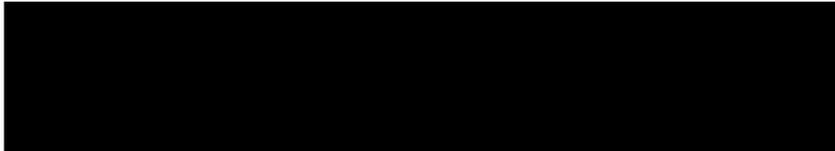




U.S. Department of Justice
Immigration and Naturalization Service

B5

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



File: [Redacted] Office: Vermont Service Center Date: NOV 20 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]

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 E. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner seeks to classify the beneficiary 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 to employ the beneficiary as a research scientist supervisor. 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 beneficiary 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. The Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, concurred. On motion, counsel argues that the beneficiary's models are far above other statistical models used nationally and that the lengthy labor certification process is superfluous.

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 Economics from the City University of New York (CUNY). 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.

In support of the petition, the petitioner submitted the beneficiary's degrees in economics; a certificate issued by the United States Department of Health and Human Services certifying the beneficiary's completion of a training program in vital statistics; a press release, related New York Times article, and an article from *Morbidity and Mortality Weekly Report* regarding the results of a study reflecting a reduction of AIDS deaths in New York City in 1996 in which the beneficiary participated; two non-health related economic papers co-authored by the beneficiary, one of which was published in the *Business Research Yearbook*; and letters of recommendation from collaborators, employers and professors, including then Director of Congressional Budget Office, June E. O'Neill, previously the Director of the Center for Study of Business and Government at CUNY.

On September 29, 1998, the director requested a personal statement from the beneficiary and additional documentation demonstrating that the beneficiary's impact would be national and that the beneficiary would play a significant role in his field. Finally, the director stated that if an exemption from the labor certification requirement were in the national interest, documentation

from U.S. experts, established institutions, and appropriate governmental agencies would be available.

In response, the petitioner submitted information regarding the importance of analyzing vital statistics; a letter from Mary Anne Freedman, Director of the Division of Vital Statistics at the National Center for Health Statistics regarding the importance of the statistics provided by New York City; a letter from the beneficiary discussing his involvement in research projects; numerous articles discussing the AIDS research study in which the beneficiary was involved; a program from the 12th World AIDS Conference listing the beneficiary's poster session; a November 24, 1998 letter addressed to Dr. Mary Ann Chiasson accepting the AIDS study for publication in the *Journal of Acquired Immune Deficiency Syndromes and Human Retrovirology*; a new reference letter jointly signed by Dr. Theodore Joyce and Andrew Racine, collaborators of the beneficiary, who discuss the beneficiary's role in their study on New York infant mortality allegedly published in *Pediatrics* in 1998; a copy of the infant mortality article which contains no evidence of publication in *Pediatrics*; and a letter from Mary Ann Chiasson, Assistant Commissioner of the New York Department of Health and co-author of the above mentioned AIDS study, praising the beneficiary's analysis of the data used in that study.

The director concluded that the record included no evidence that the beneficiary's statistical methods were better than those used by other research teams analyzing vital statistics and that the beneficiary's skills could be articulated on a labor certification application. On appeal, counsel contested the director's conclusions and submitted a copy of an e-mail message sent from Jing Fang to the beneficiary containing an article-like analysis of income inequality and infant mortality by zip code in New York City, complete with a title and list of authors. There is no indication this "article" was ever published. The list of names, apparently the authors of the analysis, includes Mr. Fang but not the beneficiary. Mr. Fang does not indicate in his message that he adopted the beneficiary's methods for this analysis nor does the e-mail message include any citations. Finally, counsel argues that the director erred in relying on Matter of New York State Dept. of Transportation, *supra*, and submits an article from *Interpreter Releases* which criticizes the decision.

The AAO concluded that the petitioner had not demonstrated that the beneficiary would substantially benefit the United States to a greater extent than that contemplated by the definition of exceptional ability, a classification normally requiring a labor certificate. The AAO did not address counsel's critique of Matter of New York State Dept. of Transportation, and counsel does not raise this argument again on motion. We simply note that, by law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. Counsel has not demonstrated that either Congress¹ or any other competent authority has overturned the precedent decision, and counsel's

¹ Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further

disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

On motion, counsel argues once again that the beneficiary's models are "far above other statistical models that are being put to use on a national basis." The petitioner submits evidence that the beneficiary has received raises and his performance appraisal. The performance appraisal indicates that the beneficiary overall consistently meets expectations, consistently exceeds expectations only with regard to collaborating with research projects, developing reports, being a team player and dealing with outside agencies, and is an asset to the petitioner corporation. Counsel also argues that the labor certification process is too lengthy and unnecessary as counsel has personally gone through the process with another statistician.

The record still remains absent evidence that the beneficiary has truly influenced his field as a whole. Nearly all of the letters are from collaborators or professors. The only independent letters refer to the importance of obtaining data from New York City due to its unique population and position as a designated entity which reports straight to the Federal Government instead of going through the state first. It is acknowledged that the AIDS study garnered much national and international attention in the press. The notoriety, however, was based on the reduction in AIDS deaths demonstrated by the study, not the statistical methods used to obtain the results. The record contains no evidence that other states or jurisdictions are considering adopting the beneficiary's methods. The e-mail from Mr. Fang discussed above is simply not evidence that the beneficiary's methods are influential in his field.

Much of the record is devoted to demonstrating the importance of analyzing vital statistics, especially in New York City. 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. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought.

Finally, we do not find counsel's argument regarding the superfluous and time-consuming nature of the labor certification process persuasive. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Further, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

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,

in response to the precedent decision.

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. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of January 31, 2000 is affirmed. The petition is denied.