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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: Nebraska Service Center

Date: JUL 16 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 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.

On appeal, counsel argues that the director erred in denying the petition without first requesting additional documentation pursuant to 8 C.F.R. 103.2(b)(8). Even if we concluded that the director erred in this regard, the appropriate remedy would be to consider the evidence that would have been submitted in response to such a request on appeal. On appeal, the only new evidence submitted relates to the national impact of the petitioner's area of research. This evidence and counsel's remaining arguments will be discussed below.

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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in Geoscience from the University of Nebraska. 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).

As stated by the director, 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.

Counsel challenges the director's use of this language, noting that it was published before the law permitted advanced degree professionals to apply for the national interest waiver of the labor certification requirements. The language, however, was expressly applied to advanced degree professional cases in a precedent decision by the Administrative Appeals Office. That case reasoned:

Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998). In addition, that case 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 petitioner works in an area of intrinsic merit, paleoclimatology. The director then concluded that the proposed benefits of the petitioner's work, study of ancient climate in the central United States, would not be national in scope. As noted by counsel on appeal, the petitioner's references explain how the petitioner's study of regional climate is important to an understanding of the global climate. On appeal, the petitioner submits evidence regarding the national impact of regional droughts. We concur with counsel that the record adequately establishes that the proposed benefits of the petitioner's work would be national in scope. It remains, then, to determine whether the petitioner 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 petitioner's contributions in the field are of such unusual significance that the petitioner 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 a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

The petitioner's advisor at the University of Nebraska, [REDACTED] provides:

[The petitioner] is a bright, hard-working research scientist who has produced creative work in paleoclimatology. He has been using stable isotopes of hydrogen, carbon, and nitrogen from dated-lake sediment to better understand past changes in climate. His work has provided new evidence that the application of these stable isotope methods as tools to assess past climate may be easily misinterpreted. His findings challenge reported climate interpretations based on stable isotopes and significantly alter previous accounts of climate variability in the mid-continent region during the past 9,000 years. A national interest in historical climate change has developed in response to concerns of climate warming resulting from increased atmospheric levels of green house gases. His work has been outstanding and his research will continue to be published in peer-reviewed international journals. It is expected that his work will be read and referenced by the majority of researchers using stable isotopes to evaluate past climate.

In a separate letter [REDACTED] provides additional scientific detail regarding the petitioner's work. [REDACTED] concludes that the petitioner's work is "state-of-the-art."

[REDACTED] another professor at the University of Nebraska, discusses the importance of studying historic climates in order to understand the changes occurring today. [REDACTED] asserts that many approaches to researching historic climates are necessary. He continues:

[The petitioner] has utilized chemical changes in lake sediments recovered from cores, an approach that has not often been used, but which shows great promise.

...

[The petitioner's] studies are providing one additional avenue to examine the topic of climate changes during the recent past. . . . The kind of work he did, examination of changes in the chemistry of sediments as proxy for climatic conditions, has been undertaken by only a few other scientists in the United States, and the approach is relatively new. To date, only a small part of the work he has done has been published, but as more becomes available, I am sure it will be noted by others in this country and in the world who are working on related projects.

It is, therefore, my professional opinion that the research that [the petitioner] has been doing is a significant contribution to the understanding of past climatic changes. This kind of research calls for the kind of background that one receives in completing a doctoral degree, and requires someone with at least an M.S. degree and several years of experience. Few paleoclimatologists have the combination of education and experience needed to do effective research in this area. [The petitioner's] two master's degrees in chemistry and the work he did for the doctoral program does qualify him well for it.

Professor Robert Taylor, the petitioner's advisor at the Alabama Agricultural and Mechanical University, writes:

[The petitioner's] Master of Science Thesis Work entitled "Zinc Sorption by Some Benchmark Soils of Alabama" is a landmark piece of work for agronomically important widespread soils throughout the State of Alabama. To my knowledge, this is the first study that elucidated the theory of the mechanism(s) and kinetics (rate) of zinc retention/release by those soils. In an era when soils are more and more important as depository for biosolids such as animal and sewage sludge waste, which may contain elevated levels of zinc, this work is critical. The work has significance not only for the State of Alabama but also for the nation and the world as we enter a new millennium and waste disposal becomes a grave issue as global human population escalates. Two research articles were published from [the petitioner's] Master of Science Thesis The work done by [the petitioner] definitely could not be accomplished with the level of competence exhibited by someone with minimum qualifications.

Professor Taylor does not explain how the petitioner's work has already influenced his field as a whole. Professor Taylor's assertion that a person with "minimum qualifications" could not perform the petitioner's research is not persuasive. The phrase "minimum qualifications" as used in Matter of New York State Dept. of Transportation, *supra*, refers to the minimum qualifications required to perform the type of work the petitioner seeks to do. Such "minimum" qualifications could be quite high; a high level position is likely to have "minimum" qualifications that would exclude most people. The petitioner must demonstrate that he would benefit the national interest to a greater extent than others who have the same minimum educational and experience requirements as those needed to perform the job he seeks to perform. Otherwise, the petitioner has not established why a waiver of the labor certification process is in the national interest.

The above letters are all from the petitioner's collaborators and immediate colleagues. We concur with the director's implication that such letters are important in providing details about the petitioner's role in various projects, but that they cannot by themselves establish the petitioner's influence over the field as a whole. Counsel's argument that neither the law nor the regulations require letters from disinterested experts is not persuasive. While the law and the regulations are silent regarding the type of documentation that is required for a national interest waiver, Matter of New York State Dept. of Transportation, *supra*, requires that the petitioner have demonstrated some degree of influence on the field as a whole. Letters from disinterested experts, depending on what those letters say, can demonstrate such an influence. Other evidence including, but not limited to, documentation reflecting that the petitioner's work has been cited by several independent researchers, could also demonstrate an influence over the field as a whole.

As noted by counsel on appeal, the petitioner did submit letters from two individuals in the field who have not worked with the petitioner. Specifically, the petitioner submitted a letter from [REDACTED] a professor at Western Michigan University whose work overlaps with the petitioner's. [REDACTED] indicates that he has known the petitioner for two years and that he has reviewed manuscripts submitted by the petitioner and has discussed his studies "on numerous occasions." [REDACTED] writes:

[The petitioner] is continuing research in this country using the expertise developed during his graduate studies. His research is of immense national and international interest and the findings that result from his upcoming work will be watched eagerly by the scientific community. His work will vastly enhance our understanding of how the earth's climate has changed in the past several thousand years.

It is my opinion that [the petitioner] has an expertise that should be exploited for the benefit of [the] national and international community. In any case, the research that he is presently involved in requires personnel with no less a qualification than a Ph.D.

_____ does not explain how the petitioner has already influenced his field. For example, _____ does not assert that the petitioner has influenced _____ own work. An expectation that scientists will take notice of the petitioner's work at some point in the future is insufficient. Moreover, _____ assertion that the petitioner's research requires an investigator with a Ph.D. is not helpful to the petitioner. 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. Thus, _____ similar assertions (quoted above) that only a researcher with a Ph.D. or a Master's degree and several years of experience could perform the research being done by the petitioner are equally unpersuasive. The petitioner must demonstrate that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications for the type of job sought by the petitioner. The record does not adequately establish how the petitioner will benefit the national interest to a greater extent than other Ph.D. recipients.

_____ professor and former dean at Brigham Young University, asserts that the petitioner's work is based on his own previous work and that he has read the petitioner's articles and corresponded with him. _____ further notes that he supervised the theses of two of the petitioner's classmates at the University of Nebraska. Regarding the petitioner, _____ states:

[The petitioner] used fractionation of the stable isotopes of carbon, hydrogen, oxygen and nitrogen to greatly increase our understanding of the history of lake sediments. In fact, isotopic values for lacustrine sediments in the U.S.A. have never before been reported. The work shows good technique and clear exposition. This is a major contribution to science and will have a very positive impact on scientific contribution in the U.S.A. He has been exceptionally well-trained and shows great initiative. Very few people in the world have the qualifications and training to do isotopic research. He has a bright future, has already made significant contributions to the scientific literature and will be a great benefit to this country in both basic and applied research.

While _____ identifies an alleged contribution, the reporting of isotopic values for lacustrine sediments, he does not explain how this reporting has already influenced the field. _____ does not indicate that the petitioner has influenced his own work or provide examples of other research inspired by the petitioner's results.

In his letter accompanying the petition, the petitioner asserted that he had authored nine articles and an abstract. The petitioner submitted no evidence to support this assertion. Moreover, 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 independent researchers have cited the petitioner's work or other evidence that the articles have been influential in the field.

In his letter, the petitioner also asserts that he "served as a judge of the work of other geologists" by working as a supervisor and that his scholarships, tuition and maintenance grants should be considered awards for work in his field. Reviewing the work of one's fellow employees is inherent to the job of supervisor. Scholarships and other "awards" based on academic achievements are not evidence of recognition in one's field. Regardless, these factors are criteria for aliens of exceptional ability, a classification that normally requires a labor certification. Meeting one or even the necessary three criteria for this classification is not, in and of itself, evidence that a waiver of the labor certification is in the national interest.

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.