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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 02 2005

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)

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.

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 Administrative Appeals Office 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 Science Applications International Corporation (SAIC) Frederick, an operations and technical support contractor for the National Cancer Institute at Frederick, Maryland (NCI-Frederick). 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 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] 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.

Counsel states that the petitioner "is conducting high-level research associated with the treatment and prevention of cancer. One of his projects involves research on the human tumor protein known as p53." Counsel also states:

> [The petitioner's] research involving cancer targets, revealed that Tumor Necrosis Factor (TNF), exhibits multiple biological activities and it can contribute to the defense against infectious agents and the control of tumor growth by developing an antibody that modifies TNF's anti-inflammatory role. By modifying the [anti-]inflammatory role of TNF, it was found to provide useful treatments for patients with HIV/AIDS.

The intrinsic merit and national scope of cancer and HIV research are not in dispute. At issue in this proceeding is whether or not the petitioner's work in these areas merit the special benefit of a national interest waiver. An alien does not automatically qualify for a waiver simply by conducting cancer or HIV research.

The petitioner submits copies of several witness letters, which appear, from their wording, to have been written originally to support a separate petition in which the petitioner sought a different immigrant classification. Four of the six initial witnesses work at NCI-Frederick, where the petitioner works. A fifth witness was a student at Moscow State University at the same time as the petitioner, and the remaining witness heads a facility whose researchers have collaborated with the petitioner. [redacted] who supervises the petitioner's work, states that the petitioner "is bright, energetic, highly productive, and has made useful contributions to science in his time here." With regard to the petitioner's original work, [redacted] states that the petitioner "has made good solid and continuous progress" on a project seeking to isolate the RepA protein, achieving "remarkable" and "quite important" results that have "confirmed a very important hypothesis" first put forth by "Nobel prize winner Richard Roberts."

Dr. [redacted] Jr., chief of the Laboratory of Experimental and Computational Biology at NCI-Frederick, states that the petitioner "has successfully completed and published a number of important scientific studies on the fundamental interactions of DNA and proteins. . . . His findings will be of great benefit in exploiting the data of the human genome project and other large scale biomedical research efforts."

[redacted] a research fellow at NCI-Frederick, states that he and the petitioner "are jointly leading on several research projects." Dr [redacted] states that the petitioner has taken the lead "on a whole range of profound fundamental research projects and authored many research articles of the highest academic quality." [redacted] states "I am sure that [the petitioner's] profound theoretical knowledge, innovative research methods, and extraordinary talent for generating 'cutting edge' ideas will continue to have a direct and significant impact on the work that we are doing."

[redacted] an SAIC-Frederick staff scientist at NCI-Frederick, states that the petitioner "demonstrated his truly outstanding abilities researching in the field of DNA base flipping, DNA-protein recognition and interaction, and molecular information theory. Among other prominent publications in his field he also co-authored the patented innovation describing the new type of molecular engines that utilize the principle of muscular contraction."

[redacted] an assistant professor at Brown University when he wrote his letter, studied for his doctorate at Moscow State University while the petitioner was working toward his master's degree there. [redacted] states: "The most important outcome of [the petitioner's] research is that it allows theoretical prediction of targets for essential regulatory proteins in [the] human genome and, most importantly, leads to design of synthetic or natural molecular modulators of gene expression."

Fyodor V. Bunkin, director of the Wave Research Center (WRC) at the Russian Academy of Sciences, states:

> In cooperation with WRC scientists [the petitioner] has made a good progress studying two important physical problems. First, it is the theoretical solution of a thermodynamic problem of low-temperature stratification in monomolecular associated liquids (the most urgent example is water). Second, he and his colleagues from the Laboratory of Experimental and Computational Biology (National Cancer Institute, Frederick, MD) have initiated the research in orientational ordering of proteins with Fe(+2) and Fe(+3) ions in a non-uniform magnetic field. Corresponding experiments are already planned at the Wave Research Center. In my opinion, these experiments will have interesting engineering applications.

Counsel asserts that the petitioner has published numerous articles, which have "been cited thirty-nine times as positive authority in some of the most respected and prestigious scientific journals in his field." The petitioner submits documentation showing that six of his articles have been cited an aggregate total of 24 times, including at least seven self-citations by the petitioner and/or his collaborators. One article lacks an itemized list, so we cannot determine if the five citations of that article include any further self-citations. The greatest number of independent citations for any one article is six.

The petitioner submits copies of two patent applications on which he is named as a co-inventor. An alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dept. of Transportation* at 221, n. 7. Here, the record contains no independent evaluation of the innovations documented in the patent applications. Because the United States Patent and Trademark Office receives hundreds of thousands of patent applications each year, we cannot conclude that the filing of a patent application is, by itself, significant evidence of eligibility.

The director denied the petition, acknowledging the claims made by the petitioner's collaborators, but finding that the record does not show comparable recognition from the field at large, outside of the beneficiary's own circle of collaborators and employers. On appeal, counsel contends that the director "did not perform a

careful review of the evidence presented or grant due consideration to [the petitioner's] accomplishments." Counsel states that the director at least should have issued a request for evidence as described at 8 C.F.R. § 103.2(b)(8). We note the absence of such a notice here in the record. The most expeditious remedy for this failing is to give full consideration on appeal to new evidence, submitted on appeal, that the petitioner presumably would have submitted in response to a request for evidence, had one been issued.

Counsel repeatedly refers to the petitioner as a "high level research scientist," but does not explain this term. The petitioner appears to be a post-doctoral researcher, which is not a high rank within the academic hierarchy. Alternatively, counsel may be suggesting that the petitioner's research is at a "high level" because it is taking place at a high-profile government facility. We reject the assertion that any given research facility is so important or prestigious that an alien, simply by working there, presumptively qualifies for a national interest waiver, even if the alien is directly employed by the facility rather than through a contracting agency as this alien is.

Counsel states that the petitioner's research, both at NCI-Frederick and, earlier, in Russia, has been responsible for important scientific advances. Arguably, the purpose of *all* cancer research is to learn more about the disease and its causes, in order more effectively to prevent and treat it. The fact that the petitioner has contributed to this body of knowledge makes him an effective and productive researcher, but we cannot conclude that every cancer researcher who produces useful results qualifies for a national interest waiver. When judging which researchers stand out from their peers to a sufficient degree to warrant the special benefit of a waiver, it is entirely valid to consider the impact and attention caused by the work of a given researcher.

Counsel states "substantial documentation was submitted on behalf of [the petitioner] which evidenced the importance, significance and overall impact of his contributions to this field of scientific research." Counsel asserts that the director did not give sufficient consideration to the petitioner's pending patent applications, one of which involves a molecular motor, the other of which concerns a cloning technique for the p53 gene. With regard to the latter application, counsel asserts "these discoveries are seen to be vital in cancer research." Counsel's use of a passive verb leaves unanswered the question of *who* sees these discoveries as vital. The record contains no commentary about the petitioner's work from independent third parties, to indicate that the petitioner's work has attracted attention beyond his own group of collaborators and superiors. We take note that the petitioner's collaborators view him as a particularly talented researcher, but at the same time, Congress made it clear, by the structure of the statute, that exceptional ability is not by itself grounds for a waiver.

Pointing to the petitioner's publication record, counsel states "it is clear that [the petitioner's] research has had a great impact on the field of cancer research." An article's existence in print is not evidence that the article has influenced a significant number of other researchers. The opinions of the petitioner's co-authors as to the significance of the articles they wrote with the petitioner are not definitive or objective indicators of the articles' impact. Similarly, the reputation of a journal in which an article appears does not automatically elevate that article to a particular level of impact or importance. The impact factor of a journal is determined by the articles it contains, rather than vice versa. We have already discussed the citation of the petitioner's work elsewhere in this decision, observing that the petitioner has not shown that any of his articles have warranted more than six independent citations. The petitioner has not shown this level of citation is so rarely seen that it readily demonstrates significant impact on the field.

The petitioner submits new letters on appeal. Counsel acknowledges that the witnesses "are indeed professional acquaintances" of the petitioner, but asserts that, given their stature in the field, their association

with the petitioner is, itself, evidence of substantial talent and influence. Counsel cites an unpublished appellate decision, in which the AAO stated "the very fact that the petitioner is close to several ranking figures lends circumstantial support to the petitioner's claims of eligibility." We note that the decision thus quoted involved a different immigrant classification. In another cited decision, counsel states that the AAO found "the caliber of witnesses was very high and that INS must give considerable weight to their expertise when evaluating the relative significance of the petitioner's work." Counsel states that similar logic applies in this proceeding.

Setting aside the fact that the cited decision is unpublished and has no weight as precedent, we note that, in the cited case, the AAO's comments were aimed at two witnesses. One witness was a member of the National Academy of Sciences, and the other "received a first place ranking [from] the Institute for Scientific Information for publishing the highest number of worldwide influential papers in 1998" (internal quotation marks omitted). The petitioner has not shown that the witnesses in this present matter have attained comparable levels of achievement.

The petitioner has submitted new letters from previous witnesses. [redacted] states: "Although we do not publish many papers from this lab, we write them extremely carefully and with good English. We would rather publish a few important papers than many cheap ones." [redacted] asserts that the petitioner "has achieved international recognition for his work on DNA replication," but he does not elaborate or explain what objective evidence he reviewed when he concluded that the petitioner has earned such recognition. [redacted] who had left Brown University to become a research scientist at [redacted] Birmingham, Alabama, states: "There should be no doubt whatsoever that [the petitioner] has demonstrated extraordinary ability and that he is conducting high-level research that has huge implications for our ability to better diagnose and treat cancer."

[redacted] states: "I cannot emphasize enough the importance of [the petitioner's] contributions to his field. He has opened up an entirely new avenue of research in the area of cancer research." At the same time, [redacted] claims that the petitioner "is a member of a professional organization that sets extremely high standards for its members. [redacted] does not name the organization, but the record documents the petitioner's membership in the American Chemical Society (ACS) and the American Society for Microbiology (ASM).

A letter from ACS to the petitioner states, in part: "In recognition of your preeminence in the scientific community, you have been formally nominated for membership in the American Chemical Society." A subsequent letter confirms the petitioner's acceptance into the ACS. The petitioner has also submitted background materials from the ACS' official web site, http://www/chemistry.org. One page from that site indicates that "Membership is for Everyone," and that the ACS has "more than 163,000 members." The highest rank of membership, that of Full Member, requires "a bachelor's degree in a chemical science from an ACS approved program, a bachelor's degree in a chemical science from a non-approved ACS program and three years work experience, an earned doctor's or master's degree in a chemical science, or less formal training than indicated above but having significant achievement in a chemical science." Degree and experience requirements are not "extremely high standards," as is proven by its admission of well over a hundred fifty thousand members. These clearly-stated standards must take precedence over the ACS' use of the word "preeminence" in what is, essentially, a self-serving letter designed to encourage the submission of membership fees.

Similarly, the petitioner provides printouts from ASM's web site, http://www/asmusa.org, indicating that ASM is the "largest single life science membership organization in the world," with "over 42,000 members."

The site states: "Eligibility to become a Full Member of the Society is open to any person who is interested in microbiology and holds at least a bachelor's degree or equivalent experience in microbiology or related field." Once again, these are not "extremely high standards"; any trained microbiologist would qualify for membership.

Because the petitioner's own evidence conclusively proves that neither ASM nor ACS has "extremely high standards" for membership, and the petitioner has claimed no other memberships, we must conclude that Dr. Siderov was exaggerating those standards. This exaggeration, whether intentional or otherwise, must color our interpretation of his comments regarding the importance of the petitioner's work. Because counsel, too, has touted the petitioner's memberships as evidence of his abilities and reputation, we must apply the same judgment to counsel's assertions and arguments.

The petitioner submits documents relating to his peer review of an article submitted for journal publication. The petitioner has not demonstrated that this instance of peer review establishes his reputation within the field.[1] The petitioner has not substantiated the claim that only the most respected and influential researchers are entrusted with the peer review of articles by prominent authors. Even then, the invitation to perform the review is addressed to [redacted] who decided on his own initiative to involve the petitioner in the process.

The petitioner has established that he is a productive scientist who has won substantial respect from his collaborators and superiors. He has not, however, demonstrated that his work stands apart from that of others in the field to an extent that would justify a special waiver of the job offer requirement that, by law, typically applies to research scientists in the petitioner's 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, 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.

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[1] We take administrative notice of the American Chemical Society's *Ethical Guidelines to Publication of Chemical Research*, available online at http://pubs.acs.org/instruct/ethic.html, which states: "Inasmuch as the reviewing of manuscripts is an essential step in the publication process, and therefore in the operation of the scientific method, every scientist has an obligation to do a fair share of reviewing." As an ACS member, the petitioner has presumably been exposed to these guidelines, but even if he has not, it remains that a professional organization with over 150,000 members views peer review as a routine duty rather than a rare privilege.