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U.S. Department of Justice

Immigration and Naturalization Service

identifying data ...
prevent clearly unwarranted
invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 05 2003

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Haynard

for 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 seeks employment as a research scientist at PPD Development, Inc. 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.

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 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 petitioner holds a Ph.D. from Virginia Commonwealth University's Medical College of Virginia ("VCU MCV"). 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 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, 22 I&N Dec. 215 (Comm. 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 application for a national interest waiver cannot be approved. The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." Counsel states that this form is among the initially submitted documents, but it is not in the record. Without this document, by regulation, the petitioner has not properly applied for a waiver of the job offer requirement. Because the director's decision was based on the merits of the waiver request, the merits shall be the focus of this decision as well.

Counsel states the petitioner's "work has been directly associated with the design and development of an innovative pharmaceutical aerosol delivery device for the treatment of various lung diseases such as asthma." The intrinsic merit and national scope of pharmaceutical research of this kind is self-evident. At issue is not the importance of such work, but whether the petitioner's specific contributions stand out to an extent that warrant a national interest waiver of the job offer requirement that normally applies to professionals working in that specialty.

The petitioner's initial submission consists almost entirely of witness letters and the *curricula vitae* of the witnesses. Counsel states that the witnesses are "all eminent researche[r]s in their own right [and] come from varied backgrounds." Of the five witnesses who submitted letters

with the initial filing, three are VCU MCV faculty members and a fourth trained at VCU MCV. The fifth letter contains no information about its author's training.

[redacted] chairman of the Department of Pharmaceutics at VCU MCV, appears to be the most prominent of the petitioner's witnesses. [redacted] states that his research group is "recognized internationally as one of the premier research units studying both the formulation and design of pharmaceutical inhalers and the performance and disposition of drugs following their delivery to the lung." Prof. Byron states:

> Annually about 500 million inhalation devices are used in the world. . . . However, all current[ly] marketed inhalers have low drug delivery efficiency to the lung. Presently, my group is working on the development of a novel aerosol device, which may improve drug delivery efficiency considerably. . . . [The petitioner] has played an important role in this research project since joining the graduate program of my department in 1996. Over the past four years he has developed considerable expertise as a scientist within the Aerosol Research Group. His research has concerned the elucidation of mechanisms and kinetics of budesonide degradation in non-aqueous solutions; these solutions are likely inhaler formulations for the novel aerosol device. . . . He showed excellent capabilities in pharmaceutical analysis and successfully developed a stability-indicating high performance liquid chromatographic (HPLC) assay method for budesonide. He has also reviewed multiple alternate degradation pathways by developing his expertise in liquid chromatography-mass spectrometry. . . . He was the first one to systematically study the degradation of budesonide.

Dr. Jürgen Venitz, associate professor at VCU MCV, states:

> [The petitioner] was the first to discover that the current official European Pharmacopoeia's assay method was not selective for budesonide epimers. This will have a significant impact on the future pharmaceutical analysis of budesonide. [The petitioner] was also the first to systematically examine the effects of storage and formulation variables on the degradation kinetics and mechanisms of budesonide in propylene glycol. . . . These results provided a necessary scientific basis for formulating a safe and stable inhalation aerosol inhalation product of budesonide. . . . The results from his studies allowed developing preventative steps to avoid potentially dangerous side effects from degradation in the future drug product.

Similar information is contained in letters from [redacted] another associate professor at VCU MCV, and from [redacted] now at Novartis Pharma AG, who previously worked as a postdoctoral researcher at VCU MCV, training unde[redacted] while the petitioner was a doctoral candidate.

The only witness who does not claim a connection with VCU MCV is [redacted] senior research scientist at the National Institutes of Health, whose own background is not clear from Dr. Ma's letter or the one-page fragment of the *curriculum vitae* accompanying the letter. Dr. Ma deems the petitioner "a leading research scientist in the field of pharmaceutical inhalation aerosol drug design, development, testing and manufacturing," and asserts that the petitioner "provided distinguishing contributions on the identification of steroid drugs," and established "a mass spectral library of steroids using the most advanced liquid chromatography. . . . The establishment of such a library provided a powerful tool for the identification of new synthesized steroids, steroid impurities, degradation products and metabolites." [redacted] states that the petitioner has experimented with propylene glycol-based propellants, which may ultimately replace environmentally harmful chlorofluorocarbon propellants in pharmaceutical inhalers.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director concluded that the letters submitted by the petitioner do not "establish that the petitioner is the primary motivator behind projects that PPD Development, Inc. accepts" or that the petitioner "has had a *significant* effect on the field."

On appeal, counsel asserts that the director erred by failing to issue a request for evidence in accordance with 8 C.F.R. 103.2(b)(8). Counsel asserts that the petitioner was not afforded the opportunity to submit additional evidence, but counsel does not indicate what further evidence the petitioner would have submitted in response to such a notice. The petitioner's submission on appeal includes no new evidence, and counsel does not indicate that the petitioner requires further time to obtain such evidence.

Counsel states:

> There is no discussion [in the director's decision] of the content of [the witness] letters or the substantial evidence provided that [the petitioner's] research . . . does represent a substantial contribution to the field and has advanced current scientific and medical understanding of the treatment of asthma, and the development of new and improved aerosol drugs in general. His discoveries and research have been highly practical, and his impact on the field is not conjectural in nature.

Apart from the letters, the record does not contain any evidence at all about the petitioner's work, let alone "substantial evidence" that the petitioner has strongly influenced work within his specialty. Counsel states that the importance of the petitioner's work is evidence from his published articles, but the record does not contain the articles themselves nor any direct evidence of their publication, let alone evidence that those articles are heavily cited or highly regarded outside of VCU MCV. Nearly all of the petitioner's witnesses have demonstrated ties to the university where the petitioner obtained his doctorate; counsel's assertion that these individuals "come from varied backgrounds" does not alter the fact that the petitioner's reputation appears to be largely restricted to his former professors and collaborators. Counsel's reference to these

witnesses as "respected scientists from the United States and abroad" is misleading because the only witness writing from outside the United States is one of the petitioner's former collaborators. This witness' subsequent relocation to Switzerland does not demonstrate that the petitioner's work has had international influence.

Many material assertions are entirely unsubstantiated by primary evidence. If the petitioner's work has in fact already had a significant impact on the manufacture of inhaled drugs, then this fact ought to be common knowledge in the industry. If such primary evidence does not exist, then it is not clear what basis exists to support the claim that the petitioner has had such influence.

Also, despite claims to the contrary, assertions about the petitioner's impact appear to be largely speculative, indicating that the petitioner's work will have a significant impact when (and if) various other conditions (some out of the petitioner's control) are met. For instance, the statement by one of the petitioner's former collaborators that "I believe that [the petitioner's] HPLC method will be widely used in the future by both pharmaceutical drug companies and in clinical studies" cannot carry the same weight as evidence from multiple drug companies, showing that those companies do in fact intend to use the petitioner's methods. The record simply does not offer any confirmation that the petitioner's work is viewed as especially important by a significant number of researchers outside of Virginia Commonwealth University.

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 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.