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U.S. Department of Justice
Immigration and Naturalization Service

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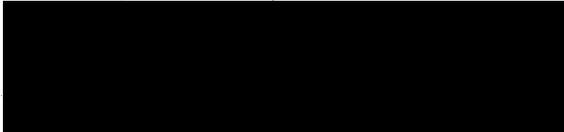
File: [Redacted] Office: Nebraska Service Center

Date: JUN 13 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. At the time of filing, the petitioner was a Ph.D. candidate and research assistant at the University of Minnesota. 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 petitioner holds an M.S. degree in Mechanical Engineering from the University of Minnesota. 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.

Counsel describes the petitioner's work:

[The petitioner] is currently a senior research assistant in the High Temperature Laboratory and the Engineering Research Center for Plasma-Aided Manufacturing located at the University of Minnesota. . . . With his recognized expertise and leading stature in the field, [the petitioner] has been named the lead researcher of plasma spray technology in the HTL and a core research fellow of the thrust area of coating technology in the ERC for Plasma-Aided Manufacturing.

In terms of his specific contributions of significant and substantial importance to the field, [the petitioner] has been responsible for the development of a new plasma spray torch that improves the quality of the plasma sprayed coatings; a new diagnostic technology for plasma spraying process based on torch voltage, light, and sound analysis; a real-time monitor-control system; and a new diagnostic strategy employing sound signal as an indicator for monitoring plasma spraying processes thereby resulting in a manufacturing-environment-friendly application system. . . .

[The petitioner] is a leader in the field conducting research at the very forefront of this critically important field.

At an increasing rate, industry has begun to realize the importance of plasma spray technology, but in order for it to become more widely utilized, costs must be reduced and reliability improved. This is the focus of [the petitioner's] cutting-edge research, an area in which he has made significant and substantial contributions that have greatly advanced the field. . . .

To achieve a uniform and reproducible coating, sprayed powder must be evenly heated and accelerated. However . . . there are high levels of fluctuation in temperature and velocity of the plasma jet. . . . Such fluctuations result in strong variations in the heating of sprayed particles. Consequently, plasma instability, i.e. fluctuations, is considered one of the most determining factors for the quality of sprayed coatings. . . .

In order to fully understand and control a plasma spray process, the dynamic characteristics of the plasma must be considered. [The petitioner's] cutting-edge research has focused on or has been related to this subject.

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.

Along with copies of his published articles, the petitioner submits several witness letters. [REDACTED] director of the High Temperature Laboratory at the University of Minnesota, states:

The plasma spray industry is always demanding highly reliable coatings while, at the same time, trying to reduce production costs. Thus, the main and current focus of this line of research is to achieve effective and economic controls of the spray process. . . . [The petitioner] is responsible for developing a novel diagnostic approach based on a combination of voltage, light and sound measurement with the goal of establishing guidelines for a real-time control system for the plasma spray process. His improved system consists of a PC and certain user-friendly sensors. As previous diagnostic systems were lab-oriented, it was hard to control the spray process when we changed the work environment from the lab to the industrial setting. [The petitioner's] new system can be easily adopted by and effectively manipulated by the industry, even under a strong interference.

[The petitioner] also developed a new plasma spray torch concept combining a shroud surrounding the plasma jet with an anti-vortex flow. This concept successfully removes many obstacles existing in current spray torch designs. For example it provides the uniformity of heating and prevents the oxidation of metal or alloy material. . . . As he demonstrated in the laboratory, both the deposition efficiency as well as the quality of sprayed coatings can be substantially improved by this approach. As a result, adoption of this concept by the industry will enormously reduce production costs and refine product quality and service time. Actually, the industry is already evaluating this new spray torch for wide application.

Several other witnesses who have worked with the petitioner at the University of Minnesota or otherwise know him well offer similar descriptions of the petitioner's work. These statements from the petitioner's mentors, collaborators and colleagues offer valuable illumination of the nature of the petitioner's work, but they cannot by themselves show that the petitioner's work has earned significant notice or attention outside of his circle of collaborators and associates. Witnesses close to the petitioner have reported that industrial corporations have taken an interest in the petitioner's work, and that the petitioner's efforts are especially important to the aerospace industry, but the record contains no first-hand evidence to establish the actual level of interest expressed by the corporations themselves. The general statement that "industry" will benefit from the petitioner's work is not sufficient in this regard.

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 found that "the record does not establish that the alien petitioner has yet established a history or pattern of significant contributions to his field." While the record shows that the petitioner has received some honors and awards, these are at the student level. As of the filing date, the petitioner had been a student for his entire adult life. The record does not show the

extent to which private industry has actually applied and implemented the petitioner's innovations, or the degree of beneficial change that those innovations have brought about. The director noted the lack of independent support for the petition.

On appeal, counsel observes that the petitioner "is continuing to pursue his Ph.D. but has accepted a position as a Plasma Process Engineer with Hypertherm, Inc.," which "is the world leader in plasma cutting equipment." The petitioner's current project has the goal "to develop a technology that can predict the life of a plasma cutting torch." Counsel observes that "since the time of the filing, [the petitioner] has continued to present and publish his work in the field's premier forums," including conferences and journals. These publications and presentations took place, as counsel acknowledges, after the petition's filing date. Likewise, the petitioner had done no work with plasma cutting equipment as of the filing date. These materials cannot retroactively establish the petitioner's eligibility as of the filing date if the petitioner was not already eligible at that time.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumij, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel asserts that the inclusion of the petitioner's work in journals and conferences demonstrates independent recognition of that work. The record does not establish that it is unusual for researchers in the field of mechanical engineering to publish and present their work in this way. Also, the record does not establish frequent citation of the petitioner's published articles, which would demonstrate the influence of the petitioner's work on others. Witnesses have discussed potential uses for the petitioner's innovations, such as in spray coatings for aircraft parts, but the record contains no documentation from any aircraft manufacturer to show that they have actually implemented the petitioner's designs, or that those designs have had a significant effect on the manufacturing process.

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.