

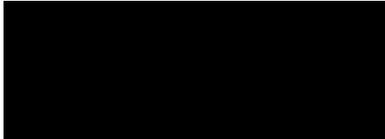


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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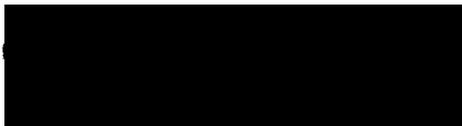


File: [Redacted] Office: Nebraska Service Center Date: 24 APR 2002

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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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 semiconductor process engineer. 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.

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 beneficiary holds a Master's degree in organic chemical technology from East China University. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary 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.

We concur with the director that the beneficiary works in an area of intrinsic merit, chemical engineering, and that the proposed benefits of his work, improved plastics recycling and more efficient fuel cells, would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, 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. At issue is whether this beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. Id. at note 6.

[REDACTED] of the petitioning company, discusses the recruiting process which led to hiring the beneficiary and the beneficiary's work with photovoltaic cell semiconductor processing [REDACTED]

[The beneficiary] has quickly learned and mastered all the processing steps and the use of all the equipment and has been making solid contributions to our progress toward commercialization. He now can handle the fragile GaSb wafers adeptly. The photovoltaic cells he has processed have very good (close to if not world record) performance. [The beneficiary] has also become familiar with measurement of the cell's quantum response. He has also helped to organize our processing laboratory and is one of our major daily maintainers of our critical processing equipment.

██████████ an associate professor at Oregon State University (OSU), discusses the importance of the beneficiary's thesis research, improved recycling of Polystyrene (PS) and Polyethylene (PE). ██████████ writes:

[The beneficiary] has successfully processed the PS, PE blends using extrusion and compression molding, and demonstrated significant impact of processing on the mechanical properties. He also found the evidence of interlocking structure in the blends, and co-continuous phase of PS and PE. He used a Scanning Electron Micrograph (SEM) to show that the different morphology of dispersed PS resulted from different processing conditions. He also found that blends PS and PE possess a much better creep resistance either as a plastic blends themselves or as a matrix of PS/PE/Weed composites. These results have been submitted to the *Journal of Applied Polymer Science* in two papers. In addition, he also studied the compatibility of PS/PE/Wood composites, and improved the mechanical properties further. These results are also in preparation for publishing. [The beneficiary's] research work has greatly enhanced our knowledge on the PS/PE blends, and are meaningful for our plastics recycling industry for the implications towards the production of quality plastic wood products.

██████████ concludes that the beneficiary is well regarded at OSU, that he has been invited to present his research at department seminars, and that the permanent job offer the beneficiary received from the petitioner prior to graduation is rare for OSU students. ██████████ an associate professor at OSU, reiterates much of the information quoted above and asserts that improved creep properties will result in increased plastic recycling for wood alternatives. He further asserts that the beneficiary "played a key role in the Design of ██████████ a course project in our Wood Physics class." ██████████ another professor at OSU, provides general praise of the beneficiary's academic achievements and asserts that the beneficiary's thesis work relates to his current project because polymers play an important role in the semiconductor industry. Other OSU professors provide similar information.

██████████ one of the beneficiary's instructors at East China University, provides general praise of the beneficiary's academic abilities at that institution and asserts that the beneficiary went on to teach at Nanjing University upon graduation. Regarding the beneficiary's research while at East China University, Dr. Fan states:

[The beneficiary] finished the synthesis of an anti-malarial drug Atebrin. It was a synthesis of seven steps commencing with 2,4-diaminotoluene. He made several important innovations on the synthesis and finally his achievement was adopted by a local pharmaceutical company.

The record contains no information from the pharmaceutical company detailing the significance of the beneficiary's contribution. Moreover, it is not clear how this work relates to his current work with photovoltaic cells.

On appeal, counsel quotes from several of the above letters, concluding that they "show that [the beneficiary] is highly respected by his fellows in the field." The letters, however, are all from the beneficiary's collaborators and immediate colleagues. While such letters are important in providing details about the beneficiary's role in various projects, they cannot by themselves establish the beneficiary's influence over the field as a whole. In his own statement responding to counsel's question as to how his work has been "recognized as significant by peers, governmental entities, professional or business organizations," the beneficiary responds only that his advisors and employers have recognized his abilities.

On appeal, the petitioner submits two published articles authored by the beneficiary. Both articles, however, were published after the date of filing. A petitioner must establish the beneficiary's eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing, the beneficiary had authored one article published in a Chinese-language journal, study published in the *Fourth National Symposium on Organic Chemical Technology*, and other study published in *The Society of Rheology 70th Annual Meeting*.

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 influence; we must consider the research community's reaction to those articles. The record contains no evidence that the beneficiary's articles have been cited by independent researchers.

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.