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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 11 2003

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:

[redacted]

PUBLIC COPY

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Heyward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and the Associate Commissioner for Examinations summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

The petitioner seeks to classify the beneficiary 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 research assistant and a doctoral candidate at the Medical College of Ohio. Subsequently, the petitioner completed his studies and began postdoctoral work at Stanford University.[1] 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.

The Administrative Appeals Office, acting on behalf of the Associate Commissioner, summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v) because the record, at that time, contained no brief to set forth specific reasons for the appeal. The petitioner has demonstrated that counsel did submit a timely brief, which did not reach the record of proceeding prior to the summary dismissal.

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. --
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> > (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.
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> (B) Waiver of Job Offer.
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> > (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.

[1] As of the time of this appellate adjudication, February 2003, the petitioner is an assistant professor at Harvard Medical School.

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 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.

The petitioner's studies have involved the use of radiation therapy to treat brain cancer. Counsel indicates that the petitioner's work has focused on "three important research projects: electron beam cancer therapy, stereotactic radiosurgery for brain tumors and intensity-modulated radiation therapy."

Along with background information about his area of research, and copies of his published articles, the petitioner submits several witness letters. Professor Ayyangar M. Komanduri, chief of the Physics Division at the Medical College of Ohio, states:

> I hired [the petitioner] as a research assistant on the basis of his solid physics background and outstanding research potential in the field of radiation physics.

. . . [I]n China, [the petitioner] pursued research on problems regarding cancer radiation therapy using electron beams. His work eliminated the shortcomings of the famous Fermi-Eyges model by considering electron energy loss straggling. He developed a new electron dose calculation model which improves the treatment accuracy. . . .

In his first year in my group, [the petitioner] mainly worked with me in an important area of radiation therapy, stereotactic radiosurgery . . . [which] is an advanced modality for the treatment of small and deeply seated brain tumors which are extremely difficult or even impossible to be removed by conventional surgery. In stereotactic radiosurgery, a very high dose of radiation is delivered within a very short period of time to kill the tumor. Because the brain tumor is usually surrounded by critical healthy organs, it is extremely crucial to accurately deliver radiation to avoid damaging healthy organs. However, the required high accuracy can be hardly achieved using traditional approaches.

To solve this problem, [the petitioner] introduced a new method, Monte Carlo method, to improve the accuracy for stereotactic radiosurgery. He constructed the Monte Carlo software system and performed extensive studies on radiosurgery dosimetry using this system. Based on this software system, we developed the first Monte Carlo treatment planning system in the world for stereotactic radiosurgery. Currently, this planning system is the most accurate one; it is much more accurate than those systems used world-wide. [The petitioner's] research demonstrated that the Monte Carlo method is a powerful tool to acquire accurate dosimetry and treatment planning for stereotactic radiosurgery. Due to his efforts, Medical College of Ohio has become one of the leading groups in this important area of cancer therapy in the world. It has significant implications for the treatment of brain tumors and will greatly benefit hundreds of thousands of patients suffering from brain diseases.

The significance of [the petitioner's] work on stereotactic radiosurgery has been widely acknowledged. . . .

Another of [the petitioner's] important contributions to the field of cancer therapy is his development of a compensator based intensity-modulated radiation therapy (IMRT) system. . . . Using this technology, the radiation intensity is optimally modulated by the computer software. The result is that most radiation can be delivered to the tumor while the critical healthy organs near the tumor can be protected to the greatest degree possible. . . . It is well recognized that IMRT technology is the biggest breakthrough in the field of cancer radiation therapy since [the] 1970s. . . .

[The petitioner's] research is focused [on] developing the IMRT technology based on the compensator as opposed to DMLC. The compensator is a regular piece of radiation therapy equipment available to most cancer centers in the United States. Therefore, [the petitioner's] work will simplify the implementation of IMRT

> technology and greatly cut its cost. . . . [N]umerous hospitals will be able to use the IMRT technology at a much lower cost.

John H. Hubbell is an emeritus senior radiation physicist/consultant at the National Institute of Standards and Technology, past president of the International Radiation Physics Society ("IRPS"), and editor-in-chief of *Radiation Physics and Chemistry*. Mr. Hubbell, whose interaction with the petitioner appears to be limited to organizing IRPS meetings, praises the petitioner's "world-class work" and asserts that the petitioner "is clearly emerging as a national and international significant contributor to the field of radiation oncology." Among the remaining witnesses, some have worked closely with the petitioner, while others have encountered him only briefly in professional settings. These witnesses, located throughout the United States and not only in areas adjacent to where the petitioner has worked, concur that the petitioner is responsible for significant advances in his chosen field.

On August 17, 1998, the director requested additional evidence to establish the petitioner's eligibility. In response to the director's request, the petitioner has submitted copies of additional articles as well as a new witness letter. Dr. C.M. Charlie Ma, assistant professor at Stanford University School of Medicine, states:

> Our research is focused on the development of a DICOM RT based network server-client treatment planning system for radiation therapy. This system consists of three major parts: 1) Monte Carlo dose calculation module, 2) inverse-planning module, and 3) DICOM RT communication tools. Monte Carlo method is currently the most accurate dose calculation method. Intensity Modulated Radiation Therapy (IMRT) inverse planning is considered a revolution in the field of cancer radiation therapy. The new system is superior to all other existing systems and has the potential to greatly improve the cure rate of various cancers and to benefit millions of cancer patients in this country.
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> I have known [the petitioner] since 1995 when I taught a Monte Carlo course at Medical College of Ohio. [The petitioner] is a very talented student with clear vision, strong background and thorough knowledge of medical phsics. . . . His work on stereotactic radiosurgery using the Monte Carlo simulation technique provided the first set of accurate beam data and evidence for accurate radiosurgery treatment planning. The treatment planning optimization system he developed through his thesis work provided a useful tool to generate optimized treatment plans for IMRT and has many features superior to the only commercially available optimization system. His expertise in cancer radiation therapy makes him very valuable to our research projects. This was the major reason that I recruited him immediately after he defended his Ph.D. dissertation. He has been working in my laboratory as a key researcher since July 1, 1998.
>
> Since he joined my group, [the petitioner] has made significant contributions to our research projects. So far he has successfully conducted two research tasks. One is the electron beam modeling and commissioning for Monte Carlo treatment

> planning. . . The other project . . . is the head scatter modeling for IMRT dose calculation using a finite size pencil beam algorithm.

Because the petitioner did not begin working at Stanford until July 1998, nearly half a year after the petition's January 1998 filing date, this work cannot suffice to establish the petitioner's eligibility as of the petition's filing date. *See 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. The petitioner's work at Stanford is relevant, however, inasmuch as it demonstrates that he has continued to make contributions in the area of radiation therapy.

On December 29, 1998, the director again instructed the petitioner to submit 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 arguments from counsel, who deems the petitioner to be "a recognized expert in the area of radiation physics with a long and distinguished record of critical contributions to the field."

With regard to the labor certification procedure, counsel states that "[t]he process is lengthy, cumbersome, expensive and, it has been asserted [counsel does not specify by whom], bears no authentic relationship to the business reality inherent in testing of a labor pool for able, qualified, willing and available U.S. workers." Counsel adds that "[t]he labor certification process is a sterile procedure" that is not applicable to jobs such as the petitioner's, where "the very essence of the work is creativity, ingenuity, inventiveness, imagination, and sagacity. . . . It is respectfully suggested that the fact that in certain cases the situation is not amenable to the labor certification process is the reason that Congress provided for the National Interest Waiver."

It remains that, by law, advanced degree professionals and aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement, and that advanced degree professionals were not even eligible for the waiver in the original legislation (the statute has since been amended). The Administrative Appeals Office lacks the authority to declare that Congress made a mistake when it specifically applied the job offer/labor certification requirement to aliens working in the sciences. As long as the labor certification requirement is part of the statute, we have no discretion to disregard that requirement. The Immigration and Naturalization Service has no jurisdiction over the labor certification process itself. Arguments for reform should be directed to the Department of Labor; arguments for its outright abolition should be directed to Congress, which has the sole authority to modify or remove the requirement.

We note Congress' creation of a blanket waiver for certain physicians (the recently enacted section 203(b)(2)(B)(ii) of the Act). This amendment demonstrates that Congress did not envision blanket waivers as an integral part of the original statute; otherwise, the creation of a specific blanket waiver would have been superfluous. We will give due consideration to evidence regarding the petitioner's contributions and abilities, but for the above reasons we cannot agree with counsel's contention that the occupation itself demands a waiver.

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 that, while "[t]he letters of recommendation describe a very talented and productive researcher who shows promise of contributing in his particular field," nevertheless these letters "are in general written by [the petitioner's] professors or colleagues." The director added that "the petitioner was, at the time the petition was filed, still completing research for his doctoral thesis. He has to do research to earn his doctoral degree."

Counsel argues, on appeal, that the petitioner has made "groundbreaking, trailblazing findings." The bulk of counsel's brief consists of quotations from previously submitted witness letters. A review of these letters shows that, while some of the witnesses are indeed the petitioner's close colleagues or former professors, the record also contains strong praise for the petitioner's work from individuals who have had limited professional contact with the petitioner. In particular, we cannot lightly dismiss the statements of the editor-in-chief of an international journal, who has also served as the president of an international association. The petitioner has not submitted evidence of citation of his work, which would have been very helpful in establishing eligibility, but the petitioner has nonetheless shown that his reputation is clearly not confined to the faculty and alumni of the universities where he has worked and studied.

With regard to the director's apparent concern that the petitioner conducted research as a doctoral candidate only because a doctoral candidate "has to do research," the record amply demonstrates that neither the frequency nor the significance of the petitioner's research work has declined following the petitioner's completion of his doctorate. The petitioner's work at Stanford cannot, alone, establish eligibility because it falls after the filing date, but it can certainly show that the petitioner has continued in the direction in which he was already headed as of that date. In sum, the evidence shows that the petitioner has not merely given his professors cause to believe that he will someday make significant contributions; he has made, and continues to make, such contributions while attracting the favorable attention of experts at top research facilities.

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 above testimony, and further testimony in the record, establishes that the radiation oncology 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 previous decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

ORDER: The Associate Commissioner's decision of January 3, 2002 is withdrawn, and the petition is approved.