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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 19 2009
SRC 07 800 25764

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:

[REDACTED]

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.

Derry 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 sustain the appeal and approve the petition.

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 is a postdoctoral research fellow at the University of Texas Health Science Center (UTHSC), 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 copies of materials 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 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 filed the petition on July 29, 2007, shortly after he completed his doctorate at UTHSC. The petitioner submitted several letters discussing his cancer research, all but one of them from current or former UTHSC faculty members. [REDACTED] the petitioner's supervisor at UTHSC, stated:

[The petitioner worked] on a project involving the identification of drug-resistant β -tubulin mutations. He exploited a random mutagenesis approach, an innovative tool, in order to isolate Taxol-resistant cell lines and identified a large number of Taxol

resistance mutations in β -tubulin. Before [the petitioner] joined my laboratory, identifying such mutations was an arduous process, and prior attempts to use random mutagenesis had not been successful in the hands of other researchers. At that time, I was not sure that a young scientist like [the petitioner] could carry out such a difficult project.

I was surprised when [the petitioner] isolated so many mutations in such a short period of time, fully demonstrating his extraordinary experimental skills and creativity.¹ Remarkably, his work revealed that β -tubulin mutations change the structure of tubulin, affect interactions between different tubulins, and disrupt microtubule assembly. They cause drug resistance by counteracting the action of Taxol, which has been demonstrated to enhance microtubule assembly. . . . Most importantly, [the petitioner] discovered that the drug-resistance mutations are not limited to specific regions of β -tubulin but spread to the whole sequence of the gene. . . .

This innovative finding provides new insights into the complicated mechanisms leading to resistance to anti-cancer drugs both in tissue culture and in patients. Moreover, [the petitioner's] work disputed a dogmatic idea and demonstrated why drug-binding mutations are not a major drug resistance mechanism in eukaryotic cells, but mutations affecting microtubule assembly are. . . . We fully expect that the manuscripts we are preparing based upon [the petitioner's] research will have an immediate impact on the scientific community and put us at [the] top in the field of revealing drug resistance mechanisms in clinical cancer therapy.

[REDACTED] who served on the petitioner's M.S. thesis and Ph.D. dissertation committees, stated:

As a research fellow now, [the petitioner] devotes himself to studying the potential roles of two microtubule interacting proteins, stathmin and katanin, in mediating cancer drug resistance. There are abundant studies indicating that these proteins regulate microtubule assembly, and a few papers suggest they may influence cellular drug sensitivity. However, it is necessary to obtain solid evidence for or against a role for these proteins in cancer drug resistance. This information will provide insights into novel drug resistance mechanisms in cancer and will help develop novel therapeutic strategies that may eventually improve the efficacy of cancer treatment. In a short period of time, [the petitioner] has realized many insights into the locations of the molecules that affect the microtubule network

[REDACTED] who has "collaborated on some important projects with the laboratory in which [the petitioner] works," stated that the petitioner's "significant findings thoroughly

¹ Quoting this sentence in an introductory brief, counsel erroneously replaced the word "surprised" with the phrase "absolutely stunned."

demonstrated a common mechanism of drug resistance. This work greatly improved our understanding of anti-cancer drug resistance mechanisms."

praised the petitioner as "a dedicated, motivated, and intelligent researcher," but provided few details about the petitioner's work except to state that "[h]is research showed that mutations in α - or β -tubulin genes cause drug resistance in cancer cells."

of Baylor College of Medicine, Houston, Texas, stated: "I started to learn [about the petitioner's] work during [a conference] in 2005." *curriculum vitae* indicates that was an assistant professor at UTHSC from 2001 to 2004, while the petitioner was studying for his master's degree there.

[The petitioner] found that mutations in tubulins are present in samples from patients with different cancers. . . . Accordingly, he created those mutations in tubulin gene and transfected the mutant genes into a cancer cell line. Astoundingly, the cancer cells gained resistance to paxlitaxel. Based on this unprecedented discovery, [the petitioner] went even further to explore the molecular mechanism underlying the process and whether the mutations affect the sensitivity to other drugs.

The only initial witness outside of Houston, is an assistant professor at Ohio State University. stated:

I got to know [the petitioner's] outstanding research and contributions through reading his journal articles and attending his presentations. . . . [The petitioner's] research was extremely challenging and rewarding because thanks to his research, for the first time in cancer research, the interactions between α - and β -tubulin mutations and cancer drug resistance were clearly identified and elaborated.

With regard to reference to the petitioner's "journal articles," the petitioner himself claimed to have had only one article published at the time made this assertion.

The petitioner submitted copies of his writings, consisting of one published article, one "[m]anuscript in review," and one "[m]anuscript to be submitted." The petitioner also documented four citations of his work. Two of the citations are self-citations by

On September 10, 2008, the director issued a request for evidence, instructing the petitioner to submit evidence of the impact of his research outside of UTHSC, such as additional citations of his work. In response, the petitioner submitted evidence showing that his second article had been published; a letter showing that a third article had been accepted for publication; documentation of increasing international citation of his articles; and several new letters from independent witnesses outside of UTHSC.

of Albert Einstein College of Medicine established her very substantial credentials and then evaluated the petitioner's work:

I am best known for my pioneering work describing the unique mechanism of action of Taxol, an important antitumor drug used throughout the world. My laboratory was the first to describe the enhancement of the polymerization of tubulin and the formation of stable microtubules by Taxol. Our work on Taxol generated extensive interest in this drug and contributed significantly to its success as a cancer chemotherapeutic drug. I am the recipient of several awards including membership in the National Academy of Sciences, The Institute of Medicine, and the American Academy of Arts and Sciences, plus I am a past-president of the American Association for Cancer Research. . . .

Today, as one of the most useful anti-cancer drugs ever developed, Taxol has been given to more than one million patients. . . .

However, it was observed that patients often displayed resistance to the drug, even after initially responding to it. . . . Although it was suspected that mutations in tubulin was the major reason for resistance, it has been very difficult to find such mutations by traditional screening procedures. To overcome these obstacles, [the petitioner] developed new methodology to identify Taxol resistant mutations in animal cells. . . . [The petitioner's] research not only greatly increased the number of resistance mutations found, but also explained why their locations . . . are all capable of decreasing microtubule assembly and counteracting the action of Taxol that stabilizes microtubules.

of Umeå University, Sweden, stated that the petitioner "has become a leading contributor to the research in how to circumvent drug resistance in cancer chemotherapy." [redacted] asserted that the petitioner's "innovative method allowed [the petitioner] to identify more than 50 drug resistance mutations, a number that is four times greater than the cancer drug resistance mutations discovered by all other researchers combined."

University of Pittsburgh [redacted] stated:

[The petitioner's] discovery has immediate and significant impacts on the work in my laboratory. I found [the petitioner's] discovery very inspiring and therefore requested [the petitioner's] laboratory to provide us with the cell lines that he had developed. These cell lines allowed us to test the efficacy of drugs to kill cancer cells in a manner we had not previously been able to do. The uniqueness of such cell lines lies in the fact that a simple antibiotic could easily regulate the gene expression and thus drug resistance. Taking advantage of [the petitioner's] unprecedented findings, we are now capable of testing numerous potential cancer drugs. . . .

In his second paper . . . [the petitioner] continues his leading role in deepening our understanding of mechanism of resistance of paclitaxel (marketed under the name Taxol). . . . I was thrilled to read in that paper that he had identified the majority of Taxol resistance mutations. . . . This further helps researchers like me to greatly advance the

design and development of drugs that kill the cancer cells more quickly and efficiently. As a leading pharmaceutical scientist, I regard this work as exemplary of outstanding scientific merits and technical quality.

██████████ a research assistant professor at the University of Chicago, trained at the University of Texas before the petitioner arrived there. ██████████ stated: "Taking advantage of [the petitioner's] breakthrough findings, our group was able to express the mutant protein in human neuronal cells." ██████████ claimed that "our research project would have been delayed indefinitely" but for the petitioner's work.

██████████ at the U.S. Food and Drug Administration in Jefferson, Arkansas, saw an invited talk by the petitioner and stated:

From his exciting seminar, I strongly believe that [the petitioner] is currently playing a significant role in our nation's efforts to overcome clinical resistance to cancer drugs, a major impediment to current cancer treatment paradigms. . . . [The petitioner's] research has greatly influenced the pharmaceutical industry's decision making regarding the safety criteria for drugs. . . .

[The petitioner's] findings in support of this drug resistance mechanism, without doubt, pave the way for inventing novel drugs or changing the treatment regimen to kill cancer cells more efficiently. Such a contribution is well beyond what could be expected from a young scientist so early in his career.

██████████ at Lawrence Berkeley National Laboratory, praised the petitioner's "outstanding achievement" that increased "our understanding of the mechanism of drug resistance."

The director denied the petition on February 2, 2009. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner failed to "demonstrate a past history of achievement with some degree of influence on the field as a whole." The director noted the petitioner's minimal publication and citation record, and found that, while some researchers have described the petitioner's influence on their own work, the record did not establish the petitioner's impact and influence on his field.

On appeal, counsel argues that the director did not give sufficient consideration to evidence of the petitioner's influence in his field. We are inclined to agree with counsel on this point. It is clearly true that, at the time the petitioner filed the petition, his publication and citation record were minimal. If publication and citation were the only permissible factors, then denial would have been the proper outcome. As it stands, however, those are strong factors but not the only ones, and they are not invariably the dominant factors. Citations are an important way to measure the impact of a researcher's work, but they are not the only way. (We note that the record hints at an accelerating rate of citation of the petitioner's published work.)

The director was correct in making the general finding that an alien cannot earn a waiver simply by locating witnesses who are willing to write letters on the alien's behalf. Nevertheless, we must consider the sources and content of the letters. [REDACTED] for instance, is an acclaimed pioneer of Taxol research, and an authority in the field whose opinion we cannot lightly disregard. [REDACTED] did not merely offer vague praise for the petitioner's promise or potential, or for his skill with complex laboratory equipment. Rather, she and other witnesses offered credible, persuasive and detailed explanations of why the petitioner's findings are especially significant, and how they affect an area of national concern.

By filing the petition at the very beginning of his professional career, before he had even formally received his Ph.D. diploma, the petitioner chose to seek the waiver at a time before he had much of a record to demonstrate. Premature filing of this kind can easily be fatal to a national interest waiver petition, even if many such petitions could have been approved if filed at a later time. In this particular instance, however, the available evidence of record strongly indicates that the petitioner is already responsible for important findings in his specialty. That these findings came early in his career does not diminish their significance. The petitioner's eligibility might have been more obvious had he filed the petition at a later date, but this is not a disqualifying factor here.

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.