



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

PUBLIC COPY



File: EAC-99-113-50770 Office: Vermont Service Center Date: 15 NOV 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:
[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, Vermont 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 an alien of exceptional ability. 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. Despite the fact that the petitioner had not received an advanced degree at the time of filing, the director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree. The director further concluded, however, 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.

As stated above, the director concluded that the petitioner qualified as an advanced degree professional. On the Form ETA-750B, the petitioner indicated that he had obtained a Bachelor's Degree from the University of Science and Technology of China, had participated in a Master's Program at that institution, and had "earned" a Ph.D. from the University of Minnesota in December 1998 which would be "issued" in May 1999. The petitioner submitted his diploma for his Bachelor's Degree and a verification that he attended a Master's Program from 1992 to 1994 at the University of Science and Technology of China. The petition was filed February 19, 1999. The record as a whole, including subsequent submissions by the petitioner and the appeal, does not include a diploma or an academic record indicating that the petitioner had completed his Ph.D. requirements as of February 19, 1999. In fact, his Curriculum Vitae, submitted in response to the director's request for additional documentation, indicates that he did not obtain his Ph.D. until September 1999, several months after the date of filing.

8 C.F.R. 204.5(k)(2) provides that a bachelor's degree or the equivalent "followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." The Form ETA-750B does not indicate that the petitioner had five years of progressive employment experience at the time of filing. Thus, the petitioner did not qualify as an advanced degree professional at the time of filing.

The petitioner apparently seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." While counsel states in the conclusion of her initial brief that the petitioner "is an individual of exceptional ability," nowhere in her brief does she address how the petitioner meets the regulatory requirements. As such, we will address all six of the criteria below.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

At the time of filing, the petitioner only had a bachelor's degree. Each criterion must be evaluated in terms of whether the evidence demonstrates exceptional ability. A bachelor's degree in mechanical engineering is not evidence of exceptional ability in that field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner does not claim to have 10 years of full-time experience on the Form ETA-750B and does not submit employer letters as evidence of such employment.

A license to practice the profession or certification for a particular profession or occupation

The petitioner lists no licenses on his Form ETA-750 and the record contains no evidence of any licenses.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The record contains no evidence of the petitioner's salary in comparison to others in his field.

Evidence of membership in professional associations

On his Curriculum Vitae, the petitioner indicated that he was a member of the International Society of Coating Science and Technology, the Society of Imaging Science and Technology, and a 1997-1998 Board Member of the Friendship Association of Chinese Students/Scholars. The record contains no evidence of the petitioner's membership in these associations.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record contains no evidence, other than letters, that the petitioner has contributed to his field. These letters will be discussed in more detail below. Solicited letters in support of the petition, however, are not evidence of recognition prior to the preparation of evidence for the petition.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

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 a research engineer, an area with intrinsic merit. The director concluded that the petitioner would only benefit his employer, Eastman Kodak, and would not benefit the national interest as a whole. On appeal, counsel argues that Kodak is involved in imaging projects sponsored by the government and that the petitioner's work with coatings is applicable to the publishing and entertainment industries. As will be discussed below, the record does not demonstrate that the petitioner's work has influenced his field nationally. Nor is it clear that the petitioner's work with coatings will be relevant to Kodak's government projects. Finally, while the petitioner's work might be relevant to other industries, it is not clear that he will actually be benefiting those industries by working for Kodak. Regardless, the petitioner does not meet the third prong, as will be discussed below.

Lorraine Francis, Associate Professor at the University of Minnesota, asserts that the petitioner developed a model for the drying and stress development of coatings prepared from liquid solutions of polymer, stating:

For example, [the petitioner] realized that to truly represent the solidification process properly, he should include fluid mechanics in addition to solid mechanics to his model. Connecting these two was a challenge, but proved to make his model even more applicable to a new set of problems involving flow and stress. He also participates in collaborative research activities very well. Through his participation in the Coating Process Fundamentals Program in the Center for Interfacial Engineering and at the University of Minnesota, [the petitioner] has kept his research in line with the needs of the coating industry while retaining the rigorous scientific standards.

Dr. Herb Huang, a principal engineer at Western Digital Corp., who collaborated with the petitioner in an industry-university project, writes:

Stress development and failure analysis of advanced polymer thin film materials, widely used in many key industrial areas, and their correlation to the sophisticated material processes require a quantum leap in the theoretical and technological development from the conventional visible, bulk manufacturing process to the invisible, microscopic fabrication process, challenging many industrial and academic researches [sic] world wide. However, those microscopic phenomena such as residual process stress and its intrinsic linkage to various mechanical failures, are often vitally critical to their functionality and reliability issues, not just

to the understanding and correlation to process. What [the petitioner] has been substantially working on is technically critical to this regard, particularly in the area of ultra thin polymer coatings, widely used in many of those technology fields such as photographic films. There, [the petitioner] has successfully developed a unique theoretical framework, by integrating the polymeric diffusion, visco-plasticity and J-integral theories, and eventually revealed fundamental link of polymeric coating material's chemical processes of solidification at molecular levels to the coating's macroscopic stress and failure. This level of comprehension was unprecedented in this scientific field in understanding and quantification of the critical stress development process of generic polymer thin films during solidification process, as well as films' various failure mechanisms. Extraordinary marks were also made in contracting those theoretical achievements to experimental demonstration and correlation in thoroughly scientific sophistication, which paved the critical road towards a broad industrial application.

William Gerberich, a professor at the University of Minnesota, indicates that the petitioner has merged three fields: fluid mechanics, fracture mechanics, and continuum mechanics to the complex phenomena of drying coatings which has captured the attention of the film and coating processing industries.

Jilin Yu, Vice Dean of the Graduate School of the University of Science and Technology of China, writes of the petitioner's work at the Laboratory of Material Dynamics:

[The petitioner] had been researching the dynamic properties of depleted uranium alloys under dynamic compression at various strain rates, using the apparatus of Hopkinson Compressive Bar. The purpose of those experiments is to measure mechanical properties of uranium alloys under high speed impact, and to provide the degree of damage to the alloy at different impact speed.

Professor Yu further states that the petitioner's undergraduate thesis involved developing a "method for predicting when the micro-cracks in the structure will propagate and cause severe damage," crucial to the design of airplanes engines and ship structures. The petitioner's graduate research continued in the same area, resulting in a published paper.

The petitioner's senior advisor, Professor L.E. Scriven, asserts that the petitioner's Ph.D. thesis involved "landmark" research concerning stress in coatings which was "critically acclaimed," at the prestigious Tenth International Symposium on Coating Science and Technology. Collaborator Dr. Jason Payne echoes these sentiments.

Kevin Cole, Senior Engineer at the Eastman Kodak Company, where the petitioner is currently employed, asserts that the petitioner provided important assistance in his film winding project, resulting in a unique simulation model. Zig Hakiel, Director of Media Handling Technology Unit at Kodak, asserts that the film winding project was aimed at examining air wound in with the film which can adversely effect the integrity of the roll. Mr. Hakiel continues:

This involved developing a numerical solution to the equations, which describe the air entrainment phenomenon, and writing a computer code to implement the solution. This model is being used to optimize manufacturing conditions and reduce manufacturing costs, which has significant economic value for Eastman Kodak Company and the United States of America.

The above letters are all from collaborators, supervisors, and professors. The petitioner has not provided any letters from independent experts or other evidence that his models are influential beyond his own circle of colleagues.

At the time of filing, the petitioner had authored articles published in one journal, two University Reviews, and two conference proceedings, with another article not yet published at the time of filing. 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 major contributions; we must consider the research community's reaction to those articles. The record contains no evidence that his articles have been widely cited (or even cited at all) or other evidence that the articles have been influential.

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.