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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Stegmann

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 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 he filed the petition on December 18, 2000 petitioner was a post-doctoral fellow at the Geophysical Institute of the University of Alaska at Fairbanks. 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 did not dispute that the petitioner qualifies for classification as a member of the professions holding an advanced degree or exceptional ability, but noted 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) Subject to clause (ii), the Attorney General may, when the Attorney General 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.
> >
> > (ii) Physicians working in shortage areas or veterans facilities.

The petitioner obtained a PhD in atmospheric sciences from the University of Alaska at Fairbanks in December 2000. 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.

In this case, the director found that the petitioner had established that he would be employed in a area of substantial intrinsic merit, and that the proposed benefit of the employment would be national in scope. However, the director did not find that this petitioner had established that he 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.

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.

Eligibility for the waiver must rest with the alien's qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The 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. *Id.* at note 6.

The petitioner submits several witness letters in support of his petition. Dr. Knut Stamnes, professor

at the Stevens Institute of Technology in Hoboken, New Jersey and the petitioner's PhD thesis advisor, describes the petitioner and his work:

> [redacted]s one of the best students that I have mentored. He joined my group for his Ph.D. study in the fall of 1997. He obtained his Masters degree in China in 1991, and between 1991 and 1997 he worked as a research scientist in Beijing, China. During that time he also worked as a visiting scientist in NOAA/CMDL, Boulder and in Germany. Because of his research experience and his strong background in atmospheric science, physics, mathematics and data analysis, he finished his Ph.D. thesis requirements very quickly. In about three and a half years he completed all requirements for the advanced degree and successfully defended his Ph.D. thesis, which is an excellent piece of work on satellite remote sensing of the Arctic environment.
>
> Use of satellite remote sensing data to study surface and cloud properties and the radiation budget is very important for improving our understanding of cloud and sea-ice albedo feed-back in regional and global climate models. Based on an accurate and comprehensive radiative transfer model [redacted]eveloped a set of algorithms for using the National Oceanic Atmospheric Administration (NOAA) Advanced Very High Resolution Radiometer (AVHRR) data to study cloud properties and the solar radiation budget in the Arctic.
>
> ...Dr. [redacted] is a very promising young scientist with excellent training. His expertise and capabilities will greatly contribute to the area of radiative transfer and satellite remote sensing.

Professor Brenton Watkins of the University of Alaska served on the petitioner's graduate advisory committee and observes:

> [The petitioner's] work which involves clouds, solar radiation and its effect on the earth's environment is important for national efforts in weather forecasting and to quantitatively understand and predict possible global climate change. [The petitioner's] unique expertise in satellite-based remote sensing in the arctic is valuable as this has become a powerful, and cost-effective new tool for observation of the earth-atmosphere global system....[The petitioner's] contribution is important in advancing our limited knowledge of the cloud and radiation budget in the arctic.

University of Alaska Professors Antonius Otto, Shusun Li and Glenn Shaw also join in the assertions of previous witnesses and note the petitioner's academic excellence during his enrollment at the university. Additionally, the petitioner submitted brief letters from Dr. Pier P. Tans, with whom he worked at the National Oceanic and Atmospheric Administration for six months in 1995, and from Dr. Hans Papen who worked with the petitioner at the Fraunhofer Institut in Germany during the petitioner's tenure there as a visiting scientist from November 16, 1996 to February 10, 1997. These letters basically confirmed his basic duties while on these assignments.

Dr. Zhanqing Li of "Geomatics Canada" also submitted a letter describing the petitioner's work:

> In D[redacted] research, he designed an automatic cloud discrimination technique, in which he found a good method to isolate the solar radiation from the thermal radiation in 3.75 micron channel of AVHRR, and after making anisotropic correction, an easy calculated threshold function was obtained for automatic cloud discrimination over snow/ice surface.
>
> This result is promising and will make the application of satellite for monitoring the movement of surface, cloud and ocean much easier...[The petitioner's] finding of the dependence of narrow-to-broad conversion relations with the surface condition could improve the accuracy of satellite derived albedo. This improvement is important for the climate study, weather forecast and the study of atmosphere-surface interaction because albedo is a variable used widely in many models and it is a general product of many satellites. His other research results on cloud retrieval and radiation budget from satellite are also promising... Satellite remote sensing has promising future, which will need the contributions from lots of scientist like Dr. [redacted] Dr. [redacted] is uniquely trained and his ability, skill and expertise is significantly above the ordinary encountered in the sciences [sic].

It is apparent that the petitioner has excelled academically and is engaged in important research. Nevertheless, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique training or is engaged in promising research. The labor certification process exists because protecting jobs and employment opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. The 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. In this case, the petitioner's initial witness letters generally discuss the potential implications of the petitioner's work and his individual promise as a research scientist, but do not persuasively distinguish the petitioner from other competent researchers or delineate how the petitioner's accomplishments have significantly impacted his field of endeavor.

It is also noted that the petitioner's witnesses appear to be from his immediate circle of colleagues, mentors and collaborators. This does not detract from the value of their opinions, as they are in the best position to describe the details of the petitioner's work. However, the record would be more persuasive if it were supported by evidence from independent authorities' widespread recognition of or reliance upon the petitioner's accomplishments which would demonstrate that his contributions to the field are of such unusual significance as to merit a national interest waiver.

The petitioner also submits copies of several published articles which he co-authored and three co-authored articles which were submitted at the time of filing the petition in December 2000, but had not yet been published. When assessing the influence and impact that the petitioner's work has

had, the act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may establish originality, but it cannot be concluded that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Similarly, frequent citation by independent researchers can be viewed as a more accurate indication that the petitioner's work has attracted widespread interest or authoritative recognition. In this case, the record does not indicate that the presentation or publication of one's work is unusual in the petitioner's field or that independent researchers have relied upon or heavily cited the petitioner's articles.

The director requested further evidence that the petitioner has met the guidelines set forth in *Matter of New York State Department of Transportation.* In response, along with a personal statement and a copy of his academic credentials, the petitioner submitted a second letter from Dr. Pieter Tans. He also submitted a letter from Dr. Larry McMillin, a scientist employed by the NOAA and a letter from Joseph Kan, Dean of the University of Alaska Fairbanks graduate school. These letters again summarize the importance of the petitioner's work in the study of satellite remote sensing data to examine Arctic surface and cloud properties related to global climate change, and represent the sincere regard the petitioner has earned from former colleagues and university officials. However, they basically echo the petitioner's previous submissions and do not demonstrate that at the time of filing the petition, the petitioner had significantly impacted his field of endeavor.

In denying the petition, the director stated that the record indicated that the petitioner is a productive scientist, but it did not establish "that the contributions of the alien petitioner are such that they measurably exceed those of his peers at this time."

On appeal, petitioner submits a brief from counsel, copies of two previous letters submitted by Dr. Zhanquing Li and Professor Knut Stamnes, and three new witness letters. Dr. Yongxiang Hu, a senior research scientist at the NASA Langley Research Center, states that petitioner "presented his research results in several conferences and attracted attentions of many famous scientists. His fruitful scientific research experience, unusual academic record and excellent performance attest he is a distinguished research scientist with outstanding expertise in satellite remote sensing, atmospheric chemistry and climate change."

Dan Lubin, an associate research physicist at the Scripps Institution of Oceanography and past collaborator with the petitioner on previous scientific conference reports, asserts that the petitioner "first derived an algorithm to retrieve the albedo (energy reflectance) of the Arctic Ocean surface that considers the variation of surface melting during summer. The adoption of this formula in current satellite observation algorithms will provide more accurate data products that will lead to improved climate modeling simulations."

Stephen E. Schwartz, a senior scientist with the Brookhaven National Laboratory also uses virtually identical language in saying that the "adoption of [the petitioner's] formula on current satellite observation algorithms will provide a more accurate data set and improve the climate modeling simulations" and observes that "Dr [redacted] will be an asset to the climate and global change research in this country, and more broadly to the economy of this country." Dr. Schwartz does not

indicate how he became familiar with the petitioner's work.

These generalized endorsements as to the petitioner's accomplishments and projections of future worth support the argument that the petitioner has exceptional scientific ability, but do not overcome the intent of the statute that mandates the labor certification process for scientists or show with specificity that the petitioner's work was of such recognized significance at the time of filing that it had already influenced the work undertaken by other researchers.

On appeal, counsel cites a previous AAO decision approving a national interest waiver where the alien was a financial analyst. This reliance is not supported by the record. A complete picture cannot be presented without the original record or documentation. Further, the approval in question does not represent a published precedent and therefore is not binding on the Service in another proceeding.

Counsel also suggests that the labor certification process is basically flawed involving scientists like the petitioner who may change employers when a specific project ends. It should be noted that while the labor certification process requires a permanent job offer, it is equally true that nonimmigrant classifications are available for temporary employment. As is clear from the plain wording of the statute, it is 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 the national interest. Similarly, 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. Based on 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.