



BB

U.S. Department of Justice
Immigration and Naturalization Service

identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

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



File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: JAN 23 2003

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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

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 an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist in the horticultural field. 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 the classification but concluded that he 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) Subject to clause (ii), 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.

(ii) Physicians working in shortage areas or veterans facilities.

In 1985, the petitioner received a bachelor's degree from Huazhong Agricultural University in Wuhan, China. He obtained an M.S. in Botany from the Chinese Academy of Sciences in Beijing. He entered the United States in 1994, and subsequently received a Ph.D. in Horticulture from Ohio State University in June 1999. At the time the petition was filed in November 2000, the petitioner was employed as a research associate with the Ohio State University's Department of Plant Pathology working on a collaborative project between the university and the Agricultural Research Service (ARS), United States Department of Agriculture (USDA). 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.

It appears from the record that the petitioner also seeks classification as an alien of exceptional ability. This issue is moot, however, because, as stated above, the record establishes that the petitioner 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.

Eligibility for the waiver must rest with the alien's qualifications rather than with the position sought. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The 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 sought. 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, n.6.

The application for the 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.” The record does not contain this document, and therefore, by regulation, the beneficiary cannot be considered for a waiver of the job offer requirement. The director’s notice of denial, however, does not appear to address this omission. Below, we shall consider the merits of the petitioner’s national interest claim.

We agree with the director that the petitioner works in an area of substantial intrinsic merit, horticulture and crop science, and that the proposed benefits of his research would be national in scope. The remaining determination is whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The petitioner submits several witness letters in support of his petition. Professor [REDACTED] of the Beijing Botanical Garden, one of the petitioner’s graduate advisors and employers, describes the petitioner’s work:

I found that [the petitioner] was not only a good co-operator, but also one of the most outstanding employees in this Garden. . . . His research projects included in: 1), the collection, conservation and evaluation studies of the *Vitis sp.* Rootstocks specially for China, and 2), the breeding and propagation of early-ripen seedless grapes for Northern Parts of China. . . . Meanwhile, using the tissue culture techniques, he assisted Prof. Yang to rescue the embryos from the early-ripen hybrids at the early developmental stage. . . . Two new-bred grape varieties suitable to China already become available [sic] in the market in 1995 and 1997, which can’t become true without his great contributions.

In her first submitted letter [REDACTED] Adjunct Associate Professor at Ohio State University and the petitioner’s employer, states:

[REDACTED] is working to define virus coat protein and RNA levels and distribution in resistant and susceptible maize embryos and developing seedling tissues after vascular puncture inoculation (VPI) of germinating kernels with MDMV and WSMV. He is also using a ‘virus overlay’ technique to identify maize proteins that interact with MDMV and its individual proteins. The results of [REDACTED] work will provide an understanding of the molecular basis for virus resistance in corn. The information is critical for continued protection of corn and other crops from unpredictable losses due to viral diseases. . . . [the petitioner’s] experience with immunohistochemical and in situ hybridization techniques for localizing the distribution of pathogens, proteins and gene expression in plants is critical to the

success of our project. . . . His rapid mastery of knowledge, literature and technologies important for research in the field of plant-virus interactions indicates that he will certainly be an asset to the advancement of research on plant resistance to pathogens in the U.S.

Professor [REDACTED] Associate Chair of the Dept. of Horticulture and Crop Science and the petitioner's graduate advisor at Ohio State University, states:

Since his graduation from our program, Dr. Chen has already begun to distinguish himself in his new position as a postdoctoral researcher with the United States Department of Agriculture-Agricultural Research Service.

[REDACTED] work added to our knowledge of a specific group of compounds, the leptines, that play an important role in natural resistance to the major insect pest of potatoes worldwide, the Colorado potato beetle. The results of [REDACTED] research are significant as we continue our efforts to develop insect-resistant potato varieties that will need less application of synthetic pesticides for control of this destructive beetle. From his work, [REDACTED] and I have one book chapter accepted for publication and two research articles submitted to scientific journals for consideration of publication.

In his first submitted letter, [REDACTED] supervisory research plant pathologist and research leader for the Corn and Soybean Research Unit at the ARS/USDA, similarly describes the petitioner's duties, praises the petitioner's doctoral thesis and notes that the petitioner's research experience addresses a critical area of research for disease control in important food crops. [REDACTED] the "Principal Investigator" of the petitioner's postdoctoral research with the ARS/USDA project, using virtually the same language, reiterates the previous assertions of Professors Redinbaugh and Louie. He notes that the petitioner has great promise for future success in plant science research and that the U.S. lacks comparably trained citizens of the petitioner's generation to conduct plant science research in the future.

The petitioner's witnesses consist exclusively of his supervisors, employers, colleagues or collaborators, who all agree that the petitioner is a highly skilled researcher. This does not detract from the validity of their opinions, as they may be in the best position to evaluate the petitioner's work and his role in the various research teams in which he has participated. The record, however, contains no evidence showing how the petitioner's individual contributions have significantly impacted the horticultural field as a whole or have been significantly relied upon or recognized by independent researchers. Assertions that the petitioner's efforts have great promise or that he will be an asset to crop research do little to specifically establish that his past record of achievements have reached such a level that would justify a waiver of the job offer requirement that, by law, normally attaches to the visa classification which the petitioner seeks. Likewise, a shortage of comparably trained U.S. citizens, regardless of the nature of the occupation, does not support a national interest waiver, given that the labor certification process was designed to address the issue of worker shortages.

In addition to the witness letters, the petitioner offers evidence of his educational credentials, his membership in the American Society of Plant Physiologists and an application for membership to the American Society for Horticultural Science. The record contains no evidence that the membership to either organization is reserved for those with significant past accomplishments in the field. Additionally, the regulations provide that "recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations," 8 C.F.R. 204.5(k)(3)(ii)(F), and "memberships in professional associations," 8 C.F.R. 204.5(k)(3)(ii)(E), are evidence of exceptional ability, a classification normally requiring a labor certification. As set forth in *Matter of New York State Dept. of Transportation*:

Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professional than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability or as a member of the professions holding an advanced degree.

Id. at 218-219.

The petitioner submits copies of three coauthored articles, three coauthored conference reports, copies of extracts from his master's thesis and Ph.D. dissertation, and an extract from a paper he wrote while at Ohio State. The record contains no evidence that the preparation and presentation for publication of one's work is rare in the petitioner's field of endeavor, nor does the record establish that independent researchers have heavily cited or relied upon the petitioner's work in their research. 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 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other horticultural researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would show more widespread attention, and reliance on, the petitioner's work. In this case, the record shows that most of the petitioner's articles were submitted for publication. At the time of filing the petition on November 24, 2000, the evidence submitted indicates that one coauthored article had actually been published in *Horticultural Science*, but the record fails to provide any evidence

of independent citation of the petitioner's published works by other horticultural researchers. A petitioner must establish eligibility at the time of filing a petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The director requested further evidence from the petitioner pursuant to the guidelines set forth in *Matter of New York State Department of Transportation*. In response, counsel submitted four new witness letters. In her second letter, Professor Redinbaugh again reiterates the importance of the study of virus resistance mechanisms in corn and wheat, recaps the petitioner's credentials, and notes:

We are currently preparing at least one manuscript based on [redacted] work on virus localization. He is also working on other new research projects including one to define localization of specific viral proteins inside maize cells and another to identify maize proteins that bind to specific viral proteins. [The petitioner's] combination of technical expertise and research experience in plants is difficult to find among US researchers, and progress on these projects would be drastically delayed if we had to replace him.

Professor Louie's second letter also summarizes the importance of protecting the safety of the US food supply. He states:

[The petitioner's] research involves a complex biological system and the use of many different sophisticated techniques from numerous disciplines. . . . However, it is important to note that any efforts to duplicate [the petitioner's] unique integration and synthesis of knowledge, techniques and disciplines in a complex biological system by any other researcher in any other laboratory would be economically and scientifically challenging.

Two other letters from the USDA/ARS were also submitted. [redacted] research leader in the "Corn and Soybean Unit," and Mark W. Jones, agronomist, both used virtually identical language in summarizing the significance of the petitioner's research, describing the petitioner's background and asserting the value of his contributions to the research.

Again, all of these witness letters are from the petitioner's research supervisors or colleagues at Ohio State and echo the sentiments previously submitted. In order to qualify for the classification sought, it is not enough to assert that a petitioner has useful skills or even a unique background. The significant abilities of a petitioner for a national interest waiver must also substantially outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The issue in this case is not whether research in crop virus resistance is in the national interest, but rather whether this particular petitioner, to a substantially greater extent than other U.S. workers having the same minimum qualifications, plays a significant role. There is no evidence in the record that researchers outside the petitioner's educational institutions, or current and former employers, consider his work to be of greater significance than that of other researchers in crop science.

The director denied the petition stating that "the record fails to establish that the alien's contributions are greater than others' who are also contributing to the field of knowledge." We concur with the director's decision.

On appeal, counsel states that the director failed to heed the critical importance of scientific research on the protection of the food supply and ignored the witness endorsements. The petitioner also submits a letter on appeal in which he asserts that his Ph.D. research work successfully contributed to the available knowledge relating to crop resistance to the Colorado potato beetle. He also contends that his postdoctoral corn virus research resulted in significant contributions to the study of the invasion and movement of viruses in plants. The fact remains that the record falls far short of specifically demonstrating that the petitioner has had any measurable influence on other independent researchers in the horticultural field. Simply going on record without supporting documentary evidence is not sufficient to meet the petitioner's burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

It is apparent that the petitioner's research has contributed to the overall body of knowledge in his field, but this is the goal of all such research, whether publicly or privately funded. It is also clear that his former professors, research supervisors and employers have a high regard for the petitioner's skills. They clearly expect that his findings will have an important future impact on crop research. The petitioner's findings, however, do not appear to have yet garnered significant attention from other researchers throughout the scientific community. Because the petitioner's occupation is generally subject to the job offer/labor certification requirement, the petitioner must sufficiently distinguish his work from that of others in the field if he is to show that he qualifies for a special exemption from that requirement.

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.

ORDER: The appeal is dismissed.