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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 06 2009
SRC 07 800 18548

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, Texas 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 a postdoctoral scholar at the University of California, Davis (UCD). 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 and copies of documents already in the record.

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 filed the petition on July 1, 2007. The petitioner described her work:

I will continue to work as a research scientist concentrating my research efforts in the mechanism of DNA repair and cancer initiation. My research efforts will greatly benefit the United States by providing new direction of cancer prognosis, drug design and screen, which will greatly advance medical research in public health.

. . .My research findings have greatly advanced our understanding of the mechanism of homologous recombination-dependent DNA repair efficiency and its modulating factors. . . .

Since March, 2006, I have been working as a postdoctoral scholar at University of California, Davis. . . . The purpose of this project is to investigate the role of Brca2, a human breast cancer tumor suppressor, in cancer initiation and tumor formation. The outcome of this research will reveal why patients with mutations in this protein have highly elevated risks in both breast and ovarian cancer. Another project I am involved in is designed to characterize the functional counterpart of Brca2 in yeast, which is also critical to the understanding of the efficiency of DNA repair pathway.

The petitioner submitted several witness letters. [REDACTED], who supervised the petitioner's Ph.D. research and subsequent postdoctoral work at the University of Vermont (UVM), stated:

At all stages of her career to date [the petitioner] has made unique and powerful contributions to our knowledge of how DNA recombination and repair occurs at the molecular level. [The petitioner's] Ph.D. thesis research focused on the mechanism by which recombinase enzymes assemble into presynaptic filaments on single-stranded DNA during homologous recombination and DNA double-strand break repair transactions. . . . Using a viral model system, [the petitioner] performed ground-breaking research that . . . has resulted in three publications to date. . . . Together, [the petitioner's] three papers represent a major advance in our understanding of the mechanism of action of mediator proteins in presynaptic filament assembly during recombination and DNA double-strand break repair.

[REDACTED] of Duke University met the petitioner while visiting UVM. [REDACTED] stated that the petitioner's "articles reveal key information about the critical intermediate in homologous recombination and DNA repair, and are therefore highly significant to genome stability and the avoidance of cancer."

[REDACTED], supervisor of the petitioner's postdoctoral work, stated:

[The petitioner] has been focusing her research efforts on the mechanism of homologous recombination, a central cellular pathway to repair DNA double-stranded breaks with an important function to maintain genomic stability. . . . [T]he functional principle of ionizing radiation and many anti-tumor drugs is the induction of double-stranded DNA breaks. Understanding how cells repair such breaks is critical to potentially enhance treatment efficacy and limiting side effect[s].

[REDACTED] then described the petitioner's work in technical detail, and stated "[w]e are preparing a high impact publication of our results . . . and [the petitioner] will be a prominently featured co-author."

██████████ stated that the petitioner "plays a critical role in ██████████ project. . . . Within a year, [the petitioner] demonstrated her productivity by pushing the whole project a big step forward with promising experimental data." ██████████ asserted that the petitioner "is known internationally for her contributions in characterizing basic mechanism of homologous recombination proteins in DNA repair," but the record does not contain direct evidence of such a reputation.

██████████ stated:

[The petitioner] fully utilized bacteriophage T4 as a model system to study presynaptic filament assembly; a key process in which recombinase overcomes the inhibitory effect of single-stranded DNA binding protein to form nucleoprotein complex. . . . [The petitioner's] research is a huge break-through in the field. She did extraordinary work in characterizing this complicated structure and dissecting the mechanistic steps of filament assembly in great detail. . . .

Currently, [the petitioner] is investigating the biochemical mechanisms of human Brca2 protein as a mediator protein in the human recombination system. . . . As I expected, she has produced some promising results in the breast cancer project in ██████████ laboratory.

██████████ of the University of California, Berkeley, stated that the petitioner's "revolutionary research constitutes the theoretical framework in which we can understand better homologous recombination-dependent DNA repair and the cause of cancer predisposition diseases."

The petitioner submitted copies of the articles she wrote with ██████████, and copies of 34 articles independently citing the petitioner's work. Nearly all of the citations refer to a 2001 article of which the petitioner was the fifth of six named authors. The heavy citation of this one article does not establish a continuing pattern of influence. The petitioner was the first author of other articles, but the petitioner has not shown that any of those articles have had an impact comparable to the 2001 article.

The director denied the petition on February 1, 2008, stating that the petitioner had failed to show that she "has accomplished anything more significant than other capable members of [her] profession holding similar credentials and conducting similar research."

On appeal, counsel asserts that the director "did not review and consider all supporting documents and legal arguments timely submitted by the petitioner." It is true that the director did not exhaustively catalog and discuss every exhibit in the record, but counsel does not establish that a more thorough discussion of the evidence would have resulted in a different outcome.

Given counsel's complaint that the director did not sufficiently discuss the petitioner's evidence, it is somewhat ironic that counsel's appeal brief devotes very little space to that evidence. Counsel asserts that the director mentioned only the petitioner's earlier work, and "[t]he decision is totally silent on other

more significant work petitioner has done, such as her biochemical and structural studies of human Brca2, a cancer suppressor protein." The petitioner has not established that her work with Brca2 is "more significant" than the example that the director provided.

The petitioner was the fifth author of a single well-cited publication that appeared in 2001. The petitioner has not shown comparable reception of her first-authored works, nor has she otherwise established that the citation of that one article is part of a consistent pattern of heavy citation. As for her work with Brca2 at UCD, the record does not show that the petitioner has produced any published work at all since she left UVM. [REDACTED] asserted that the petitioner's work at UCD will result in "a high impact publication," but the record contains no evidence that this article has ever appeared.

We do not dispute the intrinsic merit of cancer research, and it is possible that the petitioner's work may one day yield important findings. The available evidence, however, does not establish that the petitioner has consistently been a primary contributor to high-impact research that has broadly influenced the field beyond her circle of collaborators and mentors. Speculation about what might eventually result from the petitioner's work amounts to subjective opinion rather than evidence. We therefore agree with the director's basic finding that the petitioner has not established eligibility for the national interest waiver.

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.