B2

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

[redacted]

JAN 10 2003

File: LIN 99 097 52700 Office: CALIFORNIA SERVICE CENTER Date:
WAC 01 154 52533

IN RE: Petitioner:
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

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center,[1] 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 a member of the professions holding an advanced degree. At the time of filing, the petitioner was a doctoral student and research assistant at the University of Colorado at Boulder ("UCB"). The petitioner subsequently accepted a position as a project engineer at Fugro West, Inc. 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 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

---

[1] We note that the petition was initially filed with the Nebraska Service Center, hence the "LIN" prefix on the petition's receipt number. The petitioner requested the petition's transfer to the California Service Center following the petitioner's relocation to California in late 1999.

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.

In a statement submitted with the petition, counsel asserts that the labor certification process is inappropriate in this case because the petitioner was, at that time, a research assistant, which is a temporary position not amenable to labor certification. This argument begs the question of why permanent immigration benefits are necessary for a temporary position, for which nonimmigrant visas are available. Furthermore, the temporary positions which counsel lists are, for the most part, training positions which a researcher holds at the beginning of his or her career. There is nothing intrinsic to the scientific process to preclude obtaining permanent or indefinite employment, as the very concept of tenure attests.

Counsel then argues "[t]he notion of requiring a researcher to pursue a labor certification . . . is counter-productive to the scientific process itself," because researchers frequently change jobs. Counsel argues, in effect, that scientists as a class should be exempt from the labor certification requirement. Nevertheless, the plain wording of the statute indicates that members of the professions holding advanced degrees (including scientists) as well as aliens of exceptional ability in the sciences are, generally, subject to the job offer/labor certification requirement. The Service is not in a position to "second guess" Congress by ruling that legislative error subjected

scientists to the labor certification requirement. As long as the statute's plain wording places a job offer requirement on scientists, this office lacks the authority to exempt scientists wholesale from that requirement. While some occupations may be more amenable to the national interest waiver than others, final decisions must remain at a case-by-case level.

Subsequent events have rendered moot several of counsel's arguments. The petitioner is no longer a research associate or student at UCB; he now works for a private company. Furthermore, the portability provisions of section 204(j) of the Act allow an alien to change jobs while awaiting adjustment of status, provided the new job is sufficiently similar to the original job.

The above arguments focus on peculiarities of employment in the sciences, rather than on the merits of the individual alien. Greater weight attaches to arguments specific to this petitioner. Counsel does not discuss the petitioner's specific qualifications at length, instead referring the Service to witness letters submitted with the petition.

The most detailed letter is from Dr. Dobroslav Znidarcic, the associate professor who has supervised the petitioner's doctoral work at UCB. Dr. Znidarcic states:

> For the past several years, [the petitioner] has been studying flow processes in soil and the characteristics of soft clay soils, as well as the sedimentation, consolidation, and desiccation behaviors of these materials. In particular, he has been studying these processes in the context of phosphate mining, which takes place across the United States and can radically alter the local environment surrounding a mining operation. Phosphate mining takes place over a substantial area of land and can produce significant mine tailings that must be disposed of by the mining operation. Currently, the disposal processes that are used by mining companies to ride sites of mine tailings leave the land unusable for up to 50 years. . . .
>
> In phosphate mining operations, mining companies take the mined ore that is mixed with soil . . . then mix the ore with water in order to extract the phosphate, and are left with a sludge. Presently, mining companies dump this sludge into ponds. . . . [T]he top of the sludge pond dries quickly and develops a crust that impedes the consolidation and drying of the deeper layers of the pond. . . . [The petitioner] is spearheading research in order to expedite this consolidation process so that our nation may reuse these large tracts of land within 10 to 20 years, instead of the lengthy 50 years that the process currently requires. . . .
>
> [The petitioner] has engaged in highly technical and cutting-edge scientific research. For his first objective of finding the characteristics of soil, [the petitioner] developed a computer program and a mathematical model that could simulate the behavior of many different types of soil. In addition, this mathematical model allowed [the petitioner] to experiment with a variety of

> different remedial measures. . . . [The petitioner] has already completed his work developing this computer program, and now he is striving to determine the proper methods to be used in specific dumping sites. . . . [The petitioner] has developed a plan so that if mining companies follow his specifications, they can both reduce the number of sludge ponds necessary to accommodate their needs, and can also reduce the time the needed sludge ponds take to become reusable. . . .
>
> Comparing [the petitioner] to other students with the same minimum qualifications, it is easy to see that he is far superior in that he is not just an impressive scientist but an actual engineer. . . . [He is] a scientist who can, and has, directly benefited our national interest.

Other witnesses have collaborated with the petitioner on reclamation projects in Florida and Texas, and assert that the petitioner's computer model, described above, is in use at a national level. Several of the witnesses argue that engineers in general should not be "tethered" to any one position because their services are needed throughout the country. Given that the petitioner was able to participate in projects in Florida and Texas while a graduate student in Colorado, it is not clear what constraints exist to keep an engineer from performing services in different parts of the country without changing employers.

Subsequent to the filing of the petition, the petitioner informed the Service of the petitioner's new employment with Fugro West. At the time, the petitioner did not indicate the extent to which this new employment affected the ongoing projects at UCB which had formed the original basis for the waiver request.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted additional witness letters. Timothy H. Dunne, president and principal engineer of Fugro West, states:

> Fugro collects, processes, and interprets data related to the surface and subsurface of the earth and the seabed and of the man-made structures built upon it. We use sophisticated equipment, much of it developed in-house, and software systems to support our data collection and data processing activities. . . .
>
> We sought out a person of [the petitioner's] skills and high caliber to perform a leading role in several projects. Fugro was recently hired to perform a series of geotechnical research projects for the extension of San Francisco's International Airport (SFO). . . . This project will require substantial dredging and landfill construction on soft clay material, which is [the petitioner's] area of expertise. In the past year, [the petitioner] has accomplished a great deal on the SFO project. . . .
>
> A second project on which [the petitioner] will be working is the rebuilding of the San Francisco-Oakland Bay Bridge . . . a section of [which] collapsed during the

> Loma Prieta earthquake in 1989. . . . The bridge design is now nearing completion, and Fugro's geotechnical services have included site investigation, assessment of alternative alignments and foundation systems, foundation design, earthquake engineering, and development of a full-scale pile load test program. . . .
>
> The third major project taking advantage of [the petitioner's] singular talents in the area of soft clay soils is the Pier 400 development project for the Port of Los Angeles . . . [which] represents the largest North American seaport expansion in history. . . . The land reclamation program will result in the creation of about 580 acres of new land for future harbor development. Fugro has been the primary geotechnical consultant for this project since 1990. . . . For his part, over the past year, [the petitioner] has conducted work in the areas of fill consolidation, liquefaction, and soil testing on the Port of Los Angeles project. [The petitioner's] work is crucial to the Port of Los Angeles project to meet the stringent design and construction requirement.

The petitioner's involvement with the above projects did not begin until well after the filing of the petition. If the petitioner was not already eligible when he filed the petition, subsequent developments cannot retroactively establish eligibility as of the filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. *See Matter of Izummi*, 22 I & N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Mr. Dunne, apparently acknowledging the above precedents, discusses the petitioner's "major contributions to his field during his research at the University of Colorado, at the University of Michigan, and during his work in private industry with NTH Consultants, Ltd." Mr. Dunne lists the following achievements:

- Development of renovated sedimentation/consolidation/desiccation theory, laboratory testing technique, and mathematical model of soft clay soils.
- Technical assistance to the development of dredged material testing equipment and analysis methodology for marshland regeneration in Galveston Bay for Houston Ship Channel dredging project.
- Guideline for buried pipeline stress design.
- Slope failure analysis – Grand Blanc Landfill, Grand Blanc, Michigan.
- Geotechnical analysis and design of various Type II sanitary landfills in Michigan, such as Auburn Hills, Grand Blanc, and Detroit.

Mr. Dunne states "it is readily apparent to me that [the petitioner's] abilities distinguish him from the vast majority of researchers in this field," but does not explain how the above projects set the petitioner apart from others in the field. Listing the petitioner's accomplishments does not show their significance.

Mr. Dunne observes that, when the petitioner filed the petition, "he was completing his doctoral work at the University of Colorado and did not possess a permanent job. Thus, at that time, [the petitioner] was officially ineligible for a labor certification due to the absence of a permanent job offer." Mr. Dunne acknowledges that this impediment no longer exists, but he asserts that any transfer or promotion that the petitioner receives while working for Fugro would void a labor certification and require the process to begin anew. As noted above, the subsequent amendment of section 204(j) of the Act appears to address this concern, at least in part.

Margaret H. Divine, deputy director of SFO's Airfield Development Bureau, discusses the petitioner's role in the SFO expansion project. As discussed above, the petitioner was not involved in this project when he filed the petition. Ms. Divine indicates that the project will continue until 2008. The assertion that the petitioner will be necessary on this project until 2008 appears to cancel out the argument that the petitioner should be able to change jobs or locations at will, which would necessarily remove him from the project.

The director's request for further evidence included the observation that the petitioner's initial witnesses are individuals who have worked directly with the petitioner. Dr. Dobroslav Znidarcic addresses this observation, stating that none of the witnesses "presently has a material interest in the outcome of" the petition. It does not appear to have been the director's intention to suggest deliberate bias on the part of the witnesses. Rather, the implication is that the petitioner's work does not appear to be of such impact or importance that it has attracted the interest of independent experts. Even the petitioner's new employer indicates that the University of Colorado brought the petitioner to Fugro's attention. The record contains no direct, objective, independent evidence that the petitioner's work has attracted significant attention or interest outside of the companies and entities that have employed or collaborated with the petitioner.

Dr. Znidarcic correctly asserts that the petitioner need not demonstrate that he is the single most capable engineer in his field in the entire United States. Still, the petitioner must show evidence that distinguishes him from others in the field, and such evidence should consist of objective, independent documentation rather than merely the assessments of those who have supervised or collaborated with him. For example, if the petitioner contends that he has developed a computer model that is markedly superior to previous models, the petitioner could provide evidence to show that this model is in widespread use, even at engineering firms and/or research facilities where the petitioner has never worked, thus demonstrating that the petitioner's work has propagated through its intrinsic importance.

Dr. Harold W. Olsen, editor-in-chief of the *Journal of Geotechnical and Geoenvironmental Engineering*, states that the petitioner has served as a reviewer for that journal "in 1999 and 2000." The petition was filed in mid-February 1999; there is no evidence that the petitioner had acted as a reviewer as of the filing date. The initial submission mentions no such review work. Once again we note that the petitioner's reputation, earned after the filing date, does not retroactively qualify him for a priority date that predates that reputation.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated "[t]he record in this case by and large describes rather than evaluates the petitioner's work."

On appeal, the petitioner submits a brief from counsel. The bulk of the brief is devoted to a discussion of *Matter of New York State Dept. of Transportation*; much of the remainder consists of quotations from previously submitted letters, mostly regarding work that the petitioner had not even begun until months after he filed the petition. Counsel discusses various unpublished (and therefore non-binding) decisions, but there are distinguishing factors. For example, one cited case regarding a "metallocene catalysis technology research chemist" involved an alien with a substantial track record of over 20 years of experience, whereas the petitioner in this case was still a student when he filed the petition. The record does not show that this petitioner's work is viewed as significant outside of those professors, employers and collaborators who have worked directly with the petitioner.

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.