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U.S. Department of Justice
Immigration and Naturalization Service

Administrative law decision in
reopening of an alien worker
application for asylum

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



13 JUN 2002

File: EAC-99-174-53319 Office: Vermont Service Center Date:

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: 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 Center

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 sustained and the petition will be approved.

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 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 Master's degree in Electrical Engineering from the University of Missouri. 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, systems testing, and that the proposed benefits of his work, reliable software for the International Space Station, 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.

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.

John Hinkle, the manager for all Software Independent Verification and Validation (IV&V) at the National Aeronautics and Space Administration (NASA), writes:

I have worked with [the petitioner] in the coordination and development of a set of computer tools referred to as the ISS Testbed. [The petitioner] has been a key member of the development team and will be the lead member in its utilization.

[The petitioner's] knowledge, background and qualifications play a role that is essential to the success of our mission to the Space Station which is to independently validate and verify all United States software components of the Space Station.

The International Space Station Testbed provides to the Independent Validation and Verification NASA Facility, in West Virginia, the means to independently test all software components of the International Space Station built by the United States. [The petitioner's] role in our mission is unique. He possesses the knowledge to configure this Testbed to simulate every computer in the Space Station. Furthermore, all of our software analysts depend on [the petitioner's] knowledge to prepare them to use this Testbed.

The ISS Testbed is a very complex system. It incorporates Space Station Flight Software components and software environment simulation models developed by Boeing, Space Station Multiplexer/Demultiplexer emulators developed by Raytheon, Inc., GeoControl Systems Inc., control software NASA developed software, and many commercial off the shelf software and hardware products. [The petitioner] has extensive knowledge of these systems.

The petitioner also submitted a letter from Greg Miller, the Vice President of AverStar who has been involved in every manned space mission since Apollo and is the contractor in charge of managing the NASA Omnibus set of tasks. Mr. Miller asserts that he has continually monitored the progress of the Space Station Independent Testbed due to its unusually critical nature. He writes:

[The petitioner] is currently working on the completion of this Independent Testbed to validate and verify the United States software components that will be used in the International Space Station. He has made remarkable contributions to this project and continues to do so. His contributions have already earned [the petitioner] an award from our company, recognition by the NASA, and have been essential for the completion of testing of the Portable Computer System (PCS) User Interface Software and the current effort to test the Node Control Software. [The petitioner] is a critical member of our team because he is the only one that has a complete knowledge of the Testbed architecture, components, and operation which also provides him the necessary background to configure it for the different software components of the Space Station. The International Space Station is being built in an incremental manner matching the launch schedule and such testing will continue during the next several years as the assembly sequence is completed. [The petitioner's] role is so essential to our success that he is in charge of training all software IV&V analysts that will be utilizing this Testbed and he is the prime developer and engineer for the virtual 1553 data bus emulation which is the backbone of the Independent Testbed.

Thomas M. Hancock III, a lead engineer at NASA's IV&V program, writes:

[The petitioner] is responsible for integration of the Internal Systems (INTSYS) space flight software and simulation support tools into the IV&V flight software Testbed in Fairmont[,] West Virginia. [The petitioner] is one of 3 people in the United States that understands the function and complexities of the INTSYS flight software (INTSYS is one of the most complex systems on the International Space Station). The correct function of the INTSYS flight software, the software system in the United States laboratory, is critical and it MUST work correctly if risk to the astronaut's safety and the spacecraft is to be kept in check. [The petitioner's] knowledge and expertise are unique and essential to successfully complete this task. He is currently working to validate the test environment and train our team members in performing IV&V on the flight code. Based on his contributions, our team has great expectations for improving the quality of the INTSYS flight software with this test environment. His contributions will also help ensure the safety of the Astronaut crew on the Space Station. We are currently working very closely with [the petitioner] and his knowledge and expertise are essential for our task. I can assure you that both the US Space Program and NASA IV&V will continue to require his support in the future. [The petitioner's] contributions to our team are critical. They are very important to IV&V and consequently to the International Space Station program.

[The petitioner's] work is and will be essential to the INTSYS International Space Station flight software development (this task will continue for at least 5 more years). His work will continue to benefit our team's efforts and the US Space Program. I am sure he will make many more contributions in the future.

Chris Strong, the lead for the Electrical Power System and External Control Zone space station software IV&V team, writes:

[The petitioner] is one of a cadre of 4 engineers who are responsible for creating our capability to test space station software. This group has an extraordinarily difficult task because, in an effort to reduce costs for our customer, our company has resorted to using the products of other testing organizations. Our test personnel are therefore grossly understaffed to achieve the task at hand, with the idea that the test products of other organizations would make up the difference.

Unfortunately, the marrying of different products from diverse organizations to our own test objectives and capabilities has proved much more complex than anticipated, and it has fallen to our cadre of testbed engineers to rectify the situation. They have made great strides in doing so and have established a capability to test 3 of the early space station software applications But there is a long trek to the finish line. We still need the capability to test perhaps a dozen more station software applications. I anticipate our testbed cadre will be busy

with this task alone for at least another 4 years, and there is a critical need this year to create the test capability for a significant number of these applications.

Although I do not work directly with [the petitioner], I have seen enough of his handiwork to know that his effort compares favorably to those of the other members of this team. His contributions amount to a lot more than twenty five percent. And his services are especially important in support of the Photovoltaic Controller Application, the software which one of my teams is now testing (and which [the petitioner] is an expert in).

Cynthia Calhoun, a NASA program manager; T. David Hanson, an engineering manager at GeoControl Systems Inc. where the petitioner is employed; James A. Engler, Jr., a project manager at the Johnson Space Center; Khalid Lateef, a senior systems engineer at AverStar Inc.; Rodger Barrington, an IV&V PCS team leader; and John Dicks, International Space Station IV&V Project Manager at AverStar Inc., all provide similar information to that quoted above.

The director concluded that the petitioner had not met the final prong set forth in Matter of New York State Dept. of Transportation, mostly because he had not demonstrated why it would be detrimental to the national interest to go through the labor certification process. Specifically, the director concluded that the petitioner's skills could be enumerated on an application for a labor certification, including his on-the-job experience.

On appeal, the petitioner notes that an employer could not list the experience the petitioner has acquired from that employer on an application for a labor certification. On this point, the petitioner is correct. Regardless, whether or not the petitioner's skills could be enumerated on a labor certification application is not the ultimate issue to be decided. Matter of New York State Dept. of Transportation provides that a national interest waiver is not warranted simply because an alien possesses unique skills since those skills could be enumerated on a labor certification application. It does not follow, however, that a petitioner must demonstrate that his qualifications cannot be enumerated on a labor certification application. The issue to be decided is whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications will, whether or not those qualifications can be enumerated on a labor certification.

The petitioner's argument, however, that the waiver is warranted solely because he has on-the-job experience which cannot be articulated on a labor certification application is also unpersuasive. As stated in Matter of New York State Dept. of Transportation, the applicability of the labor certification process is simply one factor for consideration. The petitioner still must demonstrate that he will serve the national interest to a substantially greater degree than do others with the same minimum qualifications. Id. at note 5.

A review of the record, including letters from the NASA management personnel responsible for the IV&V facility where the petitioner works, as opposed to simply the petitioner's immediate supervisors, reveals that the petitioner's abilities in systems testing far exceed those with similar

qualifications and that his past record sufficiently justifies a projection of future benefits to the national interest.

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 space systems testing community recognizes the significance of this petitioner's work rather than simply the general area of his expertise. The benefit of retaining this alien's services outweighs the national interest which 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.