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] Public Copy

11 DEC 2001

File: [redacted] Office: Texas Service Center Date:

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 which 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 which 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 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. -- The Attorney General may, when he 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.

The petitioner holds a Ph.D. in Materials Science from Washington State University (WSU). 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, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

The petitioner is currently performing research on fuel cells. Effective fuel cells could drastically reduce our reliance on fossil fuels. Such research clearly has intrinsic merit and the proposed benefits of his research would undeniably be national in scope. The record, however, does not demonstrate that the petitioner would benefit the United States to a greater extent than an available U.S. worker with the same minimum qualifications.

Dr. Allan Jacobson, Director of the Materials Research and Engineering Center at the University of Houston (MRSEC-UH) where the petitioner was employed at the time of filing, discusses the fuel cell research being conducted at the Center and its economic and environmental significance. Regarding the petitioner's work, Dr. Jacobson writes:

> Currently, [the petitioner] is conducting research with the Ceramic Membrane Laboratory of MRSEC-UH, focusing on the fabrication, the microstructural and mechanical characterization, and the determination of the electrochemical properties of ceramic membranes and solid oxide fuel cells. These tasks require [the petitioner's] abilities in employing such diverse techniques as optical microscopy, scanning electron microscopy, transmission electron microscopy, X-ray diffraction, and electron probe microanalysis. He has conducted research on different membrane and fuel cell materials including $SrC_{0.8}Fe_{0.2}O_{3-}$

> $_x$,$La_{0.8}Sr_{0.2}MnO_{3-x}$, and $La_{0.2}Sr_{0.8}Fe_{0.8}Cr_{0.2}O_{3-x}$. He has successfully developed a method to show the microstructure of these materials and to determine the grain size of a particular sample. From this research, [the petitioner] discovered that differences in the grain size strongly influence the oxygen permeability of the samples. These results have been submitted for publication and will be presented at the 1997 Materials Research Society's annual meeting in December, 1997. [The petitioner] is conducting more detailed research on oxygen permeability to understand this phenomenon, which is important to understanding the behavior of the material in service and is helpful in designing new fuel cell materials. [The petitioner's] work in mechanical characterization and materials modeling will impact greatly on the design of new membrane and fuel cell materials.

The petition was filed in October 1997. Thus, at the time of filing, the petitioner's research with MRSEC-UH had yet to be published or presented. Thus, the petitioner cannot be said to have influenced his field with this research at the time of filing. Dr. Y.L. Yang, Assistant Research Professor and collaborator of the petitioner at MRSEC-UH, provides similar information to that quoted above.

Dr. C. Howard Hamilton, the petitioner's advisor at Washington State University, writes:

> [The petitioner's] project [at WSU] was the study of the materials science, solid mechanics, and manufacturing aspects of the complex superplastic process. His main focus was on superplastic material fabrication, microstructural and mechanical characterization, and establishment of a microstructure based model to represent the mechanical behavior of superplastic materials.
>
> Among [the petitioner's] successes during his Ph.D. research was his preparation of a superplastic materials (Pb-Sn eutectic alloy). In studying the microstructural behavior of this alloy, he developed a method to show its microstructure and conducted extensive research to understand the material's mechanical behavior, which is a complex and difficult task. To my knowledge, [the petitioner] was the first person in this area to propose a mechanistic model to reflect the transient deformation behavior with Pb-Sn eutectic and aluminum alloys. His research has not only great theoretical impact, but also is important in designing the pressure profile to control the actual processing of superplastic forming. [The petitioner's] research results have been published in internationally-known journals and have been presented at materials society meetings and at the International Conference on Superplasticity in Advanced Materials (ICSAM-94), held in Moscow, Russia, reflecting the esteem in which his work has been held by his peers in the scientific community.

Dr. H.M. Zbib, an associate professor at WSU, provides similar information.

In response to a request by the director for letters from disinterested experts, the petitioner submitted three new letters. Dr. Quanxi Jia, Device Team Leader at Los Alamos National Laboratory, asserts that he knows the petitioner from his published articles and a presentation at the 1997 Materials Research Society (MRS) meeting in Boston. He writes:

> The major emphasis of [the petitioner's] research project is on development and fabrication of new oxide membrane and fuel cell materials, and analyzing their properties. By investigating the effects of the microstructure effects on the oxygen permeation and electrical conductivity of the fuel cell materials, [the petitioner] tried to establish the optimum conditions for processing the membrane and fuel cell materials. His work in ceramic membrane and fuel cell materials represents a cutting edge in this field and has raised lots of interests. His expertise in the fabrication and processing of fuel cells and his efforts to improve their electromechanical characteristics are of great significance. Since the ceramic membrane fuel cell technology involves multidisciplinary effort, it requires researchers to have multi-technological knowledge of Materials, Science and Engineering.

Dr. Liang Xue, Senior Staff Scientist at AlliedSignal, Inc., asserts that he also knows the petitioner from his articles and presentation at the 1997 MRS meeting. Dr. Xue writes that the petitioner has obtained good results in his fuel cell research and his expertise is not matched by other similar researchers in the field.

Dr. Wai Lo, Research Scientist and Staff Member at the University of Cambridge, asserts that he knows of the petitioner from his published articles and that he recently met the petitioner during a visit to the United States. Dr. Lo discusses the importance of fuel cells to the environment and states that the petitioner has a "good foundation in this important research area," that he has the potential to become a leader in the development of fuel cells, and that he has contributed to the University of Houston.

The disinterested experts praise the petitioner's research and discuss the importance of his area of research. The letters, however, do not indicate that the petitioner's work is already influential in his field. None of the disinterested experts indicate that the petitioner's research has influenced their own research. Rather, they suggest that the petitioner's work is merely promising.

The petitioner has authored five published articles. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or

research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of significant contributions; we must consider the research community's reaction to those articles. The record contains no evidence that the petitioner's articles have been widely cited by independent researchers, or even that they have been cited at all.

On appeal, counsel argues that the record demonstrates that the petitioner's expertise is unique because he has a rare combination of expertise. As stated in Matter of New York State Dept. of Transportation, supra, it cannot suffice to state that the alien possesses useful skills, or a "unique background." In addition, while counsel consistently asserts that a shortage of workers with the petitioner's skills is a consideration, Matter of New York State Dept. of Transportation specifically rejects that argument. When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise:

> would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Counsel further argues that the expertise required for the petitioner's job is so complicated that listing the qualifications on a labor certification application would be rejected by the Department of Labor as unduly restrictive. The inapplicability of the labor certification process is simply one factor to consider. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver.

A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Matter of New York State Dept. of Transportation, supra, note 6. The record does not reflect that the petitioner has such a history.

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, 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.