

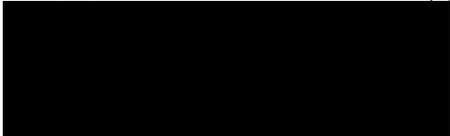


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U.S. Department of Justice
Immigration and Naturalization Service

Division of Personal Privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



19 JUN 2002

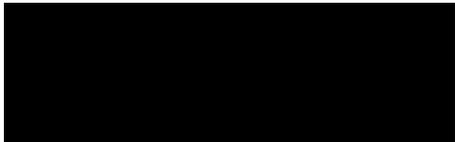
File: [Redacted] Office: Nebraska Service Center

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:



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.

The petitioner seeks to classify the beneficiary 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 seeks employment as an assistant professional scientist at the Illinois State Water Survey ("ISWS"). 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 Earth and Atmospheric Sciences from the State University of New York ("SUNY") at Albany. 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:

Air quality modeling is a complex series of advanced computations that analyze data concerning the transport of chemical species, the emission of pollutants and/or their precursor gases, and the chemical transformation of these gases in space and time. . . . The air quality model developed by the Petitioner ("SAQM") was tested by the EPA and has already been successfully used to study the problem of ozone formation in California.

The Petitioner was recently recruited by the Illinois State Water Survey to become a member of a team of scientists studying the mutual impact of various environmental systems such as air, water, and soil due to climate change. The Petitioner is responsible for studying the impact of regional air quality and collaborating with other team members to assess the impact on other systems. . . .

The petitioner was instrumental in assisting the EPA to develop a better model for studying air quality which is now being implemented by cities and states nationwide. . . .

[T]he Petitioner's proven track record of achievements reveals a uniquely talented research scientist whose contributions far exceed those of his peers.

To establish this track record, the petitioner submits several witness letters. Kenneth L. Schere, chief of the Atmospheric Model Development Branch at the National Exposure Research Laboratory of the U.S. Environmental Protection Agency, states:

I first became aware of [the petitioner's] work two years ago, through a connection with Dr. Julius Chang of SUNY-Albany. . . . In a seminar given at our offices, Dr. Chang described a new numerical chemical solver adapted for air quality modeling that was optimized for speed and accuracy to a degree unmatched by any other comparable solver. . . . Faster speeds and greater efficiency, while maintaining acceptable accuracy, mean that users of these models can do their analyses faster and perform more diagnostic tests and "future scenarios" in their air quality planning.

It was [the petitioner], on Dr. Chang's staff, who performed the work adapting and optimizing this new chemical solver (Hertel solver) to air quality models. Through collaboration with [the petitioner], we have been able to successfully test this chemical solver here, and have replicated the result for speed and accuracy, in a box-model comparing the Hertel solver with several others that we are currently using. We are very impressed with its performance. We plan to adapt this solver to our Models-3 air quality system this year. Many states and cities in the U.S. as well as Canada will be using this air quality model in their upcoming air quality management plans.

Professor Julius Chang, mentioned in Mr. Schere's letter, states:

[The petitioner] has become a truly exceptional scientist in air quality studies. He was instrumental in helping me organize a nationally advertised workshop in air quality modeling. . . . Perhaps the proper statement should be that he organized this workshop. . . .

As for his personal research, it suffices to say that the US EPA National Exposure Research Laboratory, responsible for developing the major assessment tools for air quality studies and control strategies, has sought out his assistance in making their principal model more efficient. . . .

[The petitioner] was instrumental in completing the development of the model used, SAQM. He was especially successful in documenting the model and therefore became the principal developer and caretaker of this major model. Various adaptations of this model are in use in Australia, Hong Kong, China, Taiwan, Germany, Korea and Japan. Of course, it is also in use in the US by several state environmental agencies such as California and New York. . . . As a

part of his research, [the petitioner] has developed a nice computational technique for saving most models a factor of two or more in operating cost. This translates to millions of dollars of savings for the US EPA and other agencies.

Dr. Kenneth E. Kunkel, head of the Atmospheric Environment Section at ISWS, states that the petitioner's SAQM "is considered to be one of the top models in the world for study of air quality issues at urban to regional scales," and that the petitioner "is one of the top scientists in this field." Dr. Kunkel notes that, while ISWS is a state agency, its findings are applicable nationally.

Other individuals who are collaborating with the petitioner in Illinois, or who have collaborated with him elsewhere in the past, offer similar endorsements of the importance of the petitioner's contribution to SAQM, the SARMAP Air Quality Model, as well as earlier modeling projects.

The petitioner submits a considerable quantity of background documentation, which discusses various issues relating to air pollution but does not mention the petitioner's work or its impact on national air quality.

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 observed that the petitioner's witnesses are all from his immediate circle of collaborators, mentors, former classmates, etc.

On appeal, the petitioner submits a brief from counsel and additional letters. Counsel asserts that the director "was skeptical of the alleged bias of the 'testimonial' letters" but "failed to point out a single example of alleged bias in any of the letters." The word "bias" does not appear in the director's discussion of the letters. The director stated:

The record contains seven testimonial letters from individuals in academia and research science who are aware of the alien petitioner's achievements, abilities, and skills. The letters present a strong case regarding the nature and importance of the research in question, however they do not establish that the alien's work is known and considered unique outside his immediate circle of colleagues. The record is not persuasive without corroboration from disinterested parties.

The director's statement is not an allegation of bias, but rather an acknowledgement that the only individuals who have attested to the importance of the petitioner's work are the petitioner's collaborators who have done the same work, alongside the petitioner. The director did not question the credibility or integrity of the witnesses. It remains that, because of the witnesses' ties to the petitioner, their letters cannot represent first-hand direct evidence that the petitioner's work has attracted significant attention outside of research groups at ISWS, SUNY Albany, and other facilities where the petitioner has worked or studied.

Members of the search committee that selected the petitioner for his position at ISWS state that, at the time they chose the petitioner, "we were outside his immediate circle of colleagues." The group selected the petitioner out of four finalists (from an initial pool of 20 applicants) after judging him to be "outstanding" and better qualified than the other candidates. The director did not dispute that ISWS found the petitioner to be the best qualified candidate for the position; his employment there is evidence enough of that. To assert that an alien should receive a waiver if he or she is the best-qualified applicant for a position is to imply that labor certification should only apply when an employer does not wish to hire the best-qualified applicant. Therefore, this particular appellate argument is not persuasive.

More persuasive are two letters from the Air Resources Laboratory, National Oceanic and Atmospheric Administration. Dr. Jonathan E. Pleim, a physical scientist there, makes it clear that he is more familiar with the petitioner's work than with the petitioner himself. He states:

I first became aware of [the petitioner's] research on numerical chemical solvers about two years ago when Dr. Julius Chang visited our laboratory to present a seminar on [the petitioner's] work. . . .

In summary, the results of [the petitioner's] research on chemical solvers so impressed all of us attending the seminar that we immediately requested the computer code of the chemical solver that was the subject of his evaluation study. We were very excited by the prospect of a solver that was significantly faster and more accurate than any of the solvers we had been using up to that time.

A fast but accurate chemical solver is something of a "Holy Grail" in air quality modeling. The chemical solver is by far the most expensive part of the computer simulation and computational speed is always at a premium. Claims of faster, more accurate solvers are common in this field. However, most claims turn out to be disappointing because of some drawback that was not obvious in the initial evaluation. What makes [the petitioner's] work stand out among all those that I am aware of is the superior method of evaluation that he developed. . . .

[The petitioner's] unique solution to the problems inherent in these limitations incorporates box model tests with operator splitting, which realistically mimics full model applications. . . . This is truly an outstanding achievement in the field. Since the seminar, EPA has acquired the new solver from [the petitioner] and incorporated it into our modeling system known as the Models-3 Community Multiscale Air Quality Model (CMAQ). Testing in our system shows a clear superiority in terms of performance and accuracy over our existing solvers.

As a result, [the petitioner's] work has already made an extremely important contribution to EPA's mission to protect and improve the Nation's environment.

Dr. Julian X.L. Wang, senior research meteorologist at the Air Resources Lab, states that he learned of the petitioner's work "[t]hrough discussions with my colleagues here at NOAA and other institutions on this issue." Dr. Wang deems the petitioner's new model "a substantial contribution to improving the performance of chemical species integration." Dr. Wang observes that, by cutting the computer processing time in half, the petitioner has freed processing time for additional modeling efforts for which resources were previously unavailable.

These newly submitted letters, from experts with greater professional distance from the petitioner, offer support for what were previously only unsubstantiated claims. They establish the implementation of the petitioner's work outside of his circle of collaborators, and the high esteem in which independent researchers hold the petitioner's findings. It is not simply a case of ISWS, having completed an arduous search process, being unwilling to undertake the labor certification process.

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.