



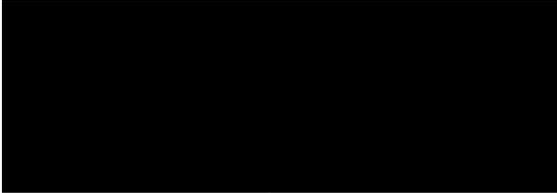
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U.S. Department of Justice

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: 11 MAR 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 which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for 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 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 Ph.D. from the University of Wisconsin-Madison. 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.

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.

James D. Callen, the petitioner's advisor at the University of Wisconsin-Madison and member of the National Academy of Engineers, asserts that, based on the petitioner's abilities, he sent the petitioner to Princeton to collaborate on the Totoidal Fusion Test Reactor (TFTR).

During that time, and subsequently, [the petitioner] developed an innovative way of directly measuring a key instability parameter ("delta-prime") for tearing modes in TFTR, applied it to TFTR data, and has published a paper on this pioneering technique. Simultaneously, he developed a theory of Alfvén wave resonance effects on tearing modes, and was a key collaborator on a joint publication of this work with some University of Iowa colleagues. For the last two years he has been on assignment at the DIII-D national tokamak fusion experiment program at General Atomics in San Diego. There he has made

significant and innovative contributions by developing new theories of the nonlinear evolution of tearing modes and flow shear effects on them. . . .

[The petitioner] has proved to be a broad and very valuable fusion plasma researcher at the DIII-D experiment in San Diego. While his main emphasis has been on developing theoretical models of complex, nonlinear plasma phenomena (mainly tearing modes) in fusion-grade plasmas, he has also independently developed new computer codes to explore these important phenomena. His research has already had significant impacts on our developing knowledge of nonlinear tearing modes in tokamaks, which are becoming widely recognized as important phenomena in tokamak fusion plasma experiments throughout the world. Also, he has interacted significantly with the experimentalists on the DIII-D experiment to the extent that they have asked him to carry out various analyses for them and included him as a coauthor on their recent research papers.

Dr. Xiaogang Wang, a research scientist at the University of Iowa who collaborated with the petitioner provides general praise of the petitioner. Dr. Eric D. Frederickson, the principal research physicist at the Princeton Plasma Physics Laboratory (PPPL) who worked with the petitioner asserts:

[The petitioner] has developed an important new technique of using detailed measurements of the structure of the temperature of the electrons TFTR plasma to experimentally determine an important term for the stability of "tearing modes[.]"

Dr. Robert J. La Haye, a principal scientist at General Atomics who collaborated with the petitioner at that institution, writes:

Here at General Atomics, and previously at the Princeton Plasma Physics Laboratory and the University of Wisconsin at Madison, [the petitioner] has become a leader in understanding tearing modes which limit the performance of tokamak fusion plasmas. At General Atomics, [the petitioner] has, among other work, written a valuable analysis code for taking experimental data to compare to theory. The ability of theoreticians to interact with experiments is of prime importance for progress to a practical energy reactor.

Ming S. Chu, a senior staff scientist at General Atomics, reiterates much of the above and asserts:

In his thesis work, [the petitioner] has solved one of the more puzzling problem in our understanding of the plasma. He has derived an accurate method to detect the tendency for the tokamak to degenerate into leaky configurations and provided a simple theoretical model for the explanations of the details in the experimental observations.

Finally, Vincent Chan, Director of the Theory and Computational Science Division Fusion Group at General Atomics, provides general praise of the petitioner.

The above letters are all from collaborators and advisors. While such letters are useful in providing details regarding the petitioner's role in various project they normally cannot by themselves demonstrate that a petitioner has influenced his field as a whole. In general, letters from immediate colleagues are more persuasive when supported by letters from independent experts attesting to the petitioner's influence on their own work. The petitioner has not submitted any letters from independent experts. Nevertheless, in the instant petition, the petitioner's advisor, Dr. Callen, is a member of the National Academy of Engineering, which is affiliated with the National Academy of Sciences. As such, his statements carry significant weight. In addition, the petitioner submits on appeal a joint letter from his new employers at the University of California, Los Angeles, Dr. Warren B. Mori and Dr. John M. Dawson. While associated with the petitioner, Dr. Dawson is a member of the National Academy of Sciences. Thus, his opinion also carries significant weight. While Dr. Dawson and Dr. Mori's comments about the petitioner's work for them is not relevant to the petitioner's eligibility at the time of filing, the joint letter also states:

[The petitioner's] previous work on measuring a key plasma instability parameter for the first time in more than 30 years and studying nonlinear tearing modes in tokamaks has significant impact in developing a reliable and efficient fusion reactor.

The record also contains evidence that the petitioner has authored seven published articles. 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 influential contributions; we must consider the research community's reaction to those articles. The petitioner failed to submit evidence that independent researchers have cited the petitioner's work. While such evidence would bolster the petitioner's claim, the record as a whole sufficiently, if minimally, establishes that he has influenced his field as a whole.

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 physics 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 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.