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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



File: [Redacted] Office: Texas Service Center

Date: 18 APR 2002

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:



Public Copy

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, 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 sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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 seeks employment as an acoustics research scientist at the National Center for Physical Acoustics ("NCPA") at the University of Mississippi. 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 director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention 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.

Three letters in the record describe the nature of the petitioner's work at NCPA. Donald A. Reago, Jr., director of the Science and Technology Division of the U.S. Army's Night Vision and Electronic Sensors Directorate, describes the project at issue and the petitioner's role therein:

[The goal of the project is] to develop acoustic technology that will detect buried land mines. . . . This project has been extremely successful and the budget has been increased fivefold because of congressional interest. During recent blind tests at Army test sites this technology demonstrated better mine detection performance than any other existing technology. . . . The main drawback is the relatively slow scan rate. When this limitation is removed we hope to incorporate this technology into mine detection systems already in development. . . .

The most critical part of this research project involves measuring the minute vibrations with the laser. This research area is [the petitioner's] field of expertise. He has designed and written the computer software that controls the scanning of the laser, acquires the data, and demodulates the signal. . . . In the future he will be working on advanced methods to greatly increase the rate at which an area can be scanned, which is critical to this project's success as a military mine detection sensor. . . .

[The petitioner's] efforts are vital to this project and his absence would place this important research effort in jeopardy.

Dr. Henry E. Bass, director of the NCPA, states:

[The petitioner's] research has helped our system to perform extraordinarily well in field tests. . . . In these tests, we were able to locate 98% of the mines with a zero percent clutter or false alarm rate. To date, there is no system with such capabilities. . . . [The petitioner's] contributions, thus far, have been the implementation of state-of-the-art signal processing algorithms, system integration and field-testing. . . .

The unique acoustic signal processing scheme that [the petitioner] developed is an original algorithm coupled with the Fast Maximum-length Sequence Transform. Real mine detection measurements conducted at Fort A.P. Hill proved the functionality and reliability of his scheme. This scheme speeds up our detection system's ability to find AP and AT mines. In the near future, [the petitioner] will play a vital role in the development of instrumentation for the final acoustic detection system. . . .

[The petitioner] possesses unique and innovative skills that enable him to make peerless, significant contributions in his field. . . . To a degree substantially greater than other U.S. researchers in acoustics landmine detection, [the petitioner] will be able to contribute to national and international interests by continuing his work here at NCPA.

James M. Sabatier, senior research scientist and research associate at NCPA, offers similar praise for the petitioner's efforts and asserts that the petitioner is a vital part of the land mine detection effort discussed above.

The petitioner explains that new mine detection apparatus is needed because the earliest mine detectors only work with metallic mines, and "[s]ome new technologies including ground penetrating radar have shown an extremely high false alarm rate and a low probability of detection of non-metallic mines." The method under development at NCPA propagates sound waves and then, by laser, analyzes the resulting ground vibration.

The petitioner has written 45 scholarly papers, and was the first author of 30 of those papers. The petitioner documents several dozen citations of his work, in several different languages, demonstrating widespread interest in, and reliance upon, the petitioner's published efforts.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted further background documentation to establish the intrinsic merit and national scope of land mine detection. The petitioner has also submitted another letter from Dr. Henry Bass, intended to address

the director's concerns. Dr. Bass states that, in addition to the above-described land mine detection work, the petitioner has made several other contributions to the field of acoustics during his time at NCPA.

The director denied the petition, stating that there is no evidence "that the petitioner's sphere of influence extends beyond his colleagues," and that the petitioner has not submitted letters from independent witnesses to explain how the petitioner's work is significant to the field as a whole.

On appeal, counsel argues "the standard set out in [Matter of New York State Dept. of Transportation] is contrary to the statute . . . and Congressional intent." Counsel cites no judicial finding to that effect. Counsel's personal opinions about Matter of New York State Dept. of Transportation have no affect on that decision's legal validity, and because counsel was not a party to that precedent decision, counsel has no standing to contest it in an administrative setting.

As of this writing, Matter of New York State Dept. of Transportation remains a binding, published precedent decision. Pursuant to 8 C.F.R. 103.3(c), the director does not have the discretion to reject published precedent. To date, neither Congress¹ nor any other competent authority has overturned the precedent decision. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error. Indeed, it would have been an error if the director had failed to take the precedent decision into account when rendering this decision. If this appeal is to be sustained, it shall be based on the merits of the record rather than on a repudiation of standing precedent.

Counsel asserts that the record shows the petitioner to be "extraordinarily qualified," with the required track record of demonstrable achievements. Here, counsel is on firmer footing than above. The record documents that the mine detection system under development at NCPA is the most effective such system available to the U.S. military, and that the Department of Defense considers the petitioner to be a vital participant in this project rather than merely a low-level assistant performing routine tasks, or a postdoctoral associate receiving what amounts to on-the-job training. The director's concern regarding the lack of independent letters is, in this case, outweighed by the petitioner's submission of other evidence (specifically, a significant number of citations) to demonstrate that researchers around the world have, for some time, been paying attention to the petitioner's work and putting it to use in their own projects. While a small number of citations has little probative value, a sustained pattern of citations has more significance, generally increasing with the number of citations and the diversity of researchers making the citations.

In short, the petitioner has shown that his work has long attracted the notice of others, and that he is currently a critical participant in a project of obvious value to the United States military. While we caution against drawing broad, general conclusions based on isolated elements of an approved

¹Congress 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. Its narrow focus implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

petition, the specific facts in this proceeding tend to support a reversal of the director's decision, and thus approval of the waiver request and the petition.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.