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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



Public Copy

File: [REDACTED] (IN-98-198-52007) Office: Nebraska Service Center

Date:

14 SEP 2001

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



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 that 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 that 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 that 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, 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. degree in computer science from the University of Idaho. 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 director did not contest that the petitioner seeks employment in an area of intrinsic merit. While the petitioner plans to work for Microsoft, the record suggests that, to date, his work has not benefited Microsoft alone. The petitioner has presented his software analysis models at conferences and published journal articles regarding these models. Dr. Paul Oman, one of the petitioner's professors and Engineering Chair at Hewlett Packard, states:

[The petitioner] continues to make his research available to all US software manufacturers, including the US government and all its contractors and subcontractors. In fact, just last weekend, [the petitioner] gave a presentation in the nation's capital setting forth the validation of his international recognized Relative Test Complexity Software Metric Model.

While the record contains no letters from interested government agencies, contractors or subcontractors, the director did not contest that the proposed benefits of the petitioner's work would be national in scope. At issue, then, is whether the petitioner meets the "third prong" discussed above.

James Tierney, Director of Test for Microsoft, the petitioner's employer, writes:

We brought [the petitioner] on board last year because of his extensive experience and outstanding record of innovative achievements in the development of software engineering tools, particularly in the area of testing. His invention of the

Relative Test Complexity Model is a tremendous contribution to the American Software Industry.

At the University of Idaho and at Microsoft, [the petitioner] has conducted research on software complexity measurement and testing, focusing on how to reduce bugs in software. This is a nationally significant problem that directly affects the U.S. software industry and the United States' position as a world leader in the development of complex software systems. Reducing bugs in computer software is a big concern for U.S. software companies: billions of dollars are spent each year on developing software, and close to half the money is for testing and debugging. One way to reduce the cost of testing/debugging is to identify ahead of time bug-prone areas in the source code. This enables engineers to solve problems in advance of testing, saving a tremendous amount of money and producing higher quality software more quickly. [The petitioner's] Relative Test Complexity Model is a sophisticated mathematical model that finds bug-prone areas of object oriented code more accurately than any other method. Having been around this industry for a number of years, I can assure you that [the petitioner's] breakthrough is truly extraordinary. He is currently working on making the model easier for software engineers to use in a wide range of projects.

Dr. [REDACTED] one of the petitioner's professors at the University of Idaho and an employee at Hewlett Packard, writes:

While at the University of Idaho, [the petitioner] completed two major software metric projects. In his first project, he demonstrated that a previously published software maintainability model (constructed by someone else) was inadequate and essentially useless. His second project resulted in publications in one regional and two internationally recognized conferences. . . .

[The petitioner's] software testing metric model is designed to locate software defects so that expensive testing resources can be allocated more effectively, thereby reducing overall testing costs. He has proven that it is 5% more effective than previously published models. Although a 5% cost savings from [the petitioner's] model (compared to the next best model) may not seem that significant at first glance, it must be remembered that the overall cost of U.S. software testing is huge. Assuming that the overall cost of software testing is \$1 billion per year, [the petitioner's] model potentially saves millions of dollars per year. This is a worthy contribution and should be considered when you make your decision regarding immigration status.

Ramkumar Pichai, Superintendent of the Optimizer Test Group at Microsoft; Troy Pearse of Hewlett Packard in Idaho; and Gregory Hall, Professor of Computer Sciences at Southwest Texas State University all reiterate the importance of software testing, the amount of time and resources consumed by testing software, and the significance of the petitioner's model.

On September 17, 1998, the director requested additional evidence to address the three prongs set forth in Matter of New York State Dept. of Transportation, *supra*. In response, the petitioner submitted new letters from his colleagues at the University of Idaho and Microsoft. These letters further attest to the petitioner's skills, the importance of his model, and suggest that his model has led to international acclaim.

The director concluded that the petitioner had not "established a track record of ongoing substantial discoveries," and that a waiver of the labor certification requirement for the petitioner was not in the national interest.

On appeal, counsel asserts that the director "ignored or trivialized" the evidence submitted in her "shallow and superficial" decision which failed to judge the petition on its own merits. Counsel asserts that had the director properly reviewed the evidence, she would have seen that the petitioner has "a proven track record of serving the national interest to a substantially greater degree than those with only the 'minimum qualifications' in the field." Finally, counsel submits a non-precedent decision issued by the Administrative Appeals Office in February 1998 (prior to the issuance of Matter of New York State Dept. of Transportation) for the proposition that expert letters from those at the forefront of their field, even if they are the petitioner's colleagues and collaborators, must be given due weight.

Counsel's arguments are not persuasive. Despite counsel's concern that the director merely "noted" the petitioner's development of a software analysis model, the fact remains that the director did consider this research in her decision. In addition, while letters from collaborators and colleagues are important, they must be supported by independent evidence that the petitioner has influenced his field as a whole. See generally Matter of New York State Dept. of Transportation, *supra*, note 6. The record contains little evidence from independent experts outside of Idaho or Washington or interested government agencies. Moreover, the petitioner provided little evidence that the references are at the forefront of their field. The record does not contain the resumes of the individuals providing reference letters. Thus, we concur with the director's findings that the petitioner has not demonstrated the impact of his research.

Counsel accuses the director of trivializing the petitioner's research by stating that "a certain amount of discovery is expected while conducting graduate research." We do not find error in this assessment. 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 can be argued that any Ph.D. thesis, in order to be accepted, must offer new and useful information to the pool of knowledge.

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. While the record contains evidence that the petitioner has authored published articles, there is no evidence that the petitioner's articles have been cited.

Counsel has argued that the petitioner's Ph.D. degree in computer sciences is recognized as rare among U.S. workers. As stated in Matter of New York State Dept. of Transportation, *supra*, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Finally, counsel argues on appeal that Microsoft has obtained a labor certification for the petitioner. Thus, concludes counsel, as the Department of Labor has concluded that no U.S. worker is available to fulfill the petitioner's job, there is no national interest in pursuing the labor certification process. This argument is not only peculiar in that it requests a waiver of a process already completed, it completely contradicts counsel's earlier argument stated in response to the director's request for additional evidence. At that time, counsel stated:

The fact that Microsoft can file a slam-dunk labor certification case cannot be used to [the petitioner's] benefit in his own national interest waiver-based petition.

We concur with counsel's initial argument. That the petitioner obtained a labor certification in his behalf on July 9, 1999 is not an argument that a waiver of that process is in the national interest. If anything, it demonstrates how unnecessary the waiver request was.¹ As stated in Matter of New York State Dept. of Transportation, 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.

In light of the above, the record does not demonstrate that the petitioner has influenced his field as a whole. Thus, we concur with the director that the petitioner has not demonstrated that he will benefit the United States to a greater extent than an available U.S. worker, if there were one, with the same minimum qualifications.

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

¹ It is noted that Microsoft filed a subsequent Form I-140 petition in the petitioner's behalf, which the Service approved, and the petitioner has a pending Form I-485 Application to Register Permanent Residence or Adjustment of Status.

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.