U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: LIN-98-102-50461 Office: Nebraska Service Center Date: JAN 11 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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 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.

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. -- The Attorney General may, when he 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 Dairy Science from Ohio State University. 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 a labor certification, is in the national interest.

Neither the statute nor Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> 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 Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

The director acknowledged that the petitioner works in an area of intrinsic merit, the study of vector-borne diseases, and the proposed benefits of his work, the control of such diseases, is national in scope. The director concluded, however, that the petitioner had not established that he would serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum requirements.

Initially, the petitioner submitted his degree, his published articles, and evidence of his professional memberships. In response to the director's first request for additional documentation, the petitioner submitted additional academic records, evidence that he was requested to speak at a conference in Athens, Ohio, and a single reference letter from his employer. In the letter, the employer simply provides the petitioner's duties. Subsequently, the director advised the petitioner of the requirements for a national interest waiver set forth in Matter of New York State Dept. of Transportation, and granted the petitioner another opportunity to submit new documentation. In response, the petitioner submitted more evidence regarding his professional memberships, a copy of the same letter from his employer, and information regarding the citizenship of his children.

In her decision, the director noted that publication was inherent to the field of research and that the record lacked reference letters from disinterested experts in the field. Thus, the director concluded that the petitioner had not influenced his field to a substantially greater extent than other qualified workers in the field.

On appeal, the petitioner submits several letters from colleagues in Ohio and collaborators at the Department of Health and Human Services. The petitioner also submits evidence that his articles have been extensively cited. Counsel urges that this new evidence be considered on appeal. As the evidence goes to the petitioner's eligibility at the time of filing, it will be considered below.

Most of the letters submitted on appeal include at least some, if not all, of the following language.

> [The petitioner's] knowledge, abilities, and experience are unquestionably unique. In particular, his work concerning insect-borne pathogens involves an astounding combination of functions: knowledge of insect physiology; knowledge of microbiology and biochemistry; surveillance and tracking of disease carrying insects across large geographical areas; field sampling and testing of insects; laboratory testing of insects; tracking the spread of insect-borne disease in humans; and knowledge of laboratory isolation facility techniques. Of course, many of these functions are also relevant to [the petitioner's] work with other types of vector-borne diseases. Furthermore, the techniques and methods for tracking vector-borne diseases and for the associated laboratory work are constantly changing and being updated. Someone without extremely in-depth knowledge, such as that held by [the petitioner], would simply be incapable of performing the necessary functions. The multi-disciplinary knowledge that [the petitioner] has acquired is extremely rare. There are not very many people in the United States who can match his level of expertise. His expertise sets him apart from, and in my opinion, far above others in his field.
>
> In addition, I would emphasize that [the petitioner] will be using his unique expertise in a manner that will significantly benefit the field of endeavor that he works in – that of controlling vector-borne diseases. These types of diseases (e.g. encephalitis, Rocky Mountain Spotted Fever, Lyme disease, etc.) afflict thousands of Americans every year. They also have dangerous potential for sudden outbreaks if not tracked and identified in an expeditious manner. It is not an exaggeration to say that [the petitioner] is saving the lives of Americans. Through his work, and through his presentations and scholarship, he continues to add significantly to our knowledge of how such diseases are spread, as well as adapting new and constantly changing laboratory techniques to this purpose.
>
> Finally, although I have little knowledge of the "labor certification" process, it has been explained to me that the INS is considering rejecting [the petitioner's] application on the basis that it would be more appropriate to attempt to find U.S. citizens or residents to fill his position at the Ohio Department of Health, so long as those citizens or residents meet the "minimum qualifications" to do the work that [the petitioner] is doing. I would first say that even the concept of "minimum qualifications" for vector-borne disease research and tracking would appear entirely inapplicable. There is not an available pool of talent waiting to be hired.

> There are a handful of individuals who specialize in this type of multi-disciplinary scientific research. These individuals have found their way into the field over the course of years through the applications of different types of knowledge during successive stages of education and/or careers. To risk lowering the standard to any sort of artificial "minimum" poses, in my opinion, a severe danger to public health. In any event, [the petitioner] certainly will contribute to his field to a substantially greater degree than any person with "minimum qualifications," even if such qualifications could effectively be established. His varied background in dairy science, microbiology, entomology, laboratory isolation procedures, and many other fields is simply impossible to match.

The letters from Terry Allan, Chief, Office of Epidemiology and Surveillance at Cuyahoga County Board of Health in Ohio; Dr. Hammed Agboola at Wilberforce University in Ohio; Dr. John C. Nduaguba at Morrow County Hospital in Ohio; and Dr. Sydney Alozie at the City University of New York who has known the petitioner for twenty-five years all include the above language verbatim. Dr. Richard L. Berry uses a very slightly altered version of the above paragraphs in his letter. Dr. Roger S. Nasci, a research entomologist at the Department of Health and Human Services includes small portions of the above language.

As the letters are all signed, the author is clearly assenting to the information provided in the letters. The use of identical language, however, indicates that the authors did not use their own words to describe the petitioner's work. Reliance on some type of "form letter" written by someone else somewhat reduces the evidentiary weight of the letters. Regardless, the arguments expressed in the form letter are not persuasive.

We do not contest the importance of tracking vector-borne illnesses. Eligibility for the waiver, however, 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.

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. Matter of New York State Dept. of Transportation, supra, note 6. Letters from friends, local colleagues, and collaborators is not evidence that the petitioner has influenced the field as a whole.

Further, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. In addition, while the references assert that researchers with the petitioner's skills are rare, Matter of New York State Dept. of Transportation specifically rejects that argument. When discussing claims

that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise:

> would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

The argument that the Ohio Department of Health would have to lower the job requirements if seeking a labor certificate for the petitioner is not persuasive. The use of the phrase "minimum qualifications" simply narrows the job qualifications to those necessary to perform the duties of the position. The minimum qualifications for a complex job opportunity might be quite high.

In addition to the form letter discussed above, Dr. Nasci further states:

> Because of the consistently high quality of [the petitioner's] work, we recently included him as a collaborator in the Centers for Disease Control and Prevention project to develop and evaluate a new diagnostic test for tracking the prevalence of [the] St. Louis Encephalitis virus in mosquito populations. His participation in the project was extremely valuable. It is rare to find scientists in state public health laboratories who display his level of competence.

While Dr. Nasci indicates that the petitioner is talented and very competent, he does not indicate how the petitioner has influenced his field as a whole. Dr. Forrest Smith, the Medical director of the Bureau of Infectious Disease control at the Ohio Department of Health where the petitioner is employed writes:

> [The petitioner] has very specialized laboratory training in the isolation and identification of vector-borne diseases. This training was obtained by on-site individual bench training at other State Health Departments, Universities, and the Centers for Disease Control and Prevention. The skills he has developed – to identify pathogens in arthropods and reservoir mammalian hosts – is unquestionably unique. His is a very specialized field in which many of the sampling and testing techniques are cutting edge, almost experimental. They are not typical procedures taught to microbiologists or performed in a standard microbiology or virology laboratory.

Unique expertise is insufficient to establish that the petitioner qualifies for a waiver of the labor certification in the national interest.

Finally, we must consider the evidence submitted on appeal of the extensive citation of the petitioner's articles. The evidence reflects that "Ruminal Metabolism, Fiber, and Protein Digestion by Lactating Cows Fed Calcium Soap or Animal-Vegetable Fat," published in *the Journal of Dairy*

Science in 1991 has been cited 35 times and "Ruminal Synthesis, Biohydrogenation, and Digestibility of Fatty Acids by Dairy Cows" also published in the same journal in 1991 has been cited 59 times. While the petitioner's initial duties for the Ohio Department of Health involved the analysis of milk, he currently works with vector-borne diseases. While a past history of influential research need not be on the same project, there must be some nexus between the petitioner's past influence and the proposed future benefits asserted to be in the national interest. The record provides no explanation of how the petitioner's 1991 work in dairy science applies to his current work. Nor does the record reflect that the petitioner has been able to duplicate his one-time influence in dairy science in his current area of research. Moreover, the record does not include any letters from the petitioner's advisor for his published dairy science work verifying the petitioner's role in that research. In light of the above, the petitioner has not demonstrated that his past record justifies projections of future benefits as a researcher who tracks vector-borne diseases beyond those of others in the field.

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, U.S.C. 1361. The petitioner has not sustained that burden.

This denial 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.