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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: Nebraska Service Center Date: FEB 14 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]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research physicist at Kansas State University (KSU). 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 denied the petition, finding that while the petitioner qualified for classification as a member of the professions holding an advanced degree, he did not establish that an exemption from the requirement of a job offer would be in the national interest of the United States. The director noted that the petitioner had outstanding qualifications and a credible record of achievement, but concluded that the record failed to show that the national interest would be adversely affected if a labor certification were to be required.

On appeal, the petitioner's counsel argues that the director misconstrued the level of the petitioner's accomplishments and disregarded the evidence submitted in support of a national interest waiver.

> Section 203(b) of the Act states in pertinent part that:
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> (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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 petitioner received a bachelor of science degree from Wuhan University, People's Republic of China, in 1984. He also obtained a master's degree in physics from the Hebei Semiconductor Research Institute in December 1986. The record contains an academic evaluation confirming that the petitioner possesses the U.S. equivalent of a bachelor's degree and a master's degree in physics with a specialization in semiconductor physics. He is currently employed as a graduate research assistant in the physics department at KSU. The petitioner's occupation falls within the pertinent

regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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.

We concur with the director's findings that the petitioner's occupation as a semiconductor research scientist has substantial intrinsic merit, and note that the proposed benefit of his work, improved semiconductor technology, would be national in scope. The remaining issue is whether the petitioner 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 describes his current work at KSU as conducting research in "the fabrication of group III-nitride wide bandgap semiconductors for use in opitcal [sic] devices capable of operating at high temperatures, high power levels and harsh environments."

The record includes several witness letters in support of the petition. In his first letter, Hongxing Jiang, a professor of physics at KSU, states:

> Together with Professor [redacted] we have established a highly prolific semiconductor research group in the Department of Physics at Kansas State University for the experimental investigations in materials growth, device fabrication, and optical and electrical properties of the group III-nitride wide band gap semiconductors.
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> . . . .
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> Since [the petitioner's] arrival he has been in charge of the MOCVD machine, including daily operations, system maintenance, and modification. Most recently, he has successfully constructed a new MOCVD reactor with unprecedented capabilities for III-nitride materials growth, for which we are truly impressed because there are only a few people in the world who are capable of such tasks.

Gary Wysin, an associate professor of physics at KSU, also endorses the petitioner's skills. He characterizes the petitioner as an individual with the "knowledge, special technical abilities and analytical and quantitative thinking skills to make exceptional contributions to semiconductor research, which could have a great impact on the economic and technological well-being of the United States."

[redacted] tenured professor with the KSU electrical and computer engineering department, indicates that he has collaborated with the petitioner's research group. Professor [redacted] confirms that the semiconductor group at KSU is highly regarded in the development of group III-nitride wide band gap semiconductors. He asserts that the petitioner's successful design of a new MOCVD reactor for III-nitride growth in the laboratory of [redacted] and [redacted] has "greatly strengthen [sic] the infrastructure for semiconductor research at Kansas State University," and regards the petitioner's involvement in the KSU semiconductor program as essential to its overall success.

[redacted] another tenured physics professor at KSU, endorses the sentiments expressed by the other KSU professors. His first letter describes the importance of group III-nitride wide band gap semiconductor materials research as it relates to applications for optical and electronic devices, more efficient lighting, and high-density optical storage. [redacted] notes several important contributions that the KSU research team has made to the field with findings published in various scholarly journals. Copies of some of these articles have been included with the petition by way of illustration. [redacted] states that "these achievements would not have been possible without [the petitioner's] diligent and skillful work in materials growth" and asserts that the retention of [the petitioner] is essential to their group.

Professor [redacted] and Professor [redacted] co-leaders of the KSU research team, subsequently submitted a joint letter in which they reiterated the high standing of the semiconductor research program at

Kansas State and extolled the skills of the petitioner. They asserted that their achievements were not possible without the petitioner's involvement in III-nitride materials growth and stated that "[based] on our interaction with [the petitioner] over the past 3 years, we truly believe that he is one of the best III-nitride crystal growers in the world. We were very lucky to have him in our group."

Krishan K. Bajaj, a senior professor of physics at Emory University, states:

> I am extremely interested in the optical properties of III-nitride wide bandgap semiconductors and my group collaborates very closely with the GaN group led by Professor [redacted] and Professor [redacted] I am quite familiar with [the petitioner's] work . . . . I am very impressed with [the petitioner's] MOCVD growth capability. It was quite remarkable that the AlGaN alloys he produced exhibited exciton linewidths approaching the theoretical limit. The optical data obtained from the samples [redacted] produced together with the theoretical model developed by my group have resulted a very nice publication [sic] in Applied Physics Letters, Volume 78, page 1829-1931 (2001).
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> . . . .
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> [The petitioner] who is continuing his Ph.D. work at Kansas State, is one of finest [sic] MOCVD specialists I have known. His understanding of the highly complex thermodynamic and chemical processes and his ability to produce intricate micro-sized photonics structures is unsurpassed.

All of the above letters are from the petitioner's immediate circle of colleagues, mentors, and collaborators. Witnesses close to the petitioner are certainly in the best position to describe the details and nature of the petitioner's work, and their statements are not without value. At the same time, however, if an individual's work is being praised with superlatives like "unsurpassed" or "the best III nitride crystal grower in the world," it is not unreasonable to expect such opinions to be shared and evidenced by solid recognition outside of the group that is collaborating in the semiconductor research with such an individual. While it is clear that the petitioner is regarded highly by those he works with, these accolades by themselves cannot establish that the petitioner has influenced his field as a whole.

There is no dispute that the KSU group and the petitioner are engaged in important research, as noted by the witnesses. Eligibility for the national interest waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Matter of New York State Dept. of Transportation,* at note 6.

In his initial submission, the petitioner provided evidence that he entered the U.S. as a J-1 nonimmigrant exchange visitor, subject to the two-year foreign residency requirement upon completion of his training. The record also shows that a waiver of this requirement was approved. A letter to the Department of State signed by Laura Bantz on behalf of Pierre Perrolle, Director, Division of International Programs for the National Science Foundation (NSF), written in support of the request for waiver of the two-year foreign residency requirement, was submitted in support of the petition. Ms. Bantz wrote that the petitioner is engaged in significant research, which is "in the public interest," and that a waiver of the foreign residence requirement would allow his efforts to continue. She further explained that his knowledge and skills developed more rapidly than expected and are not readily transferable to another individual, so securing a replacement would not be feasible. She also stated that the petitioner has "outstanding qualifications and possesses the training and experience necessary to continue to make a significant contribution to this important area both now and in the future."

On appeal, counsel contends that the director disregarded this independent evaluation of the petitioner's qualifications from the NSF. A waiver of the labor certification process is not mandated by the approval of the J-1 waiver request. There is no indication that the "public interest" as set forth in section 212(e) of the Act and "national interest" in section 203(b)(2) are interchangeable. We note that this testimonial did not address how the petitioner has influenced his field as a whole, or how the author became aware of the petitioner's work, rather than being the product of a solicitation from the petitioner in order to support his waiver request.

The petitioner also submits evidence that he is a member of the American Physical Society. Although counsel's initial letter accompanying the petition explains that the American Physical Society has over 40,000 members, the record contains no evidence of any requirements necessary to gain membership, and contains no evidence of the type of membership that the petitioner holds.[1] The regulation at 8 C.F.R. 204.5(k)(3)(ii)(E) provides that "memberships in professional associations" is included as one of the evidentiary criterion for an alien of exceptional ability, a classification normally requiring a labor certification. Meeting one, or two, or even the requisite three requirements for an alien of exceptional ability does not mandate that the labor certification requirement should be waived. Pursuant to *Matter of New York State Dept. of Transportation,* exceptional ability, by itself, is insufficient cause for a national interest waiver. A national interest waiver requires the alien to present a benefit greatly exceeding the "achievements and significant contributions" set forth in 8 C.F.R. 204.5(k)(3)(ii)(F) relating to exceptional ability aliens. This standard applies whether the alien seeks classification as an advanced degree professional or an alien of exceptional ability.

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[1] The internet site indicates that the APS accepts members who are graduate students, teachers, other professionals trained in physics, individuals working in related fields, and persons who are not professionally engaged in physics or related fields but whose interest and activity in the science would make them desirable members. "Fellows" must show a contribution to the advancement of physics.

Additionally, the petitioner submits copies of at least fifteen published articles that he has co-authored or of which he has been the lead author. The record contains nothing showing that the presentation or publication of one's work is rare in his field. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment."

Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner has failed to provide any evidence of independent citation of his articles.

Without evidence reflecting independent citation of his articles, we find that the petitioner has not persuasively distinguished his results from those of other researchers in the field. It can be expected that if this petitioner's published research were truly significant, it would be widely cited. His work may have yielded valuable results; however, the record fails to show that this particular petitioner's semiconductor research has attracted significant attention in the independent scientific community.

Counsel contends on appeal that the labor certification is inappropriate because the petitioner is working in a government-funded position that may not be permanent due to funding issues. We concur with the director's conclusion that the argument that government-funded scientists should be exempt as a class from the labor certification requirement is inconsistent with the plain language of the statute. While the unavailability of a U.S. employer to apply for a labor certification will be given consideration in appropriate cases, the inapplicability or unavailability of a labor certification is not sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. *Matter of New York State Dept. of Transportation* at 218, n.5.

Clearly, the petitioner's professors and collaborators have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof.

A petitioner seeking a national interest waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. The labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. It cannot suffice to simply state that the petitioner possesses useful skills, or a "unique background." The individual alien must clearly present a significant benefit to the field of endeavor, and must have already influenced his field at the time of filing the petition.

It is apparent that the petitioner's research has contributed to the overall body of knowledge in his field, but this is the goal of all such research, whether publicly or privately funded. The record does not sufficiently demonstrate, however, that this particular petitioner's work has garnered significant attention from independent researchers throughout the scientific community. Because the petitioner's occupation is generally subject to the job offer/labor certification requirement, the petitioner must sufficiently distinguish his work from that of others in the field if he is to show that he qualifies for a special exemption from that requirement.

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.