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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: Nebraska Service Center Date: 29 NOV 2001

IN RE: Petitioner: [redacted]
Beneficiary:

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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

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 did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree but found 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. --
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> > (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 director did not contest that the petitioner was an advanced degree professional. The petitioner claims to holds a Master's degree in Engineering Mechanics from the University of Alabama. That degree, however, is not in the record. Instead, the petitioner submits a letter from his professor at the University of Cincinnati asserting that the petitioner had completed all the candidacy requirements for his Ph.D. and was currently working on the research for his dissertation. Thus, at the time the petitioner filed the petition, he had not yet received his Ph.D. As the director did not contest this issue and the petitioner could easily overcome it on motion by providing evidence that he received his Master's degree in 1992 as claimed, we will also examine whether the petitioner has demonstrated that the waiver of the labor certification requirement 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 an engineer engaged in the research and development of biomedical devices. The director concluded that since the petitioner is working for a private company which controls the dissemination of the petitioner's work, his work did not have intrinsic merit and the proposed benefits of his research would not have a national impact. These conclusions were in error. Research and development of biomedical devices has intrinsic merit. Moreover, the fact that biomedical devices useful to the medical profession are being developed by a private company does not negate the national impact of the work itself. A private company would not develop medical devices it did not plan to sell to the medical establishment. The fact that the company is in the business for profit does not mean that its discoveries do not have the potential to benefit the nation as a whole. In addition, the petitioner's current position involves consulting with other private businesses to assist them in their own research and product development. Thus, it remains to determine whether the petitioner has established that he will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Dr. Douglas L. Marriott, Principal and Staff Consultant for Stress Engineering Services, Inc. (SES) where the petitioner is employed, writes:

> [The petitioner's] main value, and one which makes him indispensable, is that he has expertise in three related fields, any one of which would qualify him as an expert. These are, nonlinear material characterization, advanced computer methods of structural analysis including experience in a method of particular value in engineering known as "finite element analysis," and in biomedical engineering. This combination of skills has placed him on a track toward being one of a very few people in the USA who are able to bring advanced understanding of materials and mechanics to bear on critical surgical procedures, such as angioplasty, internal prosthetics and closing of wounds and vessels. For example, computer simulations he has developed of the insertion and inflation of a balloon angioplastic catheter has provided suppliers of the device, and surgeons, with a clearer understanding of the process, which would be impossible to gain any other way, and is an invaluable contribution to improving this life saving surgical technique.

Clinton Hayes, Vice President of SES, indicates that he recruited the petitioner to help launch a new branch of SES to focus on increasing the safety of implants while reducing new product development costs using predictive performance analysis and optimization using Finite Element Analysis (FEA.) Mr. Hayes discusses the petitioner's "ground breaking" work on aortic stents and blow molding simulation and asserts that he has saved SES hundreds of thousands of dollars and established SES as a leader in the industry. Dr. Christopher J. Matice, a principal at SES, provides similar accolades. Kenneth Waeber at SES asserts that the petitioner was instrumental in the development of two new plastic beverage bottle designs.

As evidence that the petitioner's skills are recognized by the clients served by SES, the petitioner submits letters from Dr. Carol Jaeger Wynn and Ronald Wanless with Procter and Gamble to David Tekamp at SES. The letters praise the petitioner's work with virtual analyses and development methods. On appeal, the petitioner submits copies of a 1997 plaque awarded to the petitioner from Procter and Gamble "in recognition of your breakthrough contribution to the application of engineering technology," and a 1995 plaque awarded by the North American Soap Sector of Procter and Gamble recognizing the petitioner for his contribution to the "lattice network."

Dr. Arindam Datta, a senior scientist at Johnson and Johnson Corporate Biomaterials Center, indicates that he knows the petitioner through a "mutual association" in a research project. Dr. Datta writes of the petitioner's work at SES:

> [The petitioner's] ongoing work at Stress Engineering in the development of computer simulations of the behavior of absorbable polymers as well as healing body tissue will greatly impact the efforts of the US Medical Device Industry towards the development of such novel materials and implants. [The petitioner's] research on cell based therapies and absorbable polymer materials will eventually lead to the development of implants which will not experience such wear and failure problems.

Dr. David Butler, a professor at the University of Cincinnati, writes:

> [The petitioner] has worked closely with me for the past 5 to 6 years to provide support for our grants and grant proposals to national funding agencies. [The petitioner] performed both experimental and computational studies in support of tendon and ligament research proposed and funded by the National Institutes of Health (allograft replacement, healing and aging) and the National Science Foundation. These pilot and larger studies included in vitro and in vivo measurements of tissue forces and tissue properties and the development of implantable sensors to measure forces. His energetic contributions were instrumental to our receiving funding and completing the proposed work.

Dr. Gregory P. Boivin, another professor at the University of Cincinnati elaborates on the petitioner's work at that institution:

> [The petitioner's] specific role in this project relates to the development of a computer simulation of the loading on a tendon-a soft tissue which attaches muscle to bone and transmits tensile forces. His responsibility is to use experimentally generated data on the tendon geometry, structure, and mechanical properties to develop an accurate analytical/computer simulation of the load distribution in the tendon. The simulation model being developed by [the petitioner] is currently the only means of determining this load distribution, since any other experimental method (e.g. using a force sensor) would require surgical intervention and result in tissue damage.

Dr. Prasanna Malaviya, a research fellow at the Georgia Institute of Technology who collaborated with the petitioner at the University of Cincinnati, writes:

> The initial thrust of [the petitioner's] research was to study the biomechanical behavior of soft biological tissues such as ligaments and tendons, especially the anterior curciate ligament (ACL). [The petitioner's] interest in studying the ACL stemmed from the fact that it is the most frequently injured soft tissue structure in the knee joint. It is the primary structure providing stability to the knee joint during locomotion, and it's rupture, which happens quite frequently when the knee is exposed to high loads, can cause debilitating results in the patient. [The petitioner's] project, which involved understanding the mechanics of ACL behavior and assessing the performance of various ACL repair strategies, under different knee joint loading conditions, is at the cutting edge of orthopaedic biomechanics research. In the course of his research, [the petitioner] designed and conducted a number of very novel experiments to compare the performance of intact ACLs to ACL replacement grafts which had been treated with radiation to sterilize them before implantation in the injured knee joint. His research work

> showed, for the first time, the deleterious effects of using high doses of radiation on the mechanical performance of ACL replacement grafts.
>
> . . . [The petitioner's] exceptional experimental and computer modeling work in [the study of mechanical forces on normal and healing soft tissue] has provided new insights into how mechanical forces modulate the cascade of cellular processes which are initiated after a tissue injury.

Dr. William K. Rule, a professor at the University of Alabama, discusses the beneficiary's academic performance at that institution in general terms.

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 she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. It cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. 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 only letters in the record are from professors, co-workers, collaborators, and clients of the petitioner's employer. These letters alone, while useful in detailing the petitioner's work, cannot establish that the petitioner has influenced his field as a whole.

At the time of filing, the petitioner had authored two technical reports, authored one published article in a journal, and allegedly presented his work at nine professional conferences. The record reveals that five of these presentations were published in the proceedings of those conferences. 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 petitioner has provided no evidence that his published articles in journals and conference proceedings have been cited by independent researchers.

The petitioner is also a member of the ASME Bioengineering Division's Standards Committee for the development for biomechanical devices and implants. According to Dr. Peter Torzilli, the Chair of the Committee, the petitioner will be helping to develop/define applicable standards that

can be used to evaluate the mechanical function of implantable medical devices being developed in the United States by different biomedical companies. Dr. Torzilli, however, does not indicate the number of individuals on this committee or how they were selected.

The record contains little in the way of specific evidence to show what major improvements the petitioner has wrought in his field of endeavor. While the petitioner has published useful research and applied for two patents, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research which did not add to the general pool of knowledge in the field. Similarly, it is not clear that everyone who holds a patent for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. Moreover, some of the petitioner's research has nothing to do with biomedical devices, the area of prospective benefit claimed by the petitioner. One of the Procter and Gamble plaques is from the North American Soap Sector and the petitioner's patent applications are for the design of two beverage containers.

On appeal, the petitioner alleges that the Service has approved a national interest waiver petition for one of his assistants. The facts of that petition are unknown; the petition could have other favorable factors or have been approved in error. Regardless, each case is decided on a case-by-case basis on its own merits.

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.