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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: WAC 99 120 50154 Office: California Service Center

Date: AUG 27 2002

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:



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, California 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. At the time of filing, the petitioner was a graduate research assistant at the University of Arizona. 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 has 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.

Counsel asserts that the labor certification process is inappropriate in this case because the petitioner seeks employment as a graduate research assistant, which is a temporary position not amenable to labor certification. This argument begs the question of why permanent immigration benefits are necessary for a temporary position, for which nonimmigrant visas are available. Furthermore, the temporary positions which counsel lists are, for the most part, training positions which a researcher holds at the beginning of his or her career. There is nothing intrinsic to the scientific process which precludes permanent or indefinite employment, as the very concept of tenure attests. Indeed, one of the petitioner's witnesses, Professor Jack Gaskill, has worked at the University of Arizona since 1968, a year before the petitioner was born.

Counsel then argues "[t]he notion of requiring a researcher to pursue a labor certification . . . is counter-productive to the scientific process itself," because researchers frequently change jobs. Counsel argues, in effect, that scientists as a class should be exempt from the labor certification requirement. Nevertheless, the plain wording of the statute indicates that members of the professions holding advanced degrees (including scientists) as well as aliens of exceptional ability in the sciences are, generally, subject to the job offer/labor certification requirement. The Service is not in a position to "second guess" Congress by ruling that legislative error subjected scientists to the labor certification requirement. As long as the statute's plain wording places a job offer requirement on scientists, this office lacks the authority to exempt scientists wholesale from that requirement. While some occupations may be more amenable to the national interest waiver than others, final decisions must remain at a case-by-case level.

The above arguments focus on peculiarities of employment in the sciences, rather than on the merits of the individual alien. Greater weight attaches to arguments specific to this petitioner. Counsel does not discuss the petitioner's specific qualifications at length, instead referring the Service to the newly submitted letters.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. The most detailed letter is from Professor Malur K. Sundareshan, who supervises the petitioner's graduate studies at the University of Arizona. Prof. Sundareshan states:

[The petitioner] is participating in a research project at this department which is sponsored by the Air Force Office of Scientific Research (AFOSR), Department of Defense. The major focus of this project is to develop novel superresolution processing algorithms and novel data fusion architectures for achieving the goals of reliable surveillance and tracking of targets of interest. . . . I am of the opinion that [the petitioner] is making important contributions to this project and has been acquiring research background in an area that could potentially benefit the national security of the United States. . . .

Within the broader field of sensor technology, the more specific field in which [the petitioner] works is that of signal and image processing. . . .

Although the United States military has been using sensor technology for surveillance by aircraft and missile guidance for some time, these technologies are severely limited in their usefulness due to the limitations of different types of sensors. Many high-resolution sensors are unable to penetrate . . . atmospheric conditions that can interfere with the reconnaissance and tracking of ground targets from aerial surveillance. Sensors operating at longer wavelengths than light can often penetrate through adverse weather and other degrading conditions, but . . . [have] poor resolution. One is hence forced to implement an efficient signal processing algorithm that attempts to produce an enhanced image with a better resolution from the acquired poor resolution imagery data. . . .

In a project sponsored by the AFOSR . . . , we are developing novel superresolution processing algorithms and novel data fusion architectures for combining data from multiple sensors in order to make target surveillance and tracking more reliable. . . . [The petitioner] frequently assumes the role of a group leader on many aspects of this project. In fact, [the petitioner] is the only individual on our research team who possesses an optical engineering background, and who brings knowledge of hardware and photonics to our team. He is also one among the team that has the most in-depth background in the field of image processing. . . .

[The petitioner] has been a driving force in [the project's] ongoing success. His work has generated a number of notable accomplishments which have made important contributions to this project. To cite only a few of these briefly, first, [the petitioner] has successfully implemented a maximum likelihood restoration algorithm for processing massive millimeterwave images and has demonstrated results that are superior to what could be obtained using existing processing algorithms. Second, he has introduced a modified blind deconvolution algorithm and has demonstrated its restoration and superresolution capabilities for imagery

acquired from some state-of-the-art millimeterwave sensor platforms recently built by Air Force and Army research laboratories. Third, he has successfully integrated a background-detail separation idea into iterative restoration procedures to yield superior resolution enhancement performance.

Other University of Arizona faculty members endorse the petition. Professor Robert A. Schowengerdt states that the petitioner's "groundbreaking research is certain to result in economic gains for the United States, as well as improved technology for national defense. . . . [The petitioner] has produced remarkable results, which have established his place in the technological community." The petitioner contributed some data and visual material to a book by Dr. Schowengerdt. Professor Jack D. Gaskill states that the petitioner "is personally responsible for many novel discoveries" in the area of improving sensor image resolution.

Dr. Farid Amoozegar, communication system analyst for Hughes Space and Communications Company, states that the petitioner's "successful algorithms stand alone as some of the most significant advances in tracking and surveillance technology." James A. Jindrick, general manager of Wencil Research LLC and an adjunct instructor at the University of Arizona, asserts that the petitioner "is conducting some of the most important and advanced work to date in the field of image processing. His novel methods will have far-reaching benefits for the increased capabilities of a number of electronic machines." Both of these witnesses assert affiliation with entities other than the University of Arizona, but both have direct ties to the university through having worked or studied there.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner has not established the national scope of his work, and that the petitioner's own contribution does not warrant a waiver of the job offer requirement. The director stated that the petitioner "has not, as yet, published any research findings of great value to the field in general."

Counsel asserts that the director erred by failing to issue a request for evidence in accordance with 8 C.F.R. 103.2(b)(8). At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request. The appellate submission, in this case, consists entirely of arguments from counsel. There is no new evidence on appeal, nor is there any indication of what new evidence the petitioner may have submitted in response to a request from the director. The absence of new evidence does not suggest that further relevant evidence exists.

Counsel argues, on appeal, that the petitioner's work is national in scope because the petitioner's findings are applicable without regard to geographic location. The petitioner has undertaken his research on behalf of a national entity, the U.S. Air Force, and his findings can be nationally disseminated via publication. We concur with counsel's assertion that the director erred in denying the national scope of the petitioner's occupation.

The national scope of the petitioner's occupation, nevertheless, is a separate issue from the national impact of the petitioner's work. Counsel states that, according to published and unpublished precedent decisions, "evidence distinguishing a Petitioner as one of the top people in

the field has commonly supported favorable consideration of national interest waiver applications before the AAO" [Administrative Appeals Office]. This general observation, while rather oversimplified, is relevant only if the petitioner has submitted such evidence. The petitioner has submitted a number of enthusiastic witness statements, but as we have noted, all of these witnesses are, or were, working at the University of Arizona. The record contains no evidence that the petitioner's work has attracted wider notice, as could be expected if the petitioner's findings are especially significant throughout the field. The record contains no direct evidence that the petitioner's findings have been published, much less that the petitioner's published work has attracted serious outside notice. Witnesses have stressed the importance of the petitioner's work in military applications, aviation, and other areas, but the record contains nothing from the U.S. Air Force or affected industries to show that those entities consider the petitioner's work to have special value, beyond what is generally expected from grant-funded research. The fact that the petitioner's superiors value his work does not intrinsically elevate him above other skilled graduate students. Whatever the significance of the petitioner's work in the context of his research project at the University of Arizona, the petitioner has not submitted independent evidence of the wider significance of his work.

Counsel argues that the director has not rebutted the argument that the petitioner, as a graduate student, is ineligible for labor certification. It remains that the petitioner, as a graduate student, already has a nonimmigrant visa that is valid for the duration of his studies, after which time an employer could obtain an H-1 visa on his behalf. The petitioner could work under an H-1 visa while an application for labor certification is pending. Instances in which an alien's field of endeavor largely precludes labor certification are qualitatively different from instances in which an alien could ultimately obtain labor certification, but is still at such an early stage of professional training that the alien does not yet qualify for permanent employment.

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.