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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: [redacted] Office: Texas Service Center Date: JUL 12 2001

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, Acting 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. from the University of South Carolina. 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's academic experience in computer science and applied mathematics included research involving wavelet theory and application. The petitioner has applied his research, funded by the Department of the Navy, Office of Naval Research, to the compression and transfer of digital images, an application useful to the United States military. The petitioner submitted copies of his published articles and presentations and reference letters. On June 25, 1999, the director requested additional documentation. In response, the petitioner submitted more reference letters. While the director conceded the petitioner's area of expertise was in an area of intrinsic merit and that the benefit was national in scope, the director concluded that the petitioner would not benefit the national interest to a substantially greater degree than a similarly qualified U.S. worker. On appeal, counsel quotes extensively from previously submitted letters and argues that the petitioner's unique expertise, a shortage of workers with similar skills and the contributions made by the petitioner already warrant a waiver in the national interest.

The record includes evidence of the petitioner's dissertation, three published articles, and two presentations. 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

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Service's position that publication of scholarly articles is not automatically evidence of substantial contributions or notoriety; we must consider the research community's reaction to those articles. The record contains no evidence that the petitioner's articles have been cited by independent researchers.

[redacted] CEO of Summus, Ltd., the petitioner's current employer and a professor at the University of South Carolina states:

> [The petitioner's] work as a Graduate Research Associate, encompassed the study of wavelet-based image compression schemes as well as error protection and detection methods. While he was a Research Assistant, he developed new compression techniques for one and two-dimensional signals using non-uniform representations of the signals.
>
> . . .
>
> At Summus Ltd., [the petitioner] has been an integral part of our research team. His primary responsibility is to formulate new and exciting wavelet-based techniques for the compression, retrieval, representation and transmission of digital video and image. Currently, he is leading a project whose objective is to transmit high-quality video over low-bandwidth channels.
>
> . . .
>
> Summus Ltd. is currently working on two contracts with the Office of Naval Research and [the petitioner] is part of both teams. The primary focus of the first contract is on the efficient and reliable transmission of video and image information from battlefield using advanced mathematical procedures. . . . The goal of the second contract is to form new technologies that facilitate rapid access and response to battlefield information from the video and image sensors. Both contracts are aimed towards improving the response time to enemy threat as well as the accuracy of counter attack. We will be taking the first steps to enable unmanned, remotely controlled combat and surveillance air vehicles, thereby reducing the threat to life in the battlefield.
>
> . . .
>
> [The petitioner's] unique training and intellectual excellence are essential qualities for the research and development work being conducted at Summus Ltd.; studies that positively affect the birth of new digital video and image technologies in the United States of America.

In a subsequent letter [redacted]

 [redacted]

[The petitioner] is slotted to participate in a contract with Sonetech Corporation. The goal is to develop target classification and sonar target visualization software. . . . [The petitioner's] expertise will be required in the second stage when target classification algorithms and software based on the distinctive feature set is developed and in the final stage when the visualization software is developed.

. . .

In summary, [the petitioner] is a highly qualified researcher with enormous potential and promise. His training in both mathematics and computer science allows him to move easily between the fields of wavelet theory and digital image processing, a rare combination in this age of specialization. His unique training and intellectual excellence are essential qualities for the research and development work being conducted at Summus Ltd.; studies that positively affect the birth of new digital video and image technologies in the United States of America. . . . There are only a handful of researchers with his expertise and experience in wavelet-based digital video and image processing.

[redacted] Vice President of Summus reiterates much of the above and asserts:

It would be difficult to find a researcher that would strengthen the research capability of Summus Ltd. and who has the same combination of skills, abilities, experience, and academic adaptability as [the petitioner].

[redacted] the petitioner's dissertation advisor now working for Procter and Gamble states:

[The petitioner] has a unique background of training in both mathematics and computer science that allows him to take abstract (and oftentimes abstruse) mathematical wavelet theory and turn it into concrete, practical algorithms. One rarely finds this combination in a single individual.

. . .

Much of the research [the petitioner] performed while he was my student was driven (and paid for) by the military, who view the very low bandwidth video compression provided by advanced technologies such as wavelets as critical elements of the so-called digital battlefield. In the commercial sector, these same technologies are key enablers of the exciting new multimedia applications that are beginning to appear in the telecommunications market. [The petitioner] has made significant contributions to the commercial and defense research conducted at Summus as their lead scientist for video compression, which has in turn strengthened the economic and military capabilities of the United States.

The remaining letters from who collaborated with the petitioner at the University of South Carolina and William Mathers, the Vice President for Government Business Development at Summus, simply reiterate the assertions quoted above.

The assertion made by several of the references that few computer scientists have mathematical training or experience is not supported by the record. Regardless, 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.

The cases cited by counsel which appear to refer to the significance of labor shortages are not precedent decisions and, thus, are not binding.

It remains, while the petitioner's colleagues assert the petitioner has international notoriety and has made significant contributions to the field, the record contains little support for those assertions. While letters from peers who have worked with the petitioner are useful in explaining the petitioner's work, they must be supported by some independent evidence of the petitioner's contributions to the field in general. As stated above, while the petitioner has published a limited number of articles, the record contains no evidence that the articles are widely cited, or even cited at all. The only letters from a seemingly independent source are two letters from a scientist with the Office of Naval Research.

states in his latter, more detailed letter:

> I am the scientist at the Office of Naval Research (ONR) most concerned with advance image processing. . . . [The petitioner] has significantly contributed to several past and present projects for ONR at both the University of South Carolina and Summus, Ltd. . . . Some of his work is now being pursued at Naval Laboratories and will very likely become a part of future Navy weapons.

The letter appears to represent personal appraisal of a project which he personally oversees, and not the opinion of the United States Navy. Furthermore, it can be argued that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. Along the same lines, most research funded by ONR is likely to become a part of future Navy weapons. It does not follow that every researcher working with a government grant or whose research is pooled with other research in the final development of military weapons

inherently serves the national interest to an extent which justifies a waiver of the job offer requirement.

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.