U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: EAC 00 195 52273 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]

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

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. The petitioner is a transportation engineer who, at the time of filing, worked as a postdoctoral research associate at the New Jersey Institute of Technology ("NJIT"), where the petitioner received her doctorate in 1999. She later worked there as a visiting assistant professor before accepting an assistant professorship at the University of Kentucky. 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 states that the petitioner's "pioneering research and novel development of methods in congestion mitigation have propelled her to a position as one of the leading engineers in this field."

Along with copies of her written research and background documentation pertaining to her field of research, the petitioner submits several witness letters. Dr. Lazar N. Spasovic, an assistant professor at NJIT and director of the National Center for Transportation and Industrial Productivity ("NCTIP"), was one of the petitioner's co-advisors during the petitioner's doctoral studies at NJIT. Dr. Spasovic states:

> [A]s a research associate at NJIT . . . [the petitioner] continues to make important scholarly contributions in the fields of traffic congestion mitigation and congestion pricing. Congestion pricing is a method for allocating scarce highway capacity by having drivers pay the full social cost (including the time by which they delay other drivers) when travelling during congested periods. . . .
>
> Since it is no longer realistic to build more roads in urban areas, congestion pricing has been considered as an effective way of alleviating traffic congestion. The design of a congestion pricing policy that is not only effective but also

> politically feasible has become an important issue in transportation policymaking. The NCTIP funded a research project entitled "Developing an Integrated Congestion Pricing and Traveler Information System" for advanced research on congestion pricing policy design in the context of the whole urban road network. . . . [The petitioner] was in charge of congestion pricing policy, a major component of the project. She developed a sophisticated methodology of network toll design that provides valuable decision support to policymakers. Testing on an urban roadway network has shown that the implementation of [the petitioner's] methodology can effectively reduce the total vehicle travel time by placing tolls on only a very small number of roadway links, which makes the tolling scheme politically viable. This is an important breakthrough in the design of congestion pricing policy, and has been recognized by [the petitioner's] peers in the transportation research community as a development with great potential for nationwide application. . . .
>
> In 1999, the Commission on Science and Technology of the State of New Jersey established the New Jersey Transportation Information and Decision Engineering (TIDE) Center in order to transfer research findings to transportation-related firms, and to help the development of marketable products. As a major researcher in this project, [the petitioner] is working on the real-time estimation and prediction of travel time. This is the key element in developing an Advanced Traveler Information System (ATIS), a major part of [the] Intelligent Transportation System (ITS) initiative. [The petitioner] developed a sampling strategy that provides reliable estimation and prediction of travel time based on data from instrumented vehicles only. This is a very significant study in that it provides a foundation for the future development of realistic ITS, and could potentially be applied nationwide.

Professor Louis J. Pignataro, executive director of the Institute for Transportation at NJIT, states that the petitioner's "research on congestion pricing is original and went well beyond the state-of-the-art. She developed ground-breaking concepts in the application of congestion pricing for transportation." Others who have collaborated with the petitioner or supervised her research concur that she has made significant contributions to the investigation of congestion pricing and gathering real-time congestion information.

Dr. Clifford J. Roblee, chief of Geotechnical Research at the State of California Department of Transportation, states that the petitioner was the top ranked candidate for "a new research position in 'Facility Operations Research'" but was unable to take the position "due to current Caltrans policy of not sponsoring foreign nationals for temporary working visa[s]." Dr. Roblee asserts that the petitioner's "work in the field of transportation operations is exemplary."

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 letters submitted

with the initial filing are mostly from NJIT faculty members and others who have worked closely with the petitioner.

In response, the petitioner has submitted additional background documentation as well as letters from "[i]ndependent and recognized experts and authorities in [the petitioner's] field of endeavor." Counsel states that these individuals "have no personal relations with [the petitioner]" and thus are "highly independent." The four witnesses are (1) Dr. Lazar Spasovic, identified above, who was one of the petitioner's doctoral advisors at NJIT; (2) Professor David Bernstein, now at James Madison University, who states he has "known [the petitioner] for about five years" and "supervised her dissertation research"; (3) Dr. Steven Chien, an assistant professor at NJIT, who has "been collaborating with [the petitioner] since January 1999 on a major research project," and (4) Dr. Athanassios K. Bladikas, who is director of the Interdisciplinary Program in Transportation at NJIT and therefore one of the petitioner's superiors at NJIT.

Three of these four individuals had already provided letters with the initial filing, and thus the petitioner and counsel were on notice that the director did not consider these individuals to be independent witnesses. The remaining witness, Dr. Bladikas, is the only one who does not state that he has worked directly with the petitioner, and he offers the least information about the petitioner's work. His discussion of the petitioner is limited to naming the courses that she teaches, and the assertion that she is "one of those unique individuals who can give students a solid technical foundation as well [as] practical applications, demonstrations and experiences." The bulk of Dr. Bladikas' letter is devoted to a general discussion of the Interdisciplinary Program in Transportation and how it prepares NJIT students for their subsequent careers. To the limited extent that Dr. Bladikas actually discusses the petitioner, it is in the context of her work as an instructor, a position which she did not hold at the time the petition was filed. If the petition was not already approvable at the time of filing, the petitioner's subsequent promotion to the position of visiting assistant professor cannot establish eligibility. 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.

We do not question the expertise of the witnesses, but to call them "highly independent" of the petitioner, when in fact they supervised or collaborated with her directly, is untenable. Their statements do not establish or imply that the petitioner's work has already had a significant impact outside of NJIT, the institution through which every one of these witnesses has a direct and indisputable connection with the petitioner.

Dr. Spasovic, in his new letter, states that the petitioner's "primary research effort is associated with IITC," the International Intermodal Transportation Center, which concerns the development of a "transportation system that serves the communities and residents of northern New Jersey." Dr. Spasovic states that the petitioner "is playing a leading role in the development and implementation of an ITS regional architecture for the PORTWAY, a program of transportation improvements in

the Port Newark and Newark International Airport area." He adds that the petitioner "is also a key researcher in *several* other transportation projects" (emphasis in original).

Dr. Spasovic asserts that the importance of the petitioner's work on IITC "is underscored by her designation as Principal to the IITC Working Group and Evaluation Committee of the *Freight Information Real-time System for Transport (FIRST)* sponsored by the Port Authority of New York and New Jersey." Dr. Spasovic appointed the petitioner to this post on November 27, 2000, three days before writing this letter. The petitioner did not hold the position when she filed the petition in June 2000, nor was there any indication at that time that the appointment was imminent. Pursuant to *Matter of Izumii* and *Matter of Katigbak, supra*, the petitioner's November 2000 appointment cannot establish that the petition was approvable as of June 2000.

Prof. David Bernstein states that the petitioner "is one of a handful of people focusing on ways to design toll policies that are politically feasible." Prof. Bernstein indicates that congestion pricing is not a new concept, having been under discussion at least since the early 1990s. There is no indication that the petitioner's theories with regard to congestion pricing have been implemented on a significant scale. Dr. Steven Chien states that the petitioner "has a critical role" in the NJ-TIDE project, but a letter from Prof. Bernstein, dated just two weeks later, indicates that the petitioner "was a critical member of the TIDE Center" before "she moved on to other, equally important, things,"[1] indicating that the national interest waiver, even if granted at the time, would plainly have been no guarantee that the petitioner would have continued to work on the projects which purportedly formed the basis of her claim of eligibility.

Counsel cites a biographical sketch of the petitioner from the NCTIP Annual Report for the year ending June 30, 2000. Counsel notes that the petitioner's "work is cited as '...an important breakthrough in the design of congestion pricing policy and has been recognized by her peers in the transportation research community as a development with a great potential for nationwide application.'" This wording is taken directly from Dr. Spasovic's first letter, dated February 25, 2000, several months before the report. As noted above, Dr. Spasovic is the director of NCTIP, which explains the use of his language in the NCTIP report.

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, the petitioner submits copies of every previously submitted exhibit, along with some new evidence and a short statement from counsel.

Counsel asserts on appeal that the director failed to take into account that the petitioner "has continued to make significant contributions to her field of endeavor and the national interest of the United States evidenced by her recent publications and presentations." While the petitioner has produced several published articles and conference presentations, both before and after the filing date, the record lacks objective, independent evidence to show that the petitioner's

[1] Although the petitioner continues conducting research in the same specialty, presumably the petitioner's involvement with New Jersey-specific projects ended with her move to Kentucky.

published and presented work has affected the field as a whole to a greater extent than the publications and presentations of other researchers in the field.

Dr. Spasovic, in his latest letter, states that the petitioner "has a crucial impact on the educational program in transportation at NJIT." As noted above, the petitioner was not an instructor at NJIT when the petition was filed, and her subsequent educational responsibilities would not establish eligibility in a previously-filed petition, even if the petitioner were still at NJIT (which she is not). There is no indication that NJIT had ever offered the petitioner a permanent or tenure-track position, and if NJIT only offered temporary positions to the petitioner, then her departure was inevitable.

Documentation newly submitted with the appeal indicates that the establishment of the IITC, referenced above, was announced on December 5, 2000. Materials about IITC and other projects show that the petitioner is active in her field of research, but they do not show that top transportation engineering experts outside of NJIT regard the petitioner's work as more significant or important than the work undertaken by other traffic engineers throughout the United States. We note that the petitioner's superiors and collaborators see promise in much of the petitioner's preliminary work, but attestations regarding promise are inherently speculative in nature.

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.