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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: EAC 00 209 50002 Office: VERMONT 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, Vermont Service Center, 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 candidate at the New Jersey Institute of Technology ("NJIT"). The petitioner completed the requirements for the degree shortly before the filing of the appeal. 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 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 describes the petitioner's work:

> [The petitioner] has extensive electrical engineering research experience, specifically in microwave imaging and signal processing and space-time coded modulation, commensurate to his educational and research achievements. . . . [At] the No. 23 Institute of China AeroSpace Corporation (CASC), Beijing, . . . focusing his research on the analysis of basic Inverse Synthetic Aperture Radar (ISAR) imaging theory, motion compensation and imaging processing methods for flying targets, he developed cutting-edge computer programs for simulated radar echo data and real experimental echo data from flying targets. . . . [The petitioner] derived detailed theoretical analysis of the ISAR system and completed the development of a range fine alignment algorithm and a "CLEAN" algorithm to improve the focusing method. . . .
>
> [At NJIT, the petitioner] has been engaged in the development of Space-Time Coded Modulation (STCM) concepts in the advancement of wireless communications and the design and analysis of adaptive sequence detection algorithm for space-time coded modulation over fading channels with cochannel interference. . . .

> [The petitioner] is recognized worldwide as a leading expert in the area of electrical engineering research, specifically image and signal processing and Space-Time Coded Modulation.

The intrinsic merit of the petitioner's field of research is not in dispute, and scientific findings of this type have national applications. At issue is the third prong of the test described in *Matter of New York State Dept. of Transportation*.

Along with documentation pertaining to the petitioner's field of research, and copies of the petitioner's scholarly writings, the petitioner submits several witness letters. Several individuals who have supervised, collaborated or studied with the petitioner describe his graduate student work as "outstanding." Many of these individuals describe technical details of the petitioner's work but they do not explain why this work is of special significance in the field. NJIT Professor Kenneth Sohn states:

> Space-time processing is a promising approach for co-channel interference reduction on wireless network quality and increasing capacity of wireless communications systems. . . . [S]pace-time processing techniques improve economics and performance in the multiple access systems. As demand for new wireless services expands rapidly, the use of space-time coding in signal modulation method can make progress of updating current wireless transmission and receiving methods within limited FCC radio channel. As [the petitioner] Research result [sic], he already published many conference papers and submitted several journal papers on space-time coding scheme. I have no doubt that his ongoing research will contribute significantly to the development of this important field in our country.

Dr. Alexander M. Haimovich, the petitioner's doctoral supervisor at NJIT, states "[t]he space-time processing schemes investigated by [the petitioner] are promising new methods for increasing the performance of wireless communications." Dr. Haimovich asserts that the petitioner's "work led to new ideas for the development of new coded modulation techniques for improving the system performance." Dr. Haimovich credits the petitioner with the development of "turbo-STCM" codes which "combine the important properties of turbo coding and STCM into a unified framework. The overall effect is a significant improvement in the wireless system performance in terms of reliable high data rate transmission." Other NJIT faculty members offer similar assessments of the petitioner's work, as do some individuals who had studied for their doctorates at NJIT alongside the petitioner. These letters, however, do not constitute first-hand evidence of how the petitioner's work is regarded outside of NJIT.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. The director noted that the petitioner had not established the impact of his published articles, nor had the petitioner shown the reaction that his work had provoked outside of those researchers who had supervised or collaborated with him. In

response, counsel lists several of the petitioner's activities subsequent to the filing of the petition. If the petitioner was not already eligible at the time he filed the petition, later events cannot retroactively make him eligible as of the 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.

Furthermore, counsel's representations regarding the significance of these accomplishments are unsupported by objective documentation. For example, counsel states that the petitioner's presentation at a conference "has generated an impact on other scientists at the national level," but to support this claim, counsel cites only an independent reviewer's remarks about the presentation's "originality and timely significance." This does not show that the petitioner's findings have been of such significance that they have influenced the work undertaken by other researchers. Such impact could be demonstrated by various means, for example by showing that other researchers have heavily cited the petitioner's writings in their own research articles. As another example, counsel observes that the petitioner served on the local organizing committee of an international conference. Review of the list of committee members shows that all but three of the members are affiliated with NJIT, including several of the petitioner's professors.

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.

On appeal, counsel states that the record "clearly and convincingly" establishes the petitioner's eligibility but the only specific statement counsel makes about the petitioner is that he "is being granted his Doctor of Philosophy in Electrical Engineering." Counsel notes that the petitioner is not yet at a stage of his career where he qualifies for a permanent job offer, and therefore labor certification is not an option. It does not follow, however, that it is in the national interest to waive requirements for aliens still in training, when those requirements apply to fully trained aliens with more experience in the same field.

The petitioner submits what appears to be a complete copy of the record along with some new exhibits which, according to counsel, show that the petitioner "has continued to make significant contributions to his field of endeavor and the national interest of the United States." These exhibits include documentation regarding the petitioner's completion of his doctorate as well as new publications and presentations by the petitioner. We do not deny that these published and presented works are original and useful to the field, but the same arguably applies to every such publication and presentation, as there would be little benefit from the dissemination of unoriginal or useless findings. It remains that the petitioner has not shown that his work has had, and is therefore likely to continue to have, especially significant impact on his field. 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. Merely describing this work, or showing that it has impressed his superiors, cannot suffice in this regard.

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.