B5

U.S. Department of Justice

Immigration and Naturalization Service

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

PUBLIC COPY

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 10 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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained 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. The petitioner seeks employment as an engineer at the National Renewable Energy Laboratory ("NREL"). 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.

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 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.

Counsel states that the petitioner's "ongoing work in renewable energy" merits a national interest waiver. Counsel asserts that labor certification is unavailable because the petitioner's position at NREL is temporary, and that it would be inappropriate because the labor certification process "will chain him to the institution that has filed the labor certification, and [the petitioner] will not be able to change employers during the many years that it takes to obtain permanent resident status." The provisions of the recently added section 204(j) of the Act appear to nullify the latter argument, stating:

> A petition under subsection (a)(1)(D)[1] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

While regulations spelling out the exact procedures have yet to be promulgated, the plain language of section 204(j) of the Act allows an alien to change jobs only 180 days after applying for adjustment of status, provided the new job is comparable to the previous one.

---

[1] This should read "subsection (a)(1)(F)."

Concerning the temporary nature of the petitioner's employment at NREL, it is true that labor certification is unavailable for a temporary position, but it is equally true that nonimmigrant classifications are available for temporary employment. NREL's desire to employ the petitioner for a fixed, finite period is not grounds for a waiver. Of primary concern is the significance of the petitioner's contributions.

Along with copies of his published articles and abstracts of his conference presentations, the petitioner submits several witness letters. Dr. Kenell J. Touryan, manager of Newly Independent States Country Programs at NREL, states that the petitioner "is currently leading a number of projects supported by the Department of Energy which are of national benefit to the United States. . . . [H]e has been conducting cutting-edge research in the field of wind energy for more than ten years, and is a true leader in that field." Dr. Touryan describes several programs with which the petitioner has been involved. The petitioner served as coordinator of a program to provide and install wind turbines in Russia, and of "a smaller wind resource assessment project in the Republic of Georgia." Dr. Touryan states that the petitioner is also "a key player in . . . the Department of Energy's broad effort to decrease the risk of proliferation of nuclear weapons. The strategy of the program is to focus scientists and engineers at various weapons institutes on projects that result in successful non-weapons business opportunities." Dr. Touryan maintains "[t]his project is absolutely vital for national security and ultimately world peace," and states that the petitioner "is not simply a manager of such projects, but was selected for these roles specifically because of his outstanding expertise in wind energy." Dr. Touryan asserts that the petitioner "has led a number of important breakthroughs in the field" of wind energy technology, such as "a breakthrough design in maximizing the energy obtained by a wind turbine generator," which "is being used for the development of a new generator that can produce 40% more energy than any previous generator."

Dr. Eduard Muljadi, a senior engineer at NREL, describes two other projects that the petitioner has undertaken:

> The first is a project funded by DOE and is a project that focuses on wind electric battery charging systems. Approximately one billion people in the world do not have access to electricity. Therefore, they rely on 12-volt car batteries for their power supply. Such batteries must be charged using diesel generators which presents a number of problems. . . . [The petitioner] developed the concepts of the wind electric battery charging system. He then modeled, designed and tested a new wind powered battery charging system which not surprisingly has been highly successful. . . . As a result of [the petitioner's] work the Department of Energy has already granted a contract to a private United States company, Ascension Technologies, to build a commercial version of [the petitioner's] wind electric battery charging system. [The petitioner] continues to supervise this work. His work in this area will result in many people throughout the world having a reliable, economically available and nonpolluting energy source for their power system. . . . Currently there are pilot projects in Chile, Argentina, Indonesia and

> South Africa and more will be added when the wind electrical battery charging station is commercialized.
>
> In another project that aids those in remote areas, [the petitioner] led the development of a low cost, wind powered ice making system. This system is primarily of benefit to those in rural fishing communities. To complete this work [the petitioner] modeled and tested different system architectures and utilized his expertise to develop recommendations for the development of this system. His system is a great benefit for fish harvest preservation which is a significant problem in many rural communities worldwide.

Several executives of various private companies and an official of the U.S. Department of Energy, assert that the petitioner plays a crucial role in the above-described projects.

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 "the evidence presented does not establish that the petitioner is the primary motivator behind projects that the laboratory is continuing as part of its own mission," and rejected counsel's argument that scientists, as a class, ought to be exempt from the job offer requirement (which, by law, plainly applies to aliens working in the sciences).

Counsel asserts that the director erred by failing to issue a request for evidence in accordance with 8 CFR 103.2(b)(8). At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request. In this instance, the petitioner has not submitted any new evidence on appeal. The appeal consists entirely of a brief from counsel, containing references to the initial evidentiary submission. It is not clear what materials the petitioner would have submitted in response to a request for evidence, but that the petitioner does not consider worth submitting or even mentioning on appeal. If the petitioner had no further evidence to offer, then the director's failure to request such evidence amounts to harmless error.

Counsel correctly argues that if the petitioner is able to demonstrate persuasively that his or her contributions have been especially valuable, then eligibility for the waiver is established without further discussion as to why compliance with the job offer requirement would be detrimental to the national interest. While protection of qualified U.S. workers is in the national interest, it is also in the national interest to attract and retain proven leaders in various fields of endeavor. There is no simple, universal test to balance these two national interest factors.

Upon careful consideration of the materials in the record, we conclude that the petitioner has played a major role in a number of internationally important projects, and can rightly be deemed a leader in his field. Evidence regarding his dramatic improvement of wind turbine efficiency demonstrates that his expertise is not limited to the short-term projects for which NREL has temporarily hired him. We conclude that the petitioner is not merely following instructions

issued to him by superiors, but rather he is exercising considerable influence over not only the execution but also the direction of the projects with which he is involved. The projects, in turn, are of clear national and international importance, researching inexpensive and environmentally responsible energy sources both in developing areas and in developed but heavily polluted areas.

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 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.