



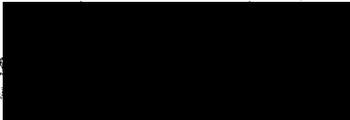
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U.S. Department of Justice

Immigration and Naturalization Service

Id. Some data deleted to prevent clearly unwarranted invasion of personal privacy

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



File: [Redacted] Office: Nebraska Service Center

Date: JUL 26 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 sustained and the petition will be approved.

We note that the petitioner was originally represented by attorney [REDACTED]. The record reflects no action by Ms. [REDACTED] apart from the preparation of the initial petition. The term "counsel" shall refer to the present attorney of record and to others at the same firm involved in preparing appellate materials.

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 he filed the petition, the petitioner was a research associate at the University of Chicago ("UC"). 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 Ph.D. degree in Astronomy and Astrophysics from UC. 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 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 research, the petitioner submits several witness letters, of which we will consider selected examples. UC Professor Robert Rosner, director of the Center for Astrophysical Thermonuclear Flashes, states:

[The petitioner] is an important contributor to several projects now underway at the Accelerated Strategic Computing Initiative (ASCI) FLASH Center at the University of Chicago. In one project, [the petitioner] has worked on programs to test, validate, and understand mixing at unstable interfaces, a fundamental problem in nuclear astrophysics. (One such process is Rayleigh-Taylor instability, where heavy fluid is accelerated toward light fluid. Rayleigh-Taylor instability happens in a supernova explosion as shock waves propel heavy elements toward the outer shells of a star.) . . .

[The petitioner's] work on the development of analytical and numerical tools for research on double-diffusive slot convection has resulted in a more

comprehensive apprehension of this dynamic system. This problem has relevance to both astrophysics and the more mundane world of terrestrial energy conservation: Slot convection is a process that occurs, for example, in double-paned (insulated) windows. In this process, the horizontal temperature difference between the window's exterior and interior surfaces . . . [can] overcome the insulating properties of the window. . . .

[The petitioner] is also a key contributor to our studies of thermonuclear flame propagation. The speed of such flames is key to how the resulting stellar explosions develop. In this ongoing work, [the petitioner] is specifically helping us develop our numerical simulation tools for understanding how various types of flows lead to the speed-up of flame propagation.

Professor William Roy Young of the Scripps Institution of Oceanography states:

[The petitioner's] contributions to the projects currently underway at the FLASH Center are essential. . . . His work on sedimentation and layer formation has led to a new interpretation of sedimenting phenomena observed in the laboratory more than 20 years ago. Currently an ongoing experiment in the group is motivated by his findings. . . .

[The petitioner] studies Rayleigh-Taylor instability specifically as it pertains to exploding supernovae and inertial confinement nuclear fusion. The results of his efforts shed light on the amount of energy that is expended in thermonuclear events, and reveals further information on the properties of manmade thermonuclear devices such as the atomic bomb.

Dr. Alan Kerstein of Sandia National Laboratories, who first learned of the petitioner's work at a seminar, states that the petitioner's "contributions have been extremely valuable to us . . . he has an impeccable reputation among those who know of his work." Professor Philip J. Morrison of the University of Texas at Austin states that the petitioner's "work on stratified Kolmogorov shear flow . . . has helped us understand the limits of the single wave approximation, an approximation that occurs in a variety of fluid and plasma systems." Dr. Henry Greenside, associate professor at Duke University, states that the petitioner "is among the top young science researchers in theoretical and computational physics with special strengths in computational field dynamics." These letters indicate that familiarity with the petitioner's work, and recognition of its importance, is not limited to the universities where the petitioner has worked and studied.

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 noted that it cannot suffice for the petitioner and his witnesses simply to assert that the petitioner possesses necessary qualifications for a given position. The director found that

the petitioner has not established the significance of his contributions, or that the petitioner's "work is known and considered unique outside his immediate circle of colleagues."

On appeal, counsel states that the petitioner has shown that his "contributions would better serve the national interest than U.S. workers." Counsel has subsequently provided a brief with additional exhibits. The arguments and exhibits submitted on appeal are not generally as strong as this petitioner's initial evidence. The approval of the petition in this instance derives primarily from appellate review of the initial record rather than the arguments and evidence presented on appeal.

Counsel cites documentation showing that the petitioner was "one of 8 funded Fellows" (other documentation names a ninth, presumably unfunded fellow) to participate in the 1999 Geophysical Fluid Dynamics Program at Woods Hole Oceanographic Institute. Counsel asserts that the "program selects a handful of scientists every year" out of an "applicant pool [that is] worldwide," the implication being that participation in this program is an exceedingly rare and highly sought-after honor. The record, however, shows that only 48 people applied for the program in 1999 (as counsel acknowledges in his brief). The petitioner, therefore, was not singled out from a massive, global pool of researchers, but rather was among the one-sixth of program applicants accepted in 1999. With regard to the "worldwide" assertion, the record contains a list of past fellows, indicating that the majority of fellows are affiliated with U.S. institutions. The 2000 fellows were all from U.S. universities, except for one fellow from McGill University in southern Canada. Unless the selection process is heavily biased toward researchers in the U.S., the composition of the fellowship lists suggests that upwards of three-quarters of the applicants are in the United States when they apply.

Whatever the prestige of the fellowship, there is no evidence that the petitioner's work during the ten-week course represents an important contribution in its own right. A witness from the Woods Hole Oceanographic Institution, dean of Graduate Studies Dr. John W. Farrington, describes the fellowship program but does not discuss the petitioner's project or assert that it was any more important or significant than other projects undertaken by other fellows.

Counsel claims that the director's decision contains contradictory statements regarding the petitioner's membership in the American Physical Society ("APS"):

INS states, "APS membership consists of outstanding scientists, who have top-level expertise and remarkable achievements in their field, as judged by recognized national and international experts." In the very same paragraph, the Service states, "The record does not indicate that the membership is indicative of outstanding or unique achievements. Furthermore, the record does not indicate that the membership is a reflection of the alien petitioner's unique standing in the field of expertise."

On the one hand, the Service admits that APS members are "outstanding scientists" with "top-level expertise," and with scarcely a pause, claims that

membership is not "indicative of outstanding or unique achievements." The INS concedes a point it later negates. An administrative body with decision-making authority should not make this type of contradiction.

Review of the director's decision reveals that the supposed contradiction arises only from counsel's selective quotation of the paragraph. Counsel has omitted a crucial sentence that completely removes the alleged contradiction. The complete paragraph reads:

The record reflects membership for the alien petitioner in the American Physical Society (APS). APS membership consists of outstanding scientists, who have top-level expertise and remarkable achievements in their field, as judged by recognized national and international experts. The record also reflects junior membership for the alien petitioner in the American Astronomical Society. The record does not indicate that the membership is indicative of outstanding or unique achievements. Furthermore, the record does not indicate that the membership is a reflection of the alien petitioner's unique standing in the field of expertise. While memberships are commendable, they do not establish a sustained pattern of achievement.

Counsel had quoted the second, fourth, and fifth sentences of the paragraph when pointing out the supposed contradiction. Clearly, however, the director did not make contradictory comments. The director's assertions in the fourth and fifth sentences plainly refer not to the petitioner's APS membership, but rather to the petitioner's junior membership in the American Astronomical Society ("AAS"). Counsel's removal of the reference to the AAS created the false appearance of such a contradiction, but the meaning of the unedited paragraph is plain. Thus, counsel's condemnation of "contradiction" by "an administrative body with decision-making authority" rests entirely on a misleading alteration of the director's language. Whether counsel deliberately excised the reference to the AAS, or simply missed it entirely while quoting passages immediately before and after it, counsel's argument collapses because it is based on a false premise.

For the record, it is worth noting here that neither the APS nor the AAS require outstanding achievements of their members. The membership requirements for both associations are widely available via the World Wide Web. According to www.aps.org, "[m]embership in the American Physical Society is open to all individuals with a strong interest in physics." According to www.aas.org, junior membership in the AAS is "[o]pen to persons who are either: a) under 28 years of age, actively involved in the advancement of astronomy or a related science . . . [or] b) full time students, regardless of age, pursuing a degree in astronomy or related science at college level or higher." The highest class of membership, full membership, is "[o]pen to any person deemed capable of preparing an acceptable scientific paper on some subject of astronomy or related branch of science." We concur with counsel insofar as that a decision-making body should take care not to issue contradictory statements, but when widely available evidence contradicts an apparently baseless assertion by the director, the director's assertion (whether favorable to the petitioner or not) cannot stand. In Sussex Engineering, Ltd. v. Montgomery, 825

F.2d 1084 (6th Cir. 1987), the Court of Appeals held that it is absurd to suggest that the Service must treat acknowledged errors as binding precedent.

The petitioner, on appeal, submits new letters from two UC faculty members, who indicate that the petitioner has left UC and begun working at Northwestern University. Apparently, this move took place so shortly before the filing of the appeal that the petitioner had not yet produced demonstrable results in his work at Northwestern.

One of the new letters on appeal is from UC Professor ArieH Königl, who states:

[The petitioner's] contributions are **unique**. The subject matter of his research involves studying important fluid processes that are not yet fully understood on account of their complexity. He has been able to make significant advances in this study by combining powerful analytic and numerical techniques, with the latter involving the use of state-of-the-art codes and machines. His research stands out in that it is guided by recent laboratory experiments, which it has succeeded in explaining (sometimes by overturning an incorrect previous interpretation).

As stated further above, the initial submission contains evidence that researchers outside of the petitioner's circle of collaborators have taken notice of the petitioner's work and consider it to be of special significance. The record does not support the director's finding to the contrary. While counsel's brief contains some weaknesses and at least one serious error, these deficiencies do not undermine the underlying petition.

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 scientific 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 that 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.