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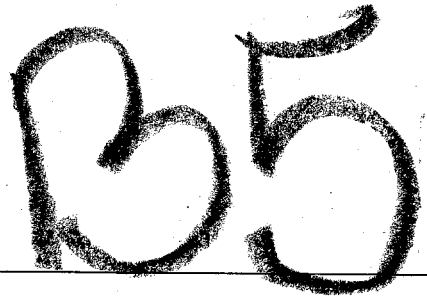

**U.S. Department of Justice**

Immigration and Naturalization Service

Identifying 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*

[redacted]

File: EAC 99 142 50198 Office: Vermont Service Center Date: JUL 26 2002

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

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 she filed the petition, the petitioner was a software engineer at Innovision Technologies, Inc., which is a contractor working with DaimlerChrysler Corporation. 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.

To explain the nature of her work, the petitioner submits several witness letters.

[redacted] a senior engineer who supervises the petitioner's work in the Powertrain Core Electronics Department of DaimlerChrysler Corp., states:

> The Powertrain Core Electronics Department is responsible for the development of engine and transmission controller software. These software packages manage the complete engine control system and transmission control system. . . .
>
> My workgroup is currently involved in the development of software for a new set of engine and transmission control electronics, which . . . represents a quantum leap in engine controller technology over previous controllers. The software utilizes object-oriented technology to implement model based controls. Several advanced technologies in our project have never been used previously in engine controller software. . . .
>
> My workgroup is primarily responsible for the foundation level of the software. The foundation software is the backbone for the entire engine controller software. . . . Other workgroups on this project depend on our work to implement the advanced control features being introduced with this controller. . . .

> [The petitioner] is responsible for several key components of the software in our group. The first part of her work involves data sampling, processing and diagnostics of analog inputs. The second part of her work concerns the vehicle security system. . . . Lastly, [the petitioner] is responsible for verification and validation of many systems developed by others on the project. . . . [The petitioner] has done an extraordinary job in every aspect of her work.

Other DaimlerChrysler personnel assert that the petitioner is a very capable worker, ideally suited for the tasks undertaken in the Foundation Software Development Group.

The assertion that the petitioner is talented and dedicated in her work does not establish why it is important to the national interest that the petitioner, rather than another fully qualified worker, be the one performing these functions at DaimlerChrysler. The petitioner's co-workers have discussed the importance of the computer systems on which they are working, for instance in terms of promoting cleaner emissions, but they do not indicate that the petitioner has been primarily responsible for innovations that would significantly reduce those emissions. The petitioner's co-workers praise her as creative, efficient, and careful in her work. These are all desirable qualities in an employee but they do not rise to the level of serving the national interest.

Another witness is [redacted] who taught a graduate course to the petitioner at Wayne State University. Like the witnesses at DaimlerChrysler, [redacted] asserts that the system on which the petitioner is now working is an ideal setting for the petitioner to make the most of her skills. These comments, however, do not establish a track record of existing achievement.

The last of the initial witnesses is [redacted] Li of Visteon (a division of Ford Motor Corporation), "a personal friend" who has "known [the petitioner] from Dec. 1996." [redacted] describes the petitioner's commendable graduate student work and states that the petitioner "had some important publications" in the area of "environmental multi-partner measuring." [redacted] asserts that the Next Generation Controller project, on which the petitioner is working, is a five to six year project for which DaimlerChrysler has been careful to select only the best workers.

With regard to the labor certification procedure, counsel states that "[t]he process is lengthy, cumbersome, expensive and, it has been asserted [counsel does not specify by whom], bears no authentic relationship to the business reality inherent in testing of a labor pool for able, qualified, willing and available U.S. workers." Counsel adds that "[t]he labor certification process is a sterile procedure" that is not applicable to jobs such as the petitioner's, where "the very essence of the work is creativity, ingenuity, inventiveness, imagination, and sagacity. . . . It is respectfully suggested that the fact that in certain cases the situation is not amenable to the labor certification process is the reason that Congress provided for the National Interest Waiver." It remains that, by law, advanced degree professionals and aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement, and that advanced degree professionals were not even eligible for the waiver in the original legislation (the statute has since been amended). The Administrative Appeals Office lacks the authority to declare that Congress

made a mistake when it specifically applied the job offer/labor certification requirement to aliens working in the sciences. As long as the labor certification requirement is part of the statute, we have no discretion to disregard that requirement. The Immigration and Naturalization Service has no jurisdiction over the labor certification process itself. Arguments for reform should be directed to the Department of Labor; arguments for its outright abolition should be directed to Congress, which has the sole authority to modify or remove the requirement.

We note Congress' creation of a blanket waiver for certain physicians (the recently enacted section 203(b)(2)(B)(ii) of the Act). This amendment demonstrates that Congress did not envision blanket waivers as an integral part of the original statute; otherwise, the creation of a specific blanket waiver would have been superfluous. We will give due consideration to evidence regarding the petitioner's contributions and abilities, but for the above reasons we cannot agree with counsel's contention that the occupation itself demands a waiver.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director specifically requested letters from "major authorities" who are not closely tied to the petitioner. In response, counsel asserts that the petitioner's work for DaimlerChrysler is "highly proprietary" and therefore few people will know about it outside of DaimlerChrysler and its contractors; nevertheless, the petitioner has already submitted a letter from an employee of Ford Motor Company, one of DaimlerChrysler's major industry rivals.

Counsel states that the petitioner "has played an invaluable role" for DaimlerChrysler's Next Generation Controller project, having "designed and implemented several key fundamental components of the next generation controller." The petitioner submits new witness letters.

Glenn J. Denomme, senior manager of Core Powertrain Electronics at DaimlerChrysler, states:

> [The petitioner] is responsible for developing several critical software systems for this new engine controller. She has worked extensively on the operating system, analog signal processing, digital output control, and vehicle security. Most important, however, has been her work on vehicle emission diagnostics. She has created a unique and innovative system that will manage all of the federally mandated On-Board Diagnostic Systems (OBD-II).

[redacted] project manager and methodologist for IBM Global Services, identifies himself as "a colleague" who has known the petitioner since 1991. [redacted], like [redacted] asserts that the petitioner's "most important contribution . . . has been in the area of vehicle emission diagnostics. She created a unique and totally innovative system that will manage all of the federally mandated On-Board Diagnostic Systems (OBD-II)." Other portions of [redacted] letter are, likewise, nearly or entirely identical to portions of [redacted] letter. [redacted] states that the petitioner's work has "had a considerable influence on the global high tech industry," which appears to be inconsistent with counsel's assertion that the petitioner's work is proprietary and therefore closely guarded within DaimlerChrysler. In any event, evidence of truly global

influence should be readily available from sources outside of the petitioner's co-workers and long-time acquaintances. If no such evidence is available, then there is no reliable empirical basis for the claim that the petitioner has had such influence. [redacted] does not identify a specific example of how the petitioner has "had a considerable influence on the global high tech industry." Other witnesses, all of whom have known the petitioner for years and none of whom work for DaimlerChrysler, assert that the petitioner is a pivotal member of the NGC/OBD-II project team, and that her educational and professional background distinguish her from others in the field.

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 asserted that the petitioner's work on her current project, which began only seven months before the filing of the petition, had not had time to produce significant results. On appeal, the petitioner submits a brief from counsel and further documentation concerning her employment. This appellate brief consists almost entirely of lengthy quotations from previously submitted letters, already considered above.

On appeal, counsel repeats the assertion that DaimlerChrysler "has not allowed dissemination of [the petitioner's] work," but then asserts that the director has not given sufficient weight to letters from employees of Ford Motor Company who claim knowledge of the petitioner's work. There is nothing from DaimlerChrysler itself to establish the proprietary nature of the petitioner's work, and even if there were, the petitioner would appear to be acting against her employer's interests by discussing her proprietary work with her acquaintances at rival automobile companies. The petitioner has not resolved the fundamental conflict within the claim that the petitioner's work, while closely guarded by her employer, has nevertheless had global influence.

The petitioner submits a copy of "a conditional offer of employment" that DaimlerChrysler extended to the petitioner on July 7, 2000, shortly before the denial of the petition. Counsel asserts that this offer to work directly for DaimlerChrysler, rather than through a contractor, is "[a] further indication of the key impact that [the petitioner] has made." Leaving aside the fact that this job offer did not exist as of the petition's filing date, and thus cannot retroactively establish eligibility, counsel's reasoning is not persuasive. Counsel's argument presumes that DaimlerChrysler only offers direct employment to workers who have had a "key impact." This presumption has no documentary support in the record.

For all the vague assertions regarding the petitioner's contributions to her field, the record contains no first-hand evidence to show that her work has had any greater impact on automotive control design than other fully trained workers in that area. General attestations regarding the petitioner's skill cannot suffice because exceptional ability, by itself, is not sufficient grounds for a national interest waiver. The plain wording of the statute indicates that the job offer requirement applies to aliens of exceptional ability.

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.