

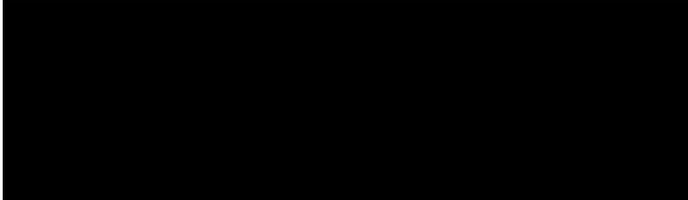


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: EAC 99 134 50678 Office: Vermont Service Center

Date: JUL 19 2007

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: Self-represented

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

We note that, up until the filing of the appeal, the petitioner was represented by [REDACTED] hereafter "counsel"). Counsel filed the Form I-290B Notice of Appeal, indicating that a brief would be submitted within 30 days. The petitioner did in fact submit a brief during that period, but the petitioner himself prepared the brief. The petitioner concludes this brief by stating "[s]ince this appeal brief is made by me myself instead of the attorney as before, please contact me directly." This statement, along with counsel's apparent lack of involvement with the preparation and submission appeal brief, indicates that the petitioner no longer considers himself to be represented by counsel. Therefore, we have designated the petitioner as self-represented at this time.

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 seeks employment as a research scholar at Virginia Polytechnic Institute and State University ("Virginia Tech"). 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 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.

Along with documentation pertaining to his field of research and a general shortage of high-tech workers that occurred during the late 1990s, the petitioner submits copies of his published research articles and several witness letters. Dr. Wayne L. Neu, associate professor at Virginia Tech, states:

[The petitioner] has been working with me since October 1997. He joined our team working on Multidisciplinary Design Optimization (MDO) of ships. This work has involved writing and linking several ship design analysis codes with another piece of software that controls the variation of a number of design variables in seeking the minimum of some objective function. This objective function may be a measure of performance of the particular design being optimized. Currently, a number of codes exist for analyzing various aspects of a

ship's characteristics and performance. . . . With the software we are working on, the computer will run each of the disciplinary modules and control the variation of the design characteristics until it has found the minimum (or maximum) of some given performance characteristic, e.g., propulsive power or cost of operation, within a set of imposed constraints. As you can imagine, linking together a number of individual programs, written in a number of different languages, is no small feat. [The petitioner] has been our head programmer on this project, overseeing four other graduate students. . . . [The petitioner] has been invaluable to us in doing this programming magic.

His expertise goes beyond programming however. He is quite knowledgeable in the area of ship design and has learned a great deal of optimization theory. He has helped us with the philosophy of our approach to the problem, i.e. how to set up our MDO problem in such a way that it is solvable. . . .

The work that [the petitioner] is doing is funded by the U.S. government's Maritech program. The Maritech program is aimed at increasing the U.S. shipbuilding industry's global competitiveness.

Dr. Neu appears to indicate that the petitioner's employment at Virginia Tech is inherently temporary, because he states that "[e]mployers in this area necessarily do a great deal of U.S. military business and would not hire a foreign national without [permanent resident] status." Obviously Virginia Tech does not require such status, because they already employ him, so Dr. Neu's comments can only refer to future employment with other employers.

Professor Bernard Grossman of Virginia Tech states that the mission of MARITECH is to "[m]anage and focus national shipbuilding research and development funding on technologies that will reduce the cost of warships to the U.S. Navy and will establish U.S. international shipbuilding competitiveness." Prof. Grossman asserts that the petitioner's "thorough knowledge of advanced ship analysis and design techniques coupled with a strong computer science background makes his contribution very valuable to our team." Other Virginia Tech faculty members offer comparable endorsements of the petitioner's skills. The only witness from somewhere other than Virginia Tech is Dr. [REDACTED] a research scientist at the University of Delaware (where the petitioner worked from 1996 to 1997). Dr. Zheng states that the petitioner has contributed "major software development" to the MARITECH program.

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 copies of four letters initially submitted with the petition, as well as arguments from counsel.

Counsel argues that Matter of New York State Dept. of Transportation violates the Administrative Procedures Act "and has effectively eliminated national interest waivers." Counsel cites no evidence to support this serious charge, and given the continued approval of national interest waiver petitions, it does not appear that any such evidence exists. Counsel

himself, in this same brief, refers to a sustained appeal by the Administrative Appeals Office, the same office that had produced the precedent decision. The sustaining of that appeal (and many others like it) serves to demonstrate that the precedent decision was not a calculated effort by the Administrative Appeals Office to destroy or eliminate the waiver. Rather, the precedent decision was an attempt to create something approaching a usable set of standards, which is entirely absent from both the statute and regulations.

It remains that Matter of New York State Dept. of Transportation is a published precedent decision. By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress<sup>1</sup> nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

After condemning the three-prong test set forth in Matter of New York State Dept. of Transportation, counsel asserts that the petitioner nevertheless has satisfied this test. Counsel persuasively argues that the petitioner's work has substantial intrinsic merit and national scope.

Counsel argues that labor certification is not appropriate in this instance because labor certification relies only on the minimum qualifications for a given position, without taking into account special skills which, while not essential to the position, nevertheless greatly enhance the alien's performance in that position. Counsel states that "the Petitioner possesses rare multidisciplinary training in Naval and Oceanic and Naval Engineering [sic] and Architecture, Computer Aided Drafting and Programming. It is this rare and unique blend of training that makes the Petitioner such a vital player in the MARITECH and other government sponsored programs that . . . are so vital to the national interest."

Considering that the petitioner's area of expertise concerns ship design, it is not improper to inquire as to what impact or influence the petitioner has had on ship design. The record does not contain any information to indicate that, to date, the petitioner's work has resulted in significant changes in ship design or construction. [REDACTED] does not assert that the petitioner has had such influence. Instead, [REDACTED] states "I believe [the petitioner's] project may improve US competition in [the] international shipbuilding industry and reduce warship cost for [the U.S.] Navy." [REDACTED] states "[t]he Maritech program is aimed at increasing the U.S. shipbuilding industry's global competitiveness," but offers no indication that the project has in fact made any progress toward that goal. Witnesses' expectations that MARITECH will one day benefit the United States, and that those benefits will be greater if the petitioner is involved, are necessarily speculative. The petitioner has submitted nothing from the U.S. Navy or any official with jurisdiction over the MARITECH program as a whole (as opposed to Virginia Tech's cell of

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<sup>1</sup>Congress has since amended the Act to facilitate waivers for certain physicians. The newly created section 203(b)(2)(B)(ii) of the Act demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation. The narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

MARITECH researchers) to indicate that the petitioner's contributions have stood out from those of other MARITECH researchers, or have attracted notice outside of his own circle of superiors and collaborators.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director indicated that the record relies on "speculation" rather than on "demonstrable achievements" that establish that the petitioner "would have a lasting impact" in his area of expertise.

On appeal, counsel asserts that a brief is forthcoming. As noted above, this assertion represents counsel's last documented action relating to this matter, and the petitioner himself has prepared and submitted the brief. The petitioner submits further background documentation to establish the intrinsic merit of his occupation. This material is unnecessary, because the director had already acknowledged "[t]he record shows that the beneficiary's area of employment . . . has substantial intrinsic merit."

The petitioner offers an example of his work, in an effort to demonstrate that his admission is in the national interest:

When MDO fails due to the divergent optimization procedure sometimes, it is very difficult to solve because after checking, an expert of ocean engineering will say no wrong [sic] from his view point of performance requirement, an expert of optimization will say no wrong also from his view point of objective function and constraint functions and an expert of computer science will say the same word from his view point of program code. Then, what is wrong? . . .

I consider this fatal problem from these 3 fields simultaneously. After I tracked numerical results of each step to run the code and analyzed mathematical expressions for performance and optimization, I found the gradient calculation for stability performance (the US Coast Guard wind heel criteria) can not be used to unstable ships [sic], however. MDO should start from arbitrary initial ships, which can be unstable also. Finally, I rewrote the code to reset the stability constraint function, so that MDO may become convergence.

The petitioner asserts "only I can solve the fatal problems as the key researcher" because he has a combination of academic training, research experience, and "practical experience to build ships in shipyards." We have not disputed that the petitioner is well qualified for the position he holds at Virginia Tech. Nevertheless, the petitioner has not demonstrated that his contributions are so significant to the MARITECH project as a whole, or to MDO in general, as to have a substantial impact outside of Virginia Tech.

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. The petitioner has not shown that MARITECH officials outside of Virginia Tech consider the petitioner's involvement to be especially important to the overall project. 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.