. Third-party witness letters are not direct, documentary evidence to support such claims.

Counsel asserts that the petitioner's "work with aspirin and T-cells led the way to a low cost treatment that delays the progression of HIV in HIV positive individuals providing these afflicted individuals with a better life." Here is where independent evidence of the petitioner's impact plays an important role. A low-cost treatment that significantly delays the onset of major AIDS symptoms could be expected to attract major attention. Counsel claims that the petitioner's work has, indeed, earned that attention. The record, however, lacks the caliber of evidence that we could reasonably expect from such a development. The absence of citations of her published work leads us to conclude that the wider scientific community has not taken a serious interest in her work. The study that is said to have established the effectiveness of the aspirin regimen involved only 20 people, and the resulting publication acknowledged that a much larger study is needed in order to validate these results. We note the assertion that the petitioner's work led to the manufacture of herbal remedy teas and tablets, but the record is devoid of impartial, empirical evidence showing the effectiveness of these products.

The assertion that the petitioner made a significant original contribution by **investigating** the use of aspirin on HIV-positive patients must overcome [REDACTED] assertion that [REDACTED] performed similar research in the 1980s. (The assertion that [REDACTED] **work was "unconventional"** raises the unanswered question of how seriously "mainstream" researchers have taken that work.)

Furthermore, social and economic conditions in the United States (not to mention communications, educational and public health infrastructure) are significantly different than those in Botswana and Zimbabwe, and the record contains nothing from major, recognized health organizations (public or private) to indicate that there is significant interest in using the petitioner's methods in the United States, or significant expectation that such methods would be effective here.

Counsel cites an AAO decision from 2008, stating that the AAO approved a petition for a researcher "with less contributions to show for" than the present petitioner. The petitioner has not submitted evidence from the cited case, and therefore we cannot compare the two records of proceeding directly, but according to our appellate decision, the other petitioner had submitted testimony from two members of the U.S. National Academy of Sciences, and the researcher's publications had amassed over 100 independent citations, demonstrating widespread acceptance, endorsement, and use of that researcher's work. In the present proceeding, the petitioner has not submitted evidence of similar caliber. The petitioner has made very bold claims regarding the importance of her research work, but little evidence to show that the greater scientific community agrees with those claims. Anecdotal assertions are not sufficient to meet the petitioner's burden of proof in this regard.

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 decision 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.