



U.S. Citizenship  
and Immigration  
Services



FILE:



Office: TEXAS SERVICE CENTER Date:

MAR 20 2009

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:

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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.

John F. Grissom, Acting 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 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. At the time he filed the petition, the petitioner was about to begin a postdoctoral research position at the University of [REDACTED]. 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.

On appeal, the petitioner submits a brief from counsel and additional evidence.

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 the 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*, 22 I&N Dec. 215 (Commr. 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 also note 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.

In a statement accompanying his initial submission, the petitioner described his work:

I have been performing research in the field of membrane protein structure and function for 10 years. . . . The membrane proteins are located in the oily two-layered membrane that holds the cell together, and account for one-third of the genome of any organism. Membrane proteins are challenging to study, but critical to understand because they represent 60 percent of drug targets and carry out essential processes in the cell, such as photosynthesis in plants, and nerve impulses and hormone action in animals. My

research has been mostly focused on two critically important membrane complexes: the cytochrome  $b_6f$  complex in plant chloroplast, and the large conductance  $Ca^{2+}$ -activated potassium ( $BK_{Ca}$ ) channel in mammalian cells. The former plays a pivot[al] role in the process of photosynthesis. . . . The latter is critically involved in various physiological processes such as regulation of neuronal excitability and neurotransmitter release in the central nervous system, contractile tone of smooth muscles, frequency tuning of auditory hair cells, hormone secretion, and innate immunity. The abnormality of  $BK_{Ca}$  channels can cause many diseases, such as epilepsy, neuronal ischemia, hypertension, urinary incontinence, and progressive deafness.

. . . Therefore, the  $BK_{Ca}$  channel is considered as a drug target for a broad range of diseases. . . .

So far, I have immuno-purified the  $BK_{Ca}$  channels from rat brain to a large amount and high purity. I have . . . identified more than 29 *in vivo* phosphorylation sites . . . of the rat brain  $BK_{Ca}$  channels. I have discovered several important functional roles and pathways of these phosphorylation sites. . . . The result from this research greatly extends our understanding of the regulatory mechanism of neuronal excitability, and helps in development of new drugs targeting at the  $BK$  channels.

The petitioner submitted letters from several witnesses, including but not limited to his past supervisors. Professor [REDACTED] was the petitioner's principal doctoral advisor at [REDACTED] University, [REDACTED]. Prof. [REDACTED] stated:

[The petitioner's] Ph.D. research was focused on one critically important membrane protein complex, the cytochrome  $b_6f$  complex, which is a delicate molecular device in the photosynthetic membrane that contains at eight [*sic*] tightly bound protein subunits and multiple inhibitor/drug binding sites. . . . His numerous findings from this research project have greatly advanced our view of trans-membrane trafficking, and the binding and action of drug-like chemicals within membrane proteins.

The cytochrome  $b_6f$  complex plays a pivotal role in the process of photosynthesis. . . . [The petitioner] has conducted in-depth research to study the mechanism of electron/proton transfer within the cytochrome  $b_6f$  complex. He also carried out first-rate studies on the unique structural and functional properties of single copies of solar energy absorbing pigments in the cytochrome  $b_6f$  complex. His novel discoveries have provided a better understanding of membrane energy transduction in photosynthesis, and important input into the effort to harness photosynthesis to improve crop yield and to increase the efficiency of usage of renewable solar energy.

. . . I feel fortunate to have had [the petitioner] in my laboratory. He has done an outstanding job and made a very substantial impact in the research field of membrane protein structure and function. . . . His research works are well-recognized nationally and

internationally as indicated by a large number of citations (more than 80) of his papers by other researchers in this field. . . . [The petitioner's] significant accomplishments are far above what is expected from his peer group and have established him as a nationally and internationally outstanding researcher in the field of membrane protein structure and function.

Professor [REDACTED] supervised the petitioner's postdoctoral training at the University of [REDACTED]. Prof. [REDACTED] stated:

Because of [the petitioner's] distinguished achievements during his Ph.D. study, I invited him to join my laboratory so that he could apply his wealthy knowledge and unique expertise of membrane protein structure and function to our studies of ion channel proteins that are involved in nervous system disorders. [The petitioner] is an outstanding and exceptionally skilled scientist whose groundbreaking research work is of vital importance to our country's biomedical research efforts and improvement of public health in national scope. His accomplishments to date have far exceeded those of the vast majority of his peers as evidenced by his productive publications in premier scientific journals and frequent citations of his works by other researchers. . . .

[The petitioner's] research work aims to tackle the problems of neurological diseases. . . . As we know, all neuronal activities in the brain, e.g., consciousness, learning and memory, are governed by the opening and closing of a series of ion channel proteins in the neuronal cell surface that are permeable to specific ions. Compared to all other ion channels, the BK channel is a unique potassium channel that can generate exceptionally large electrical current. . . . Therefore the BK channels play an essential role in the regulation of neuronal excitability, neuronal firing, and neurotransmitter release in the brain. . . . [The petitioner] has independently . . . define[d] the biochemical and biophysical properties of the BK channel in brain and how this channel is dynamically regulated. What we learned from his research project is critically important for development and application of new drugs targeting at the BK channels for many mental and neurological diseases. . . .

[The petitioner] has made the milestone discovery that brain BK channels exist in several different splicing forms and are extensively phosphorylated at multiple sites in mammalian brain. He has assembled a comprehensive and robust data set of alternative splicing isoforms and phosphorylation sites on rat brain BK channels. These data represent a gold mine of information for determining how neuronal activity is dynamically modulated by the BK channels.

When Prof. [REDACTED] wrote his letter on [REDACTED], 2007, he gave no indication that he knew the petitioner would be leaving [REDACTED] for [REDACTED] in a little over one month. Rather, Prof. [REDACTED] implied that he expected the petitioner to remain at UCD for some time, when he stated: "I am currently submitting a new NIH research grant in which [the petitioner] is a key contributor of the proposed projects."

In a [REDACTED], 2007 letter, [REDACTED] Professor [REDACTED] stated:

[The petitioner] is currently a Postdoctoral Research Fellow in Prof. [REDACTED]'s Laboratory . . . and will soon join my laboratory . . . on [REDACTED], 2007. [The petitioner] has achieved great distinction and has made many breakthroughs in his elegant research.

...

Because of [the petitioner's] outstanding research accomplishments, unique expertise and exceptional abilities, I invited him to my laboratory as a visiting scholar from Nov. 2006 to Mar. 2007 to work on a collaborative project to characterize BK channel phosphorylation electrophysiologically. . . . This seminal research work opens a road for prevention or cure of neurological diseases through intervention of the regulatory process of the BK channels. . . . Because of his excellent performance, I further invited him to formally join my laboratory to continue his pioneering research on the dynamic regulation of cellular excitability through ion channel function.

The petitioner also submitted letters from witnesses at other institutions. Professor [REDACTED] of the University of [REDACTED], is a member of the prestigious National Academy of Sciences. The record also indicates that Prof. [REDACTED] has won several significant prizes for his work, including a [REDACTED]. Prof. [REDACTED] stated:

Although I am not within [the petitioner's] circle of colleagues or acquaintances, I am well aware of [the petitioner's] research because of our mutual research interest in neuronal channel proteins. I have reviewed his documents and invited him to give an oral presentation of his seminal research work to my colleagues and lab members in my department. I was very impressed by the research works he has performed within the last few years. He has demonstrated unique expertise and exceptional accomplishments in his breakthrough research. . . .

[The petitioner] is currently at the forefront of studying ion channels to provide better solutions for drug design for prevention and cure of neurological and psychiatric diseases. . . .

His current project, focusing on BK channels, has provided intriguing and important insights as to how phosphorylation and alternative splicing of BK channels regulates excitability of neurons. . . . He has made the surprising discovery that brain BK channels are extensively phosphorylated and alternatively spliced. . . . Such findings are important to understanding the fundamental mechanisms underlying molecular regulation of electrical excitability, and are also critically helpful for the development of novel therapeutic approaches for mental and neurological disorders.

Professor [REDACTED] of [REDACTED] Medical School, [REDACTED], stated:

Although I have not personally worked with [the petitioner], I am familiar with his research because of our common area of research interest. . . .

[The petitioner's] research has been well received and lauded in the fields of membrane structure and function and membrane bioenergetics, as evidenced by more than 100 citations of his papers by other researchers in these fields. . . .

[The petitioner] has made a highly distinctive and invaluable contribution to a research field that is vital to human health and the development of sustainable and renewable energy resources.

Dr. [REDACTED], Staff Scientist at the [REDACTED] National Laboratory, [REDACTED], stated:

I have never worked with [the petitioner], and in fact I do not know him personally. My evaluation is based on his outstanding professional contributions to the field of biochemistry/biophysics in the subdiscipline that I have been specializing in. I am well-acquainted with his research because of our joint research interest in membrane proteins involved in biological energy transducing processes. I have carefully read all his research papers because of their importance to our research field, and I have cited some of his manuscripts in my own publications. . . .

Surely, the amazing number of times (100) his publications have been cited by other scientists in the last few years reinforces my personal opinion that [the petitioner] is a prominent young scientist of extraordinary scientific capabilities and outstanding accomplishments.

Professor [REDACTED] of the University of [REDACTED], stated:

Although I have no personal ties to [the petitioner], I am quite familiar with his research interest and works and scientific expertise. I first became acquainted with [the petitioner's] research during an international conference . . . while he was still a Ph.D. student at [REDACTED] University. . . .

The vast molecular complexity of mammalian brain tissue has posed tremendous technical obstacles for comprehensive proteomics analysis. [The petitioner] has worked on this problem arduously and overcame these obstacles with great expertise. . . .

As a young scientist, [the petitioner] has achieved spectacular accomplishments in the research field of membrane protein structure and function.

The petitioner identified 101 citations of his published work. About 30 of the citations are self-citations by the petitioner and/or his collaborators, leaving approximately 70 independent citations. (The AAO cannot determine the exact number of self-citations because many authors are identified only by surname and first initial, and some citing authors with common surnames may simply have similar names to those of the petitioner's co-authors.) The petitioner submitted first-hand documentation of only a handful of these citations. The citation list included the World Wide Web address for the citation database, but the site is a subscription-only site that the director and AAO cannot access.

The director denied the petition on May 6, 2008, acknowledging the petitioner's "extensive experience within the field of biochemistry and molecular biology" and "unique understanding of ion protein channels," but concluding that "the record does not persuasively establish that the work being performed by the self-petitioner could not be accomplished by a U.S. worker possessing the same minimum qualifications."

On appeal, counsel asserts that the petitioner had claimed "over 100 worldwide citations" that were not acknowledged in the director's "boiler-plate denial letter." Counsel also observes that the director did not issue a request for evidence, even though the record contained no clear evidence of ineligibility. The petitioner submits a revised citation list, showing 128 citations of his work, along with printouts from the ISI Web of Science database to corroborate the information on the new list.

Counsel further contends that the director did not give sufficient consideration to the letters in the record, several of which were from prominent, independent witnesses. Several of these witnesses had affirmed that the petitioner's large and growing number of independent citations demonstrate the petitioner's impact on his field.

We do not agree with every point raised by counsel. For instance, counsel points to an unpublished AAO decision from 2002 "finding that 16 independent citations indicate 'widespread and lasting influence' on the field, and therefore warrant a waiver of Labor Certification." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. As each decision is considered according to its own merits, the AAO has not designated any arbitrary number of independent citations as the cutoff point for waiver eligibility. A minimally-cited researcher may establish eligibility through other means. Conversely, it is conceivable that heavy citation may not suffice to compensate for other adverse or disqualifying factors. It has never been settled AAO policy to sustain the appeal of every researcher with at least sixteen independent citations to his or her credit.

Furthermore, while counsel is correct in observing that the director issued no request for evidence, the issuance of such a request is not required, pursuant to 8 C.F.R. § 103.2(b)(8)(iii). Accordingly, the director's decision not to issue a request for evidence in this case is not, itself, an error that warrants reversal of the decision.

That being said, upon consideration of the evidence presented, the AAO finds that the evidence submitted is sufficient to establish eligibility. Credible witnesses of unquestionable expertise have

attested to the petitioner's influence in his field and affirmed that the petitioner's high citation rate commands attention and respect. The director cited no countervailing factors, instead simply declaring the undescribed evidence to be inadequate.

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 evidence in the record establishes that the scientific 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, 8 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.