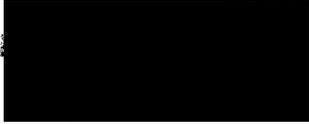




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U.S. Department of Justice
Immigration and Naturalization Service

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

File: EAC 99 105 53174 Office: Vermont Service Center Date:

IN RE: Petitioner:
Beneficiary:



11 MAR 2002
11 MAR 2002

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, 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 he filed the petition, the petitioner was a doctoral student at Princeton University. 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 an M.S. degree in Civil Engineering and Operations Research from Princeton University. 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.

Along with documentation pertaining to his field of research and his academic background and abstracts of three conference presentations, the petitioner submits several witness letters. Many of the witnesses are on the faculty of Princeton University, where the petitioner has studied since 1996. [REDACTED] states:

Since he joined my research group in 1996, [the petitioner] has been doing important research in the field of smart material sensors and actuators. He is playing a key role in the Multidisciplinary University Research Initiative (MURI) program. MURI, funded by US Army Research Office, is a program administered jointly by Princeton, Drexel and Harvard Universities. The aim of MURI is to develop novel mesoscale

piezoelectric smart material systems for civil and military applications. The research goal of my group is to construct theoretical models for different smart material systems and to provide guidelines for optimal design of smart material systems. [The petitioner] has made significant contributions to the model constructions and the experimental demonstrations by working closely with other groups in the MURI program. He was the first to demonstrate the existence of coupled flex-extensional modes of asymmetric bimorph transducers. The close agreement with experimental measurements confirms the validity of our model. Based on this model, [the petitioner] investigated the sensor applications of piezoelectric transducers. [The petitioner] demonstrated a novel piezoelectric ice sensor, which can be used to detect dangerous ice formation on aircraft wings. The sensor developed by [the petitioner] is considered to be very valuable for protecting the safety of both military and commercial aircraft.

[REDACTED] also at Princeton University, states that the petitioner "has been doing very important research in the field of smart material systems." Prof. Prevost states that the petitioner's modeling work eliminates the need for "expensive experiments" and "helps to physically understand the behavior of the smart material such that new applications can be developed."

[REDACTED] now at Epson Palo Alto Laboratory, first met the petitioner in 1996 upon returning to Princeton (where [REDACTED] had studied) to discuss a project with former professors. [REDACTED] states:

[The petitioner's] solutions for the dynamic behavior of bimorph transducers for various applications made it possible to optimize a design precisely. . . . To my knowledge, he is the first one who has systematically studied the interaction between piezoelectric crystals and viscous liquids.

Another Princeton graduate, [REDACTED] an assistant professor at the University of Nebraska, Lincoln, credits the petitioner with "significant contributions in the field of smart material systems," and states that the petitioner "has become an expert in this interdisciplinary field. . . . Some of his work has been presented at international conferences and drawn the attention of many researchers around the world."

[REDACTED] associate professor at Drexel University, has collaborated with the petitioner as part of the MURI program. [REDACTED] states:

[The petitioner] has played a significant role in our collaboration with Princeton. First, by investigating the electromechanical behavior of symmetric and asymmetric bimorph transducers of piezoelectric ceramics, he has demonstrated a method to design optimal transducers as micro-actuators in

micro-mechanical systems (MEMS). Then, [the petitioner] studied the effects of external environment on smart material systems. He solved the problem of the change of resonance frequencies of piezoelectric transducers due to its interactions with adjacent liquids.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted additional letters and documentation, which, along with the previous submission, counsel deems sufficient to address the director's concerns.

One of the new letters is from [redacted] chief scientist of the Research, Development and Engineering Center of the U.S. Army Communications-Electronics Command. Counsel states that [redacted] is "one of the most important U.S. Army scientists who is directly responsible for the development of intelligence warfare resources for the U.S. military," and that his letter alone provides sufficient justification for the national interest waiver. [redacted] states:

[The petitioner] has been working on the MURI project for the last three years and has made significant contributions to the project. He theoretically predicted the coupled flex-extensional modes of asymmetric bimorph transducers, which were then demonstrated in experiments. These provide guidelines for optimal design of bimorph-type sensors and actuators. Based on his previous work, [the petitioner] proposed an analytical model for a novel ice sensor to detect ice formation on aircraft wings . . . and greatly increase aircraft safety. Additionally, [the petitioner] has done work on a liquid-phase viscosity sensor that provides a physical explanation of the effect of compressional waves, and presents a formula for designers to suppress disturbing resonances and thus produce more reliable sensors. The viscosity sensor has been extremely investigated in recent years because of its great possibilities for applications in chemistry and biochemical research. [The petitioner's] contributions fill a gap between theoretical analysis and practical designing. This series of innovative theoretical models developed by [the petitioner] are the product of an outstanding scientist, and will have an important impact on aircraft safety, as well as other fields, that is national in scope.

Other witnesses, from universities where the petitioner has worked and studies, praise the petitioner's skills and the potential applications of his work, but they offer no new information of substance not already contained in previous submissions.

The petitioner submits copies of unpublished manuscripts co-written by the petitioner, and an organizational chart showing that the petitioner is one of eight graduate students in his particular

research team and one of three working on the project entitled "Dynamics of Piezoelectric Shell Transducers with Thickness-Graded Properties."

The director denied the petition, stating that the petitioner has not shown that his "participation was indispensable and the potential of future contributions of national interest is greater in [the petitioner's] case than [in the case of] a similarly trained United States worker." On appeal, counsel states that the director, by making this finding, "appears to have established a new and different standard" which deviates from Matter of New York State Dept. of Transportation.

While the director's decision contains language not found in Matter of New York State Dept. of Transportation, it does approach an argument found in that precedent decision. Specifically, an alien does not qualify for a national interest waiver simply by working in an important occupation or key position, if other fully qualified workers could perform the same duties with roughly the same benefit to the United States. In this instance, the director has acknowledged that the petitioner's work has intrinsic merit and national scope, but the director has also correctly observed that not everyone who passes those two tests qualifies for a national interest waiver; participation in an important project is not automatically proof of eligibility.

Counsel states that the director "has ignored much of the record evidence as to the value of the petitioner/beneficiary's inventions." Counsel cites [redacted] earlier assertion that the petitioner, in counsel's words, "has provided the underlying breakthrough, theoretical technology for the design not only of aircraft ice sensors, but for electronic sensors in general, by describing a formula . . . that will fine tune sensors to repress disturbing resonances."

[redacted] did indeed credit the petitioner with filling a theoretical gap in sensor technology, and with making significant contributions to the particular project. The record, however, offers no direct evidence that the petitioner's work has attracted a notable amount of attention outside of Princeton and the petitioner's MURI collaborators and supervisors (such as Dr. Ballato). While one need not establish national acclaim to qualify for a waiver, it is much easier to support the assertion that a given discovery or finding is highly significant if there is evidence that the discovery or finding has attracted outside attention. In this instance, there is no evidence that (for example) the aircraft industry has taken notice of the petitioner's ice-detection model, let alone found it to be significantly superior to existing means for removing ice, or preventing its formation, on aircraft wings. For that matter, the record does not establish that the petitioner's model has resulted in even a functional prototype of such a detector.

Similarly, counsel cites the assertion that the petitioner "was the first to demonstrate the existence of couples flex-extensional models of asymmetric bimorph transducers," but does not explain how this discovery ranks among other discoveries. Novelty is not an automatic guarantee of a waiver, and not every new discovery is of equal importance or interest.

The petitioner was still a student at the time of filing, and thus his nonimmigrant student visa was adequate to allow him to participate in the project at hand. While several witnesses at Princeton have praised the petitioner's skill and training, there is no explicit indication that the petitioner intends to remain with the project after completing his degree, or that Princeton intends to retain him on a permanent basis.¹ If the waiver request hinges on the petitioner's involvement in one particular project, as is the case here, then it is valid to inquire as to whether the alien will be involved in the project for such a short time that a nonimmigrant visa would be entirely adequate to secure the alien's participation for the desired period.

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.

¹Assuming that the university sought to retain the petitioner as a postdoctoral researcher, such a temporary appointment could be covered under an H-1B nonimmigrant visa and no permanent status would be required.