

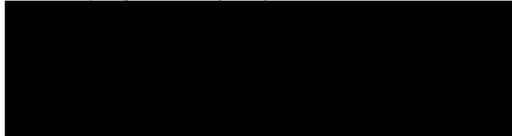


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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



File: EAC-99-157-50697 Office: Vermont Service Center

Date: JAN 11 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 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, Vermont 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 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 Master's degree in laser optics from Tianjin University. 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.

Dr. Peter Norris, President of NZ Applied Technologies, the petitioner's employer, writes:

[The petitioner's] position requires the ability to perform the highly specialized tasks of Opto-electronic device design and packaging. The project requires a rare combination of knowledge and skill encompassing Fiberoptics technology, experience in ultra-stable, precision optical mounting methods and developing high quality telecommunications products. [The petitioner] is already playing a very significant leadership role in the development and implementation of variable optical fiber attenuators that are leading to high performance telecommunication products. His unique combination of knowledge, training and abilities are proving key to the development of high performance components and setting up a manufacturing facility for mass production.

Dr. Jing Zhao, Vice President of NZ Applied Technologies, asserts that the petitioner's work with OptoCeramic attenuators led to a major business agreement with Corning Incorporated to market and manufacture a family of OptoCeramicTM devices.

Dean Tsang, a senior scientist and project leader at NZ Applied Technologies, writes:

[The petitioner] has recently made major contributions to a robust fiber-optic package that enables the solid state attenuator to operate over a large temperature

range. This design is low cost and suitable for mass production. This work has a large potential impact on DWDM systems which heretofore have not had a good variable attenuator that can be easily managed and controlled.

Dr. Paul Melman, another senior scientist at NZ Applied Technologies, provides similar accolades.

Joseph P. Lorenzo, Chief of the optoelectronic technology branch of the US Air Force Research Laboratory with whom the petitioner's employer collaborates, writes:

The purpose of [the petitioner's] project is to develop novel oxide-based photonic materials and devices such as integrated isolators, light modulators, and optical switches. As an expert on opt-mechanics and optics, [the petitioner] has made important contributions to a U.S. Air Force "Advanced Isolator Technology" program, developed cutting-edge integrated reflection mode fiber optic isolator for future military telecommunication systems. [The petitioner] is also instrumental in the successful development of Opto-Ceramic™ optic attenuators at NZAT. This solid-state non-mechanical fiber in-line attenuator is the first in the world and has been intensely sought for the rapidly expanding dense wavelength-division-multiplexing (DWDM) telecom market. This innovative technology platform enables this Company to enter the commercial market with engineering type VOA's for DoD system designers. I understand this product accounts for 40% of NZAT's 1998 fourth quart[er] revenue. In addition, [the petitioner] is also involved in other defense and high technology related projects, such as high sensitivity optic sensors. He has exhibited great insight and versatility in solving many DoD and Air Force related technical problems.

Honghua Qiu, former vice president of the North China Research Institute of Electro-Optics (NCRIEO) and current vice president of MP FiberOptics, Inc. in Sunnyvale, California, discusses the petitioner's work at those institutions.

During the course of his research work [at NCRIEO], [the petitioner] has developed various lasers, especially the "High power solid state Nd:YAG laser[.]" he used very unique technology to reach very high efficiency. Due to his excellent job, [the petitioner] has been sent to the Institute of Berlin Solid State Laser Technology, Germany, to exchange achievements on high power solid-state lasers. The Institute of Berlin was playing a key role in high power laser of "Eureca Plan" then.

In addition, [the petitioner] as a principal researcher, successfully developed a high energy solid state laser with a short pulse width and good beam quality. This laser was a cutting edge technology at that time and the first such device in [C]hina. This laser source has long been sought for a number of applications including laser radar, remote sensing and range finding.

In a joint program, [the petitioner] was recommended by the Institute to participate [at] MP FiberOptics[,] Inc., at Sunnyvale[,] CA., to develop fiber optical communication passive devices, in-line isolators, free space isolators, collimators, attenuates and so on. Due to his efforts, MP's products have been greatly improved in its quality and reliability. During this period, he has participated [in] the establishment of the ISO 9001 quality assurance system.

Kevin Zhang, R&D Manager at Oportek, Inc. and former classmate of the petitioner's, reiterates much of the information quoted above. Ren-Sue Wong, a colleague of the petitioner's at MP FiberOptics, Inc., provides similar information regarding the petitioner's work there as that quoted above.

In response to the director's request for additional documentation, the petitioner submitted a letter from Jean-Louis Malinge, Director in the Photonic Technologies Division of Corning, Inc. Mr. Malinge writes that he has known the petitioner for two years through a joint development project on VOAs. Mr. Malinge further states:

[The petitioner] is a key technical staff member of NZAT's development team for the VOA. His background includes over ten years in the research, development and manufacturing of photonic devices. [The petitioner's] talent knowledge, and experience are clearly evidenced in the VOA device designs, fabrications, and packaging. For example, he first invented the creative rugged and stress-free mounting technology for the highly sensitive PLZT-based VOA device, which has completely solved the device stability problem. Although the PLZT material has a high response speed and high electro-optical effect, the PLZT had never been successfully fabricated into a practical communication device due to its sensitivity to device configuration, packaging and environment. [The petitioner's] inventive device design has, for the first time in the world, led to the successful realization of reliable, PLZT-based VOA products.

Being an expert in PLZT properties and optoelectronic devices, [the petitioner] has also improved the light Polarization Dependent Loss (PDL) in VOA devices from 3 dB to 0.3 dB at 20 dB attenuation by using a unique optical design. [The petitioner's] successful inventive design was compact, highly stable and reliable, and has passed the major reliability tests at Corning and at NZAT based on Belicore Criteria for design verification. This solid state VOA device represents the state-of-the-art technology worldwide, and with the highest response speed, most compact package, in addition to having no moving parts.

The petitioner also submitted letters from Professor Mark Cronin-Golomb at Tufts University; Dr. Xiao-Dong Xiang, a staff scientist at Lawrence Berkeley National Laboratory; and Dr. Yicheng Lu a professor at Rutgers University, all of whom collaborated with the petitioner's efforts at NZAT. They provide similar information to that quoted above.

On appeal, the petitioner submits more reference letters from collaborators in China and the United States. They shed little new light on the petitioner's contributions to his field. While they assert that the petitioner's unique abilities make him irreplaceable at his company, 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. Moreover, 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 petitioner, however, also submitted a letter from a disinterested expert. Dr. Gary Wicks, a professor at the Institute of Optics at the University of Rochester, asserts that he has reviewed the petitioner's resume, publications, and presentations. He concludes:

[The petitioner] has conducted groundbreaking research involving the development of novel fiber optic network components, specifically, advanced variable optical attenuators, waveguide isolators, and broad band-width optical sensors, for the purpose of improving the control, capacity, and performance of traffic streams along information "super-highways[.]" as well as for implementation within myriad additional information technology and sensor-based surveying systems. He has distinguished himself through the design of cutting-edge laser technologies, while at the same time subjecting these new technologies to a rigorous regime of performance tests, for the purpose of both managing dispersive sources (such as reflective interference effects) and improving levels of design efficiency (in regard to both the initial manufacture and eventual commercial application of all optoelectronic devices).

Dr. Wicks makes clear that his recommendation is solely based on his review of materials sent to him by the petitioner. He does not indicate he had ever heard of the petitioner's work prior to being contacted by the petitioner or that the petitioner's work has influenced his own work. Nevertheless, the University of Rochester has a distinguished optics program and Dr. Wicks' independent opinion that the petitioner's work is "groundbreaking" cannot be discounted.

The petitioner also submits evidence that the Chinese Government awarded the petitioner several awards. Specifically, the State Science and Technology Commission awarded the petitioner the third prize Science and Technology and Achievement Award for his high power Nd:YAG Laser in December 1992, and the third prize Science and Technology and Achievement Award for his high average power solid state laser project in December 1997. The record does not include information regarding the number of researchers involved in these projects or the petitioner's

role. In December 1996, the Commission awarded the petitioner the first Science and Technology and Achievement Award for his high average power, high repetition rate slab geometry Nd:YAG laser. The evaluation certificate for the latter award reveals that there were eight researchers on this project, including a professor listed as the chief investigator and two senior engineers. The petitioner was only listed as an engineer. Moreover, the record reveals that 310 projects received Science and Technology and Achievement Awards in 1996. It is not known how many projects were considered. The petitioner is also a regular member of the International Society for Optical Engineering (SPIE). Awards and professional memberships are elements for exceptional ability. As stated in Matter of New York State Dept. of Transportation, the exceptional ability classification normally requires a labor certification. Thus, evidence which relates to the regulatory requirements for aliens of exceptional ability is insufficient to establish that a waiver of the labor certification is in the national interest. By seeking an extra benefit, the petitioner assumes an extra burden of proof.

The petitioner submits several Chinese journal articles and presentation abstracts. While the petitioner failed to submit translations of any of the information on the first page of these articles, one article has an English abstract which names the petitioner as an author. The remaining articles and presentation abstracts appear to be authored by the petitioner as they include the Chinese characters which the petitioner listed on the petition as his name in Chinese. From this information, the petitioner appears to have authored two long articles and given three presentations with published abstracts. The record also includes what counsel refers to as a published article, "Super Gaussian Film Laser," in *Laser & Infrared* in 1993. The evidence for this article is what appears to be a list of articles or abstracts. The list, in Chinese with no translation, includes several titles, authors, and one or two sentences following that information. One of the titles is followed by two authors, one of which appears to be the petitioner, and one sentence of text. The actual article is not in the record.

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 influential contributions; we must consider the research community's reaction to those articles. The record contains no evidence that the petitioner's articles have been cited at all, let alone by independent researchers.

The record also contains a Chinese patent application, a U.S. patent application for a "high speed electro-optic modulator," which lists the petitioner as one of the inventors, and a U.S. provisional patent application for a "polarization-independent optical isolator," which does not list the petitioner as one of the inventors. The record also includes a patent application for a

“reflective fiber-optic isolator which does list the petitioner as an inventor. It is not clear, however, that everyone who holds a patent for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. Matter of New York State Dept. of Transportation, supra, note 7. Whether the specific invention serves the national interest must be decided on a case by case basis. In 1998 NZ Applied Technologies awarded the petitioner and three other employees stock options for outstanding efforts and contributions to major achievements at the company the previous year. The petitioner’s award was based on his contribution to VOA Design and Fabrication Procedures.

In response to the director’s request for additional documentation, the petitioner submitted a December 1998 article in *Photonics Spectra* which reported that *Inc. Magazine* listed NZ Applied Technologies as one of the top 500 fastest-growing private companies, ranking it above the other four photonics firms on the list. The *Photonics Spectra* article reported:

The 6-year old company had sales of \$3.3 million last year, much of it owing to its block-buster product: a variable optical attenuator – a critical component in the rapidly growing optical telecom networks.

Thus, at the time of filing, the petitioner had been awarded by his company for his outstanding contribution to VOA technology, a technology which had already garnered NZ Applied Technologies attention in trade publications. On appeal, the petitioner submitted a press release from Corning, Inc. whereby Corning announced that it had reached an agreement to purchase the remaining 80% of equity in NZ Applied Technologies. (Corning had purchased the previous 20% in 1999.) In the press release, Mr. Malinge cites NZ Applied Technologies OptoCeramic components for DWDM such as VOAs as the basis for the acquisition. The press release asserts that NZ Applied Technologies’ VOAs are the fastest, most compact VOAs on the market. The sale was completed on May 8, 2000. While these press releases were put out after the date of filing, they reflect Corning’s continued interest in the petitioner’s work which had already brought media attention to NZ Applied Technologies at the time of filing.

We concur with the director that the reference letters submitted prior to the appeal are all from collaborators and colleagues. Moreover, as stated above, that the petitioner’s work has resulted in patents is not, by itself, particularly noteworthy. It is inherent in the field of optics research and development to develop original technologies and improve existing technologies. Similarly, corporate awards in and of themselves are not evidence that the petitioner would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Contrary to the director’s conclusion, however, this evidence does establish that the petitioner played an extremely significant role in the development of VOA technology at NZ Applied Technologies. Since the record establishes that this technology attracted the interest of trade journals, led to the significant growth of NZ Applied Technologies, and resulted in the buyout by Corning, a major optics company, we conclude that the petitioner has established his influence on the field as a whole.

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 which 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.