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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC-00-108-54436 Office: Vermont Service Center Date: JAN 17 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)

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 Hayward

Robert P. Wiemann, Director
Administrative Appeals Office

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

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.
> >
> > > (i) . . . the Attorney General may, when the Attorney General 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 Master's degree in epidemiology from Shanghai Medical 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, 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.

We concur with the director that the petitioner works in an area of intrinsic merit, medical research. Without explanation, the director concluded that the proposed benefits of the petitioner's work, improved understanding of cancer and heart disease risk factors, would not be national in scope. We disagree. It is clear that an improved understanding of risk factors for serious diseases would lead to prevention of these diseases nationwide. Thus, the petitioner has established that the proposed benefits of his work would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver 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. *Id.* at 219, note 6.

Dr. Trudy Bush, director of the graduate program at the University of Maryland, Baltimore, where the petitioner was a Ph.D. student, discusses the importance of the petitioner's areas of research, cancer epidemiology and cardiovascular disease. She further asserts that the petitioner's research is "recognized in the United States and in other countries" and that he has made "significant contributions to the understanding of the causes (or etiologies) of different cancers." As examples of his cancer research, Dr. Bush asserts that the petitioner discovered that liver cancer among children and adolescents was associated with a drug prescribed for precocious puberty and that hot tea consumption, alcohol drinking, smoking and a lower consumption of green/yellow vegetables are associated with esophageal cancer. She asserts that his current work is on breast cancer etiologies and is aimed at increasing screening rates. Regarding cardiovascular disease, Dr. Bush asserts that the petitioner has identified a new lipid measurement (non-high density lipoprotein (non-HDL) as an identifier of those at risk for cardiovascular disease in addition to the known low density lipoprotein (LDL). Dr. Bush credits the petitioner's unique combination of experience as a physician and an epidemiologist for his ability to contribute to his field.

Dr. Patricia Langenberg, Chair of the Women's Health Research Group at the University of Maryland, provides similar information to that provided by Dr. Bush. In addition, Dr. Langenberg provides more detail regarding the petitioner's breast cancer research. Specifically, the petitioner demonstrated that smokers have a lower breast-screening rate than non-smokers do and that alcohol drinkers have a higher screening rate than nondrinkers do. Dr. Langenberg states that this research "provided extremely important information for identifying women at risk of not obtaining regular mammograms." Regarding the petitioner's discovery of non-HDL as an indicator of heart disease risk, Dr. Langenberg asserts that unlike LDL tests, the non-HDL test does not require blood samples from fasting patients and "remains accurate in persons with high triglyceride levels."

Dr. Bu-Tian Ji, an epidemiologist at the National Institutes of Health (NIH), based his conclusions on a review of the petitioner's resume. Dr. Ji asserts that the petitioner is "playing extremely critical roles in a number of clinical research projects which are very important for improving health care in the U.S. Population" due to "the breadth and scope of his medical and research training." Dr. Ji further asserts that the petitioner's findings are significant for prevention of certain cancers.

Dr. Naohito Yamaguchi and Dr. Tomotaka Sobue of the National Cancer Center Research Institute in Japan; Dr. Shaw Watanabe, a professor at Tokyo University of Agriculture; and Dr. Yoshihide Kinjo, an associate professor at Okinawa Prefectural College of Nursing, provide general praise of the petitioner's work on esophageal and liver cancers while working in Japan. All of these individuals are listed as co-authors on the petitioner's articles on liver and esophageal cancers. Dr. Yamaguchi asserts that the petitioner distinguishes himself from other researchers due to this "exceptional ability to analyze and design clinical research protocols."

In response to the director's request for additional documentation, the petitioner submitted new letters. Robert Northington, associate research director of clinical biostatistics at Wyeth-Ayerst

Research, asserts that the petitioner joined that company in July 2000, five months after the petition was filed, and that he was hired to continue his work with the multicenter study of hormone replacement therapy with which Wyeth-Ayerst was already involved. Mr. Northington reiterates that the petitioner's combination of experience in quantitative methods and clinical medicine enables him to excel in his research.

Dr. Roger Blumenthal, director of the Johns Hopkins Ciccarone Center for the Prevention of Heart Disease, asserts that the petitioner has unique training and experience. He further asserts that the petitioner's results regarding non-HDL levels as an indicator of heart disease risk are significant and have been accepted for publication in the *Archives of Internal Medicine*. Dr. Blumenthal continues that Dr. Scott Grundy, a key member of the Adult Treatment Panel III (ATP III), will write an editorial on the petitioner's results to appear in the same issue. Finally, Dr. Blumenthal asserts that the petitioner's work on predictors of lipoprotein response to hormone replacement therapy is also a significant contribution.

The petitioner also submitted a June 12, 2000 letter from Dr. Grundy thanking Dr. Bush for sharing her article (co-authored with the petitioner) with him. He states that in order for him to rely on their results, the article must be published or at least in press. He concludes that the article "should strengthen the argument for making non-HDL a target of therapy under some circumstances."

In support of the petition, the petitioner submitted six published articles. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles.

In response to the director's request for evidence regarding the articles' influence, counsel asserts that the petitioner's 1999 article on rates of breast cancer research was cited three times. In addition, counsel asserts that the petitioner's identification of non-HDL as a risk factor has influenced clinical practice. Finally, counsel asserts that the petitioner's work on the risks of hormone replacement theory was reprinted in *Menopause Digest* in 2000 and *Climacteric* in 1999.

The director concluded that since the petitioner's unique qualifications could be expressed on an application for labor certification, the petitioner had not demonstrated that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications would.

On appeal, counsel argues that whether or not the petitioner's skills could be articulated on a labor certification, the petitioner was a student at the time of filing and, as such, did not have an employer to seek labor certification in his behalf. We do not find this argument persuasive. A petitioner cannot avoid the labor certification process by failing to seek employment. We concur with the director's conclusion that the petitioner's unique combination of experience alone would be insufficient cause to waive the labor certification process.

Nevertheless, we find that the record adequately establishes that the petitioner has a track record of achievement with at least some degree of influence on the field as a whole. While we acknowledge that some of the recognition of the petitioner's work came after the date of filing, the petitioner had already published an article on hormone replacement therapy and on the use of non-HDL as a heart disease risk indicator at the time of filing. The record shows that both articles have been influential. On appeal, the petitioner submits additional materials reflecting that influence, including references to his work in other publications, including the mainstream newswire *Reuters Health*.

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 above testimony, and further testimony in the record, establishes that the 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, 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.