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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: WAC 01 017 53230 Office: CALIFORNIA SERVICE CENTER Date: JAN 15 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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]

PUBLIC COPY

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 Heyward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California 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 seeks employment as a chief scientist and engineering manager. 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 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 petition was filed on October 17, 2000. At the time of filing, the petitioner held a Master of Science degree in Microwaves and Quantum Electronics (Faculty of Engineering) from the University of London. He also had obtained a doctorate from the University of London in April 1977.[1] The record indicates that the petitioner was employed as the chief scientist of "Fibersense & Signals Inc." (Fibersense), a Canadian fiber optics company that he founded in 1984. He entered the US in 1998 as an intracompany transferee. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions

[1] The university record submitted does not indicate a PhD specialty.

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.

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 the self-employed alien will serve the national interest to a substantially greater degree than do others in same field. *Id.* at 218, n.5.

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. 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 219, n.6.

The application for the national interest waiver cannot be approved. The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part; "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the beneficiary cannot be considered for a waiver of the job offer requirement. The director's notice of denial, however, does not appear to address this omission. Below, we shall consider the merits of the petitioner's national interest claim.

In this case, the director did not dispute that this petitioner's occupation is in an area of substantial intrinsic merit. We concur with this finding. His field of endeavor in the research, development and creation of fiber optic technology and components has important and varied defense and medical applications. However, the director disagreed that the proposed benefit based on the petitioner's continued employment would be national in scope or that the petitioner had demonstrated that the national interest would be adversely affected if a labor certification were required.

We disagree with the director's determination that the proposed employment is not national in scope. The pursuit and creation of fiber optic technologies is not limited to a benefit affecting a specific local or geographic interest, but serves the interests of other areas as well. The fact that the petitioner or his company also individually benefit through these activities does not preclude a finding that the employment could impact the greater field of endeavor. The remaining issue in contention 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.

The petitioner submits various items of correspondence and documentation of purchase orders from different clients, his company's brochure, copies of US and Canadian patents, and two witness letters in support of his contention that he merits an exemption from the labor certification process. [redacted], President of "Information Gatekeepers Inc.," describes the petitioner's work:

> As President of IGI, I have known [redacted] for over 20 years, and I am aware of his work throughout this period as a professional researcher, designer and product developer of fiber optic and opto-electronic components and systems. As the General Manager and Chief Scientist of Fibersense & Signals Inc. of Toronto, Canada, he has made major contributions to the U.S. Fiber Optics industry including work on the U.S. Comanche Helicopter. He has also carried out challenging research and development. We consider that [redacted] presence in the U.S. and his continued work in the critical field of fiber optic technology would be an asset to the United States, and we would strongly support his petition for U.S. residence on these grounds.

R.J. Glandfield, industrial technology advisor for the National Research Council of Canada, also submits a letter vouching for the petitioner's background and expertise:

> The purpose of this letter is to confirm that [redacted] has been involved with the design, development and production of Fiber Optic systems for many years. I have personally known Don since 1984 when I was first involved with one of his Research and Development projects in the areas of Fiber Optic coupler design. Don has extensive knowledge of Fiber Optic components, based on many years of research and development aimed at meeting the specific needs of various clients, as well as the development of a standard line of products for commercial applications. His specialized knowledge will be a benefit to any company involved in the development and production of Fiber Optic components and systems.
>
> I have known Don to be a honest and forthright individual who takes significant pride in his technical accomplishments.

The director requested further evidence from the petitioner pursuant to the guidelines set forth in *Matter of New York State Department of Transportation.* In response, the petitioner mainly submitted additional purchase order and contract specification correspondence between Boeing and Fibersense concerning Fibersense's supply of a fiber optic coupler for use in the manufacture of combat helicopters as well as copies of the petitioner's children's educational accomplishments and an additional letter from one of the petitioner's customers [redacted] staff engineer for [redacted] stated that his company developed a laser ordnance system containing a fiber optic coupler produced by the petitioner's company:

> A critical system element is a fiber optic coupler used in the built-in-test function to determine the health of the fiber optic harness leading to the ordnance devices. PS/EMC solicited quotes for this coupler with only two responding, including [redacted] Fibersense & Signals. Don's coupler design outperformed the couplers supplied by Ipitek. Pacific Scientific was able to demonstrate, to our knowledge, the first optical built in test for laser ordnance systems with the couplers supplied by Don.
>
> Later in 1993 the GBI program was shutdown and further development efforts were suspended. However, today there is a resurgence in the use of laser ordnance systems and the technology that Don has developed since 1993 will play an important role in system design. In particular, the fiber optic switching technology developed at Fibersense & Signals Inc. is key to reducing the cost of laser initiation systems...
>
> The knowledge and experience that Don brings to the United States is not only applicable to NASA, DOE and DOD but also to the rapidly emerging fiber optic

> telecommunications industry, where new forms of switching technology is key to its' expansion [sic].

The director denied the petition, acknowledging that the petitioner is a talented and experienced engineer/researcher/entrepreneur, but finding that the petitioner's claims to a waiver of a job offer in the national interest were mostly general in nature.

On appeal, the petitioner submits a brief from counsel, copies of internet articles containing excerpts of government officials' speeches in favor of a strong missile defense system, a copy of a defense department announcement relevant to solicitation of proposals for bids to the "Terrorism Technology Support Office," copies of contract specifications for an optical splitter and four new letters from individuals attesting to successfully doing business with the petitioner and Fibersense [redacted] a member of the scientific staff at the "Innovative Science and Technology Experimentation Facility" (ISTEF), Kennedy Space Center, Florida confirms:

> [redacted] has supplied custom fiber optic devices for our project that we were unable to obtain from any other source. Our current projects center around active (laser) and passive infrared optical signature detection of boosting rockets. We have used Fibersense to fabricate custom devices used to precisely combine the local oscillator and data signals from a Doppler lidar system [redacted] and the staff at Fibersense have met our extremely challenging requirements and have developed new approaches to meet our various performance parameters.

[redacted] senior staff engineer at Honeywell FM&T and project leader on optical fiber systems research, stated that "Fibersense & Signals' drawing on the technical expertise of their [redacted] has supplied unique fiber optic devices for use in our systems that perform in a very effective manner for our demanding requirements."

Kevin J. Fleming, member of the technical staff of Sandia National Laboratories, stated:

> Fibersense & Signals company, headed by [redacted] has been a supplier of various fiber optic devices, specifically multimode fiber optic splitters. Some of the devices are complex, requiring high levels of expertise in the design and fabrication of the units. Fibersense & Signals has delivered excellent products to us, with better-than-expected output performance. I have recommended them to many of my colleagues who have used their products in weapons, energy, and nuclear stockpile surveillance programs, all of which require the highest level of quality in their associated equipment.

The petitioner's witnesses appear to be from his immediate circle of clients or colleagues. This does not detract from the validity of their opinions, as they are in the best position to evaluate the petitioner's products. However, the record would be more persuasive if it included evidence from independent authorities attesting to the impact of petitioner's accomplishments.

Counsel contends on appeal that the labor certification process is inappropriate for those (like the petitioner) occupying positions requiring creativity and inventiveness. It must be noted, however, that pursuant to statute, exceptional ability, which arguably often describes creative and inventive individuals, is not by itself, sufficient cause for a national interest waiver. The benefit the petitioner presents to obtain the national interest waiver must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F) for aliens of exceptional ability. It cannot suffice to say that an alien has useful skills or even unique abilities as a successful scientist or engineer serving the defense and space industry, as counsel suggests. Assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). These abilities must also substantially outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The petitioner's evidence must show that he has already significantly influenced his field of endeavor.

Although the record here indicates that petitioner is a talented engineer and that his company has successfully supplied custom fabricated fiber optic components to other contractors in the industry, the generalized abbreviated endorsements concerning these products' performance do not sufficiently distinguish petitioner from others in his field to the extent that an exemption from the labor certification process would be justified. We do not question the importance of petitioner's field of work or the need for development of new fiber optic technology as set forth in counsel's appellate attachments. These documents mainly support the first two prongs of the national interest waiver determination by establishing the intrinsic merit of the occupation and national scope of the proposed employment. The importance of a given project or field of endeavor, however, does not establish that the petitioner is eligible for the national interest waiver. Further, the petitioner's ability may be exceptional, but this alone is not sufficient cause for a national interest waiver.

The evidence submitted has not established that the petitioner's technological achievements are substantially more significant than that of others in the field. While some of the witness letters indicate that a contract was awarded to the petitioner because of the uniqueness of the product, notably absent from the record are evaluations from independent experts in the field, or highly placed officials from those companies with which the petitioner has conducted business, indicating how, and to what extent the petitioner's products have revolutionized or at least significantly influenced his field. Simply stating that a product could not be obtained elsewhere, or that the petitioner's device met extremely challenging requirements, as noted in the letter from Andrew Grunke, without further elaboration, does not meaningfully distinguish the petitioner's products from other available technology.

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.