U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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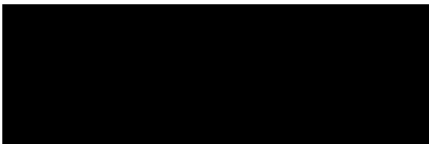
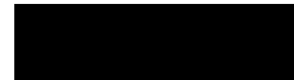
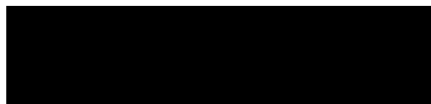


DATE: APR 2 3 2012 OFFICE: TEXAS SERVICE CENTER

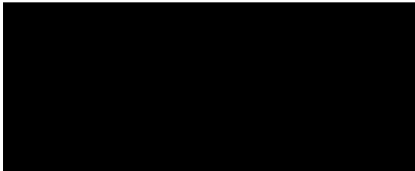


IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 program coordinator in the Department of Anesthesiology at the University of Oklahoma Health Sciences Center (OUHSC), Oklahoma City. 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.

On appeal, the petitioner submits a brief from counsel, a witness letter, and an article citing his work.

Section 203(b) of the Act states, in pertinent part:

> (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 U.S. Citizenship and Immigration Services] 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 (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show 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.

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 AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 21, 2010. In an accompanying statement, counsel stated:

> [The petitioner] has proven himself to be an outstanding researcher in numerous medical and psychological fields. In fact, it is because of his research that many novel study drugs are now being, or have been, approved by the FDA, including Seroquel SR™ (depressive disorder) and Tapentadol (arthroscopic [*sic*] shoulder

> pain). [The petitioner] has also conducted extensive research on Hurricane Katrina evacuees where he researched emotional and neurobiological responses. . . .
>
> [The petitioner] is requesting a waiver of the job offer because . . . his work and research in the novel treatments of Cancer, pain management and implicit memory, as well as the prevention of cardiac strokes after Coronary Heart Disease, will all help to improve US healthcare.

The petitioner submitted seven witness letters, all from the petitioner's current or former collaborators. Most of the witnesses discussed, at length, various research projects in which the petitioner participated. For example, Professor [redacted] division chief of Critical Care Medicine and chair of the Department of Anesthesiology at OUHSC, stated:

> [The petitioner's] current research contribution as a Clinical Research Coordinator includes "The Effects of Acadesine on Clinically Significant Adverse Cardiovascular and Cerebrovascular Events in High Risk Subjects Undergoing Coronary Artery Bypass Graft (CABG) Surgery Using Cardiopulmonary Bypass. . . ."
>
> . . . . During and shortly after CABG surgery, heart attacks occur in 5 to 10% of patients and are the main cause of death. . . . To date, no medical therapy has been shown to be effective in reducing the incidence of adverse ischemic outcomes that result from perioperative ischemic-reperfusion injury.
>
> . . . Acadesine has the potential to reduce perioperative complications in this patient population. . . .
>
> [The petitioner's] clinical research expertise and achievements have continued to significantly contribute to the accomplishment of the clinical trial in the development of the novel compound Acadesine. . . . This clinical trial is being conducted at a national and international level. Our institution is the only participating center in the state of Oklahoma. This trial, due to its unique nature and importance on a national and international level, is very intricate and requires a person with extensive background knowledge in medicine and in-depth understanding of potential investigational study drug interactions with other related medications being taken during the patient's illness. Also, this study requires a strong knowledge in various surgical procedures and methods being assessed, as well as when to know to exclude a patient from enrollment in this trial. [The petitioner] encompasses all these abilities and is the best fit for this research at our institution. He has assisted us in better understanding the study and now we are able to perform all the specific required duties efficiently and appropriately. [The petitioner's] unique background knowledge, training and experience in the area of clinical research trial have allowed us to significantly contribute to this clinical study.

The above information does not indicate that the petitioner was involved in developing Acadesine, or that he participated in the trial "at a national and international level." Rather, the petitioner appears to have participated in drawing up local trial protocols for OUHSC, with no input into trial procedures at other locations.

Prof. Roberts described other aspects of the petitioner's recent work:

> In addition, [the petitioner] plays a key role as a Co-investigator in our research project, "Reliability of Central Venous Pressure Measurements from Peripherally Inserted Central Catheters [PICC] vs. Centrally Inserted Central Catheters [CICC]" . . . , where he assisted me in its development, the design of study protocol, the consent forms, and in getting the final approval from our Local Institutional Review Board. . . .
>
> In short, this study seeks to prove that PICC can effectively measure central venous pressure in a critically sick patient population without the significant/major complications associated when using CICC procedure. Since PICC intervention is much simpler and easier to perform, it will also reduce the medical and health care cost to the patient.
>
> . . . [The petitioner's] skills as a medical researcher and as an epidemiologist were monumental in getting these projects conducted in a very time efficient manner. He continues to assist and provide his utmost professional guidance to many of our faculty members for their clinical and educational research projects currently active at our research facility. He also supervises medical students and assists residents during their clinical research rotation.

Other collaborators attributed various roles to the petitioner. Dr. [redacted] assistant professor at the University of Texas Health Science Center, stated that the petitioner "performed in-depth, neuro-physiological and neuro-biological examinations of various patients having co morbid mental illnesses," and "has established a reputation for designing very creative research projects, which have not only benefited our Department but have also been a source of incredible learning and training for our fellows, residents and medical students." One study that the petitioner "assisted in designing" is a "retrospective study" of "mitochondrial disorders and their anesthesia implications in children. . . . [The petitioner] has expanded our research efforts substantially by correcting and inventing new protocols in this field."

Other witnesses described other areas affected by the petitioner's work. Dr. [redacted] assistant professor at the University of Illinois at Chicago, previously held the same title at OUHSC. Dr [redacted] stated that the petitioner's "contributions aim to discover a new indication (i.e. reduction of general anesthesia requirement) for a widely used class of drugs (i.e. beta blockers)." Dr. [redacted] also asserted that the petitioner "made a substantial contribution to understanding the depth of

anesthesia and it's affect [*sic*] on implicit memory," in which a patient has unconscious memories of surgery, which "can have long-term consequences, such as post-traumatic stress disorder."

Dr. [redacted], also an assistant professor at OUHSC, stated that the petitioner's "studies dealt with the depth of anesthesia, opioid use after the general surgery, evaluation of microcirculation involving cardiopulmonary bypass surgical procedure and also adherence to accepted guidelines on perioperative cardiovascular evaluation."

Dr [redacted] associate professor at OUHSC, "worked with [the petitioner] on a study of Post-Operative Pain Scores and Analgesic Requirements after Ambulatory Inguinal Herniorrhapy with Pre-Operative Gabapentine Therapy."

Dr. [redacted] staff psychiatrist with the U.S. Department of Veterans Affairs (VA) Medical Center in Oklahoma City, indicated that the petitioner's work "has benefited patients with Major Depression and Bipolar disorder with Manic Depressive episodes," as well as schizophrenia.

Dr. [redacted] assistant professor at the VA Medical Center, praised the petitioner's "role as a Research Coordinator and as a Co-investigator on Alpha-Stim 100 in patients having cataract surgery. . . . The study that [the petitioner] leads will help to significantly reduce anxiety level in the patients having cataract surgery." Dr. [redacted] wording implies that he knows what the outcome of the study will be, even though it has not yet taken place. (The purpose of the study is to determine whether the Alpha-Stim procedure will, in fact, reduce preoperative anxiety in cataract patients.)

The petitioner submitted copies of three journal articles (two published, one in proof form) and numerous conference abstracts listing the petitioner as a co-author. These materials establish the dissemination of the petitioner's work, but not the impact it has had once disseminated. The petitioner did not submit citation evidence or other documentation to show the extent to which other researchers have relied on the petitioner's expertise.

On December 1, 2010, the director issued a request for evidence. The director noted that the petitioner had submitted "no corroborative primary evidence . . . specifying the direct role [the petitioner had] played in the field." The director instructed the petitioner to "[s]ubmit evidence to support that independent experts throughout the field have relied upon [his] work," such as documentation of independent citation of the petitioner's published work.

In response, counsel stated that the petitioner's initial submission addressed many of the director's concerns. Counsel stated that the director had incorrectly claimed that the petitioner had submitted only two of his own articles, and stated that the initial submission contained three such articles. The director, however, had stated that the petitioner had submitted "only two (2) scholarly articles . . . that [have] been published." One of the three articles is clearly a pre-publication proof, with the legend "Volume 00, Number 00, ■■ 2010" at the bottom of every page – placeholders for the

volume, number and date that had yet to be assigned. The director was correct in stating that the petitioner had submitted copies of only two published articles.

The petitioner submitted documentation of his continued activity, including salary documentation, copies of new abstracts, and a positive performance evaluation for 2007-2008. The petitioner did not submit new independent evidence to establish the impact of the petitioner's work outside of the entities that have employed him and funded the studies he coordinated.

The director denied the petition on August 1, 2011, stating that the record fails to establish that the petitioner has had, and will likely continue to have, a history of influential accomplishments that set him apart from other qualified professionals in his field. The director stated that witnesses have described the petitioner's contributions to various projects, but that it cannot suffice simply to say what the petitioner did without providing context and an objective basis for comparison.

On appeal, counsel condemns the director's "tremendous leap in reasoning" when interpreting *NYSDOT*. Counsel states that part of this "leap" is the conclusion "that the only way to prove 'significant benefit' is by showing that individuals from the community of experts are currently utilizing his innovations or practices." The relevant part of the director's decision reads:

> The witness statements submitted with the petition . . . cannot suffice to establish that you will serve the national interest to a substantially greater degree, when there is little evidence of individuals from the community of experts who are currently utilizing your innovations or practices. . . . While you may have made great achievements in the field, your ability to significantly impact the field beyond your colleagues and current employer have not been demonstrated.

The director did not state that outside use of the petitioner's work was "the only way to prove 'significant benefit.'" Rather, the director found that the petitioner had not established the national (rather than local or employer-specific) benefit arising from his work.

Relevant to the director's comments, the petitioner has not shown that his study designs have influenced the way other research coordinators at other institutions have designed their own studies. Another potential indicator of eligibility would be to show that the petitioner has worked on studies of national importance, and that his involvement as research coordinator has, itself, been of proportional importance. The petitioner has not established the relative importance of the studies he has designed, much less that the studies were important not only for their findings, but for how they were designed, and that those designs lay beyond the abilities of most of his colleagues.

Counsel disputes the director's finding that the petitioner had not documented independent citation of his work, stating that a previously submitted "article cites [the petitioner's] work at footnote 22." The petitioner resubmits the article in question, "Emotional and Biological Stress Measures in Katrina Survivors Relocated to Oklahoma." Counsel states that this article shows that "independent professionals in his field" have cited the petitioner's work. The submitted article, however, is not

from "independent professionals." Rather, the article is by the same research group – including the petitioner himself – that produced the cited article. Self-citation of this kind is accepted practice, but it is not evidence of wider impact, and the petitioner's citation of his own work does not make him an "independent professional" for the purposes of this proceeding.

Counsel contends:

> the number of [the petitioner's] citations does not fully reflect his significance in the field. The expectation of numerous citations in this case is misplaced due to the length of time involved in planning, funding, designing, and conducting data analysis for [the petitioner's] complex and sophisticated projects. Although we recognize that [the petitioner] must show eligibility at the time of filing, it should be noted that citations by other researchers are expected to grow exponentially once findings from these experiments are more fully published.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The expectation of "exponential" growth cannot take the place of real evidence. Furthermore, counsel has not explained how the complexity of the petitioner's research study designs would delay the publication of citing works by other researchers, who are not using those designs. As counsel acknowledges, the regulation at 8 C.F.R. § 103.2(b)(1) requires the petitioner to establish eligibility for the requested benefit at the time of filing the petition. This means that evidence of eligibility must exist at the time of filing, not that the petitioner can simply assert eligibility, while claiming that evidence will one day come into existence to show that he was already eligible at the time of filing. To file the petition without such evidence, in the hopes that it will appear later, is premature at best.

Counsel notes that the petitioner's "research work and contributions . . . were not only limited to the local level, but encompassed the University of Houston, Texas and the University of Chicago, Illinois [*sic*]." The witness in Chicago, Dr [redacted] was formerly on the OUHSC faculty, and the witness in Houston, Dr. [redacted] identified himself as an active collaborator with the petitioner. Their letters do not establish wider influence or impact of the petitioner's work.

In a new letter, OUHSC Professor [redacted] states: "we have had great difficulty finding available US workers having the same minimum qualifications. In fact, the position was originally opened for a research nurse and when we had no qualified applicants, we changed the position. No American trained physician would take this position, title or salary." The assertion that no other eligible worker is available is an argument for obtaining, rather than waiving, a labor certification, because the purpose of labor certification is to demonstrate that no qualified United States worker seeks the position. *See NYSDOT*, 22 I&N Dec. 215, 218.

Prof. [redacted] and other witnesses have stated that the petitioner played an important role in various research studies, but they have not shown how it is in the national interest to ensure that the

petitioner, rather than a different qualified professional, remains in the role of research program coordinator. The broad range of topics covered in the studies tends to support the conclusion that the petitioner is not a researcher as such, but rather assists researchers in designing the optimal way to conduct a given study, screen subjects, and so forth. The record, in this light, paints the petitioner in a supporting role, facilitating rather than conducting scientific research.

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.