



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



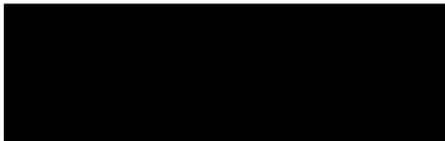
File: [Redacted] Office: Nebraska Service Center

Date: DEC 21 2001

IN RE: Petitioner: [Redacted]
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:



Public Copy

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, 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. 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 Chemical Engineering from the University of Connecticut. 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.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. Frederick Hoffstadt, Director of Research and Development, Insituform Technologies, describes the petitioner's current work:

To put [the petitioner's] distinguished qualifications and unique role in the company in perspective, I would like to give a brief description of our company's business. We are the number one company worldwide in the trenchless rehabilitation of municipal sewer pipelines and industrial pipelines. This is a very important business which has a significant impact on environmental protection, people's daily life and manufacturing industries. Much of the infrastructure in America is deteriorating at an alarming pace including that which is underground and out of sight.

* * *

Since [the petitioner] joined our company in February, he has been actively involved in evaluating the properties of composites, analyzing the causes of material failure, investigating new fillers and surface treatment processes, conducting long-term stability tests, and so on. We already knew that fillers can be used to lower the cost, increase the modulus of the composite, and reduce the shrinkage during curing. However, the composites became more brittle with the inclusion of fillers and the long-term mechanical properties dropped quickly and considerably in the moist

environment. These two problems limited greatly the application of fillers. [The petitioner's] work already showed very promising results in solving the above problems. By applying coupling agents to improve the interfacial bonding, he was able to reduce the water absorption of the composites. By using hybrid fillers, he obtained optimal balance among the modulus, elongation and cost.

Professor Emeritus Anthony DiBenedetto, the petitioner's former Ph.D. advisor at the University of Connecticut, in his letter of support describing the petitioner's doctoral research accomplishments, states:

[The petitioner] developed a novel surface treatment process to enhance interfacial adhesion between the reinforcing fibers and synthetic matrices. The resulting composite systems are considerably more resistant to hydrologic degradation than commercial materials presently available and, therefore, more durable in the human body. In my opinion, he has made a significant contribution to the area of interfacial adhesion between the reinforcing fibers and synthetic matrices, which has the potential to influence profoundly the entire field. This part of his work has been recently published in the Journal of Adhesion.

The petitioner, however, has not provided evidence that the alleged "significant contribution" has profoundly influenced the field as mentioned above. The publication of a single scholarly article is not automatic evidence of a contribution of national significance; we must consider the research community's reaction to the article. The record contains no evidence that the petitioner's article has been cited by independent researchers, or any researchers at all.

We do not dispute that the petitioner's work has yielded original results, but any accredited university would require a doctoral candidate to perform original research.

The petitioner submits various other letters, primarily from faculty members at universities where the petitioner has studied or worked. Many of these individuals say little apart from describing the petitioner's findings and asserting that the petitioner is a skilled researcher. A number of witnesses assert their confidence in the future significance of the petitioner's work; Dr. Mark Gurvich, former visiting research professor at the University of Connecticut, for instance, states "[The petitioner] has made a great contribution to this specific area of composite materials, and undoubtedly, will continue to make more in the years to come." Professor Jon Goldberg of the University of Connecticut, Shiaoguo Chen, Ren Gou-Qiang, and Professor Fungzhen Qui of China Textile University also praise the petitioner's research capabilities.

Along with the witness letters, the petitioner also submitted evidence of six research papers which he wrote or co-authored. Three of these appeared in the Journal of China Textile University, Polymeric Material Science and Engineering, and the Journal of Zhejiang University. 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Frequent citation by independent researchers demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner has failed to provide any independent researcher's citations of his work.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, counsel submitted a list of Insituform's contacts, an article appearing in Trenchless Technology in 1998 regarding Insituform's work at a nuclear power plant, a copy of the petitioner's doctoral degree in Chemical Engineering, a copy of the petitioner's membership card to the American Chemical Society, and two articles co-authored by the petitioner along with Anthony DiBenedetto which appeared in Journal of Adhesion and Wear. In regards to the two published articles, there is no evidence of citation of these articles by any independent researchers.

Counsel argues persuasively that the petitioner's field of composite engineering possesses substantial intrinsic merit, and that, the petitioner's work is, by nature, national in scope because of the universal applicability of the petitioner's research results. Counsel also contends that the petitioner's skills and contributions are at a level that justifies the waiver in this case.

Counsel offers arguments as to why the labor certification would be inappropriate in this matter. Counsel argues that the petitioner "must remain in this country to continue his groundbreaking work that is vital to United States environmental and economic concerns." Counsel adds that the labor certification process is "lengthy, cumbersome, expensive and, it has been asserted, bears no authentic relationship to business reality inherent in testing of a labor pool for able, qualified, willing and available U.S. workers to fill a specific job vacancy."

The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. Congress plainly intended that, as a matter of course, advanced degree professionals should be subject to the job offer/ labor certification requirement. The national interest waiver is not merely an option to be exercised at the discretion of the alien or his employer. Rather, it is a special, added benefit which necessarily carries with it the additional burden of demonstrating that the alien's admission will serve the national interest of the United States. It cannot suffice for the petitioner to simply enumerate the benefits of his work. To hold otherwise would eliminate the job offer requirement altogether, except for advanced-degree professionals whose work was of no demonstrable benefit to anyone.

Further, the national interest waiver does not appear to have been conceived as a means to facilitate the ongoing training of alien researchers, and the petitioner seeks an employment-based immigrant visa, rather than a student visa. It should be noted that the petitioner was still a student at the time he filed this petition; his continued participation in investigating composite materials is already covered by his nonimmigrant H-1B visa which is available to postdoctoral researchers. Therefore, his continued participation in his current project is obviously not contingent upon his obtaining permanent resident status.

The director denied the petition, stating "there is no indication that the alien petitioner is or has been the initiator or primary motivator of the projects he has been involved in." The director found that "the evidence does not demonstrate that the alien petitioner's research work has set him apart from other researchers to such an extent that he will substantially benefit prospectively the United States to a significantly greater degree than other qualified scientists engaged in research." The director noted that "while the alien petitioner is an experienced and valuable researcher, his contributions do not appear to exceed those of his peers as to substantially serve the national interest."

On appeal, counsel argues that "the decision was contrary to the weight of evidence" and "the director failed to take into account the specific contributions of the petitioner." Counsel cites witness letters previously submitted in support of the petition, and asserts that these letters demonstrate that the petitioner has made "significant and substantial contributions to the field." Counsel argues that these letters demonstrate the petitioner's "initiative, creativity, and ingenuity throughout his research career."

The record does not support counsel's conclusions. The petitioner has established that his expertise made him a valuable asset to the research team at the University of Connecticut and Insituform Technologies, but the record does not demonstrate that he is responsible for especially significant progress in the research and development of composite materials. The petitioner has not established that his research, to date, has consistently attracted significant attention outside of the University of Connecticut or Insituform Technologies. All of the witnesses provided by the petitioner are former professors, fellow alumni, co-workers, or collaborators on the petitioner's research projects or from universities attended by the petitioner. The petitioner's skills and familiarity with different aspects of composite engineering, while useful to his research institutions, does not appear to represent a national interest issue.

On appeal, the petitioner submits four research memoranda that he prepared at Insituform dated July 22, 1998; January 6, 1999; June 15, 1999 and July 23, 1999. Three of these memoranda were prepared subsequent to the filing of the Form I-140 on September 8, 1998. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

The memorandum dated July 22, 1998 addresses methods of improving the long term mechanical properties and reducing the material cost of fillers for polyester resin. This memorandum reflects

the normal job duties expected of a composite engineer, rather than a benefit to the national interest which qualifies him for a national interest waiver.

While the Service recognizes the importance of developing composite engineering technologies, 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.

The issue in this case is not whether the development of improved methods of composite engineering are in the national interest, but rather whether this particular petitioner, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role. There is no indication that researchers outside of the petitioner's universities and employers consider his work to be of greater significance than that of other researchers. Rather, many key witnesses have couched their remarks not in terms of what the petitioner has done, but what he is likely to achieve at some unspecified future point. While the petitioner certainly need not establish national fame as a researcher, the claim that his research is especially significant would benefit greatly from evidence that it has attracted significant attention outside of his research group.

At 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 he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in the field of composite engineering, we must find that the petitioner's assertion of prospective national benefit is speculative at best.

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.

ORDER: The appeal is dismissed.