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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: 12 JUN 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)

Public Copy

IN BEHALF OF PETITIONER: Self-represented

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 an alien of exceptional ability. 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.

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 Master's degree in Forest Biometrics from the University of Illinois at Urbana-Champaign as well as an earlier Master's degree in the same field from the Central South Institute of Forestry in China. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, modeling ecological systems, and that the proposed benefits of his work, improved understanding and protection of ecological systems, 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.

Initially, the petitioner claimed to be eligible for the national interest waiver based on his degrees, awards, and membership in professional associations. These are factors for aliens of exceptional ability. Matter of New York State Dept. of Transportation provides:

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.

Id. As such, even if we determined that the petitioner was an alien of exceptional ability, that determination would not, by itself, exempt the petitioner from the labor certification process.

Moreover, 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.

As stated by the director, the petitioner submitted four letters from his professors and collaborators. [REDACTED] in whose laboratory the petitioner has been working at the University of Illinois, writes:

As part of [the petitioner's] Ph.D. work, he has been developing a new system to analyze ecosystems based on realistic information. The new system can reveal the real interactions and correlations among all the components of ecosystems. This property of the new analysis system will bring profound changes of the analysis of forest and other ecosystems. Because of the computational intensity in his work, he programs and uses different super computers at the U of I National Center for Science Alliances. He has finished two research papers on this new system.

[The petitioner] is working in my new four-year project from the Strategic Environmental Research and Development Program, which is sponsored by the Department of Defense, Department of Energy, and Environment[al] Protection Agency. . . His study will play an important role in my project. The new system he is working on is expected to be established when my project completes. [The petitioner] will make a significant contribution to forest science and ecology by completing this new analysis system.

[REDACTED] with the Natural Resource Assessment and Management Division of the Army Corps of Engineers in Illinois, writes:

[The petitioner] has worked in my project "Inventory and Monitoring for Rare, Threatened, and Endangered Species on Military Installations" as a research assistant from November 1996 to December 1997. On this project, [the petitioner] worked on aspects of uncertainty and quality control in sampling rare populations, and sensitivity and error analysis in a class of metapopulation models. He has been a creative, innovative, and conscientious worker. A component of this research was presented at The Wildlife Society 1997 Annual

Conference. His efforts have been very important to my research in population and ecosystem monitoring and modeling.

the contingent chairman of the petitioner's Ph.D. program committee at the University of Illinois, writes:

[The petitioner] has built a model for me to analyze an insect-virus interactive system. In his working on this task, he demonstrated his very good academic background, very strong ability to adapt to new fields, and hard-working attitude. In his previous studies of forest ecosystems, he has a few papers and a book published. His Ph.D. thesis proposal contained several very important and urgent problems for dynamic analysis of ecosystems, insect populations, and endangered and threatened species. The contribution of his Ph.D. study is expected to develop robust analysis methods to ecosystem dynamics and quality control. His study is very promising.

in China, writes:

[The petitioner] was the Principal Investigator of [the] project[,] Development of Database Management Software for Cut Wood Data, which was funded by the Youth Science Foundation of Central South University. His four academic papers had been published on [sic] nation-wide academic journals. He co-authored the book[,] Simulation System of Management of Massoniana Pine, which was published by Forestry Press in 1991. His research effort and achievements were reward[ed] [with] a Science and Technology Progress Award by [the] Ministry of Forestry, P.R. China in 1992.

The petitioner also submitted a letter confirming that his paper, "Uncertainty Estimation of Self-thinning Process by Maximum-Entropy Principle" was accepted for presentation at a conference in Boise, Idaho; copies of his four articles published in China; evidence of the publication of his book; his membership cards for the Society of American Foresters and the Northern California Translators Association; confirmation that one of his papers was accepted for presentation at the First Young Scientists Annual Conference of the Hunan Province Scientists Association in 1992; and a copy of his Forestry Science Award from the Chinese Ministry of Forestry.

The director determined that the petitioner had not established that his work was known or considered unique outside his immediate circle of colleagues. The director also noted that the petitioner had not published any articles since his arrival in the United States. The director concluded that the petitioner had not established that he would benefit the United States to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, the petitioner reiterates that he received an award and that he co-authored a book. He notes that one of his papers had been accepted for presentation at a conference prior to filing the petition, that he has had three more papers accepted for presentation and that he has now had an

article published. He notes that one of the reviewers commented that his work represented, "a major step forward in the parameterization of complex models." As the reviewers for professional journals and conferences are professionals outside the petitioner's immediate circle of colleagues, the petitioner argues that this evidence establishes that his work is highly regarded beyond his collaborators and advisors. The petitioner further notes that his grade point average "is higher than 90%." The petitioner submits a copy of his published article, the anonymous review quoted above, three letters regarding the acceptance of his paper for three different conferences, his Ph.D. diploma and transcript, and a new letter from [REDACTED]. [REDACTED] provides general praise of the petitioner, reiterates that the petitioner's projects have been funded by government agencies, and asserts that there are very few people with the petitioner's technical expertise in statistics and super computer modeling as it relates to natural resources and environmental systems.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). As such, the fact that, since the date of filing, the petitioner has had an article published and had three papers accepted for conferences cannot be considered evidence of his eligibility at the time of filing. Nevertheless, the petitioner need only demonstrate an influence on the field as a whole regardless of where he made his influential contributions. Thus, his four published articles and book cannot be dismissed simply because they were published outside the United States.

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.

While the petitioner received an award for one of his projects, it is not clear that his publications in China influenced the field as a whole. The record contains no evidence that his articles or his book have been cited extensively by independent researchers. Regarding the positive comments by the reviewer of the petitioner's article, it can be argued that any article, in order to be accepted for publication, must offer new and useful information to the pool of knowledge and receive a positive response from the reviewers. Similarly, every researcher who presents a paper at a conference is approved to give that presentation.

With regard to [REDACTED] assertions on appeal, most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national

interest to an extent which justifies a waiver of the job offer requirement. Regarding his assertion that there are few available workers in the United States with the petitioner's skills, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Matter of New York State Dept. of Transportation, supra, provides that "the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor." Id.

Finally, we concur with the director's determination that the petitioner has not established he has influenced his field outside his immediate circle of colleagues. The above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole. Even the letters submitted mostly predict future contributions as opposed to identifying any specific contribution already made by the petitioner. Regarding the reviewer's comments, the comments of one anonymous reviewer relating specifically to whether the petitioner's article was appropriate for publication does not carry the same weight as a letter attesting to the petitioner's contributions to the field from an independent expert in the field who was aware of the petitioner's influence prior to being asked to provide a reference letter.

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.