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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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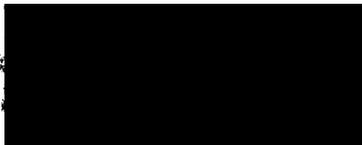
Office: Nebraska Service Center

Date: 28 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 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 to classify the beneficiary 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 is a designer and manufacturer of electric motor devices and systems. It seeks to employ the beneficiary as a senior project engineer. 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 beneficiary 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 beneficiary holds a master's degree in Electrical Engineering from the University of Kentucky. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary 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 states that the beneficiary’s “efforts and developments toward electric motor development clearly enhance productive use of our natural resources and at the same time diminish gas emissions in the environment.” Specifically, the beneficiary’s “work has been focused on the design and development of electric power steering (EPS) for automotive applications resulting in energy savings.” The energy savings result primarily from the elimination of hydraulic systems in the steering apparatus.

The petitioner submits background documentation pertaining to electric power steering systems. This documentation establishes the intrinsic merit of the beneficiary’s work, and the national character of the automobile industry establishes national scope, but general assertions about the merits of EPS cannot suffice to show that this particular beneficiary qualifies for a waiver.

To illustrate the beneficiary’s specific contributions, the petitioner submits several witness letters; we discuss examples here. Dr. Zach Fu, technical specialist at Ford Motor Company, states:

I first met [the beneficiary] and got exposed to his research works eight years ago at the University of Kentucky. . . .

[The beneficiary] was one of the pioneer researchers in developing design, analysis, and control techniques for double rotor linear switched reluctance motors, which have promising potentials for applications in aircraft, robotics, and industrial drives. . . . He also contributed heavily in developing PWM controls for industrial drives

and permanent magnet brushless DC motors for automotive applications, such as electric power steering. . . .

Throughout his career, [the beneficiary] has done outstanding research works in efforts to increase the efficiency of electric machinery. While studying for his Master and Ph.D. degrees at the University of Kentucky, he designed and built a DC-DC switched mode Buck converter employing an integrated magnetics concept. This was a novel concept in the design of switched mode power supplies. . . . He also conducted exceptional research works on fuzzy logic based vector control scheme for a voltage source inverter fed induction motor drive for high dynamic performance. . . . Its potential impacts are enormous considering the fact that [the] majority of electric motors used in the industry are induction motors. While working for SunBeam Co., he did outstanding research and design work on switched reluctance motors and brushless DC motors for use in various appliances. . . . Both switched reluctance motors and brushless DC motors that he designed have higher efficiency at much reduced mechanical noise emissions.

Dr. Fu indicates that the beneficiary has also made noteworthy contributions to the improvement of electric motors in automobiles. For instance, Dr. Fu states that the beneficiary “designed and developed permanent magnet brushless DC motors for electric power steering.”

Professor Jimmie J. Cathey, who has supervised the beneficiary’s graduate studies at the University of Kentucky, states that the beneficiary’s “research in novel electrical machines is generally acknowledged in technical circles as innovative and breakthrough,” and that “[i]f he should be forced to leave the U.S., there would be a noticeable reduction in the U.S. competitiveness in the electrical drives industry.” Dr. Eike Richter, a senior project engineer with General Electric, offers the very similar assertion that the beneficiary’s “research is generally recognized in the technical circles as innovative and novel for various applications,” and that “[s]hould he be forced to leave this country the competitiveness of our electrical drives industry would be noticeably reduced.” John Allard, senior staff engineer at Sunbeam Household Products, states that the beneficiary’s “research in novel electrical machines is generally acknowledged in the technical circles as seminal, innovative and breakthrough,” and that “[i]f he should be forced to leave the US, there would be a reduction in the US competitiveness in the electrical drives industry.” J.R. Coles, technology manager (Electromagnetics) at Lucas Varity Automotive Technical Center, asserts that the beneficiary’s “research in novel electrical machines is generally acknowledged in the technical circles as seminal, innovative and breakthrough,” and that “[i]f he should be forced to leave the US . . . [t]he impact on the US competitiveness in the electrical motors and drives industry would be noticeable.” All of these witnesses state that the beneficiary “is one of the few who can contribute significantly in the area of electrical machines and drives.” The letters contain other passages that are very similar or even identical. The use of common language in these letters suggests common authorship.

Other witnesses, from various private companies as well as the faculty of the University of Kentucky, state that the beneficiary possesses rare expertise in the design and development of certain types of electric motors. Most of the individuals from private industry indicate that they have collaborated with the beneficiary in some capacity.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary's work, but finding that the petitioner has not satisfied the remaining prong of the test outlined in Matter of New York State Dept. of Transportation. The director concluded that the petitioner has not shown that "the beneficiary is the primary motivator behind [the petitioner's] projects," or that "the labor certification process is inappropriate in this case."

On appeal, counsel argues "the Beneficiary meets all the criteria set forth in Matter of New York State Department of Transportation in all three prongs and his outstanding credentials are unique." Counsel disputes the director's finding that the beneficiary's accomplishments "appear to fall within the norm expected of successful graduate students and professionals in the field of engineering." The petitioner submits new documents intended to reinforce the assertion that the beneficiary is unique in his field.

Steven A. McHenry, vice president and general manager of the petitioning entity, states in a sworn affidavit that the beneficiary "is the primary motivator behind the projects at [the petitioning company] as well as the work that [the petitioner] is doing with other companies." Examples of these projects include "developing the motor technology for future automotive applications like electric power steering, actuators for advanced automotive features, developing energy efficient designs to meet the energy demands and the like."

The beneficiary's work is rather specialized and technical, and therefore the significance of a given innovation or invention. Simply listing the beneficiary's projects, therefore, does not give someone outside the profession a clear idea of why the beneficiary's work is more important or significant than that of others in the same specialty. Also, the beneficiary's own resume, which contains the most detailed such list, is essentially a claim by the beneficiary rather than documentary evidence of his activities and achievements. For this reason, it is important to see an independent evaluation of the beneficiary's work. Evaluations from individuals with no connection to the beneficiary (as collaborators, mentors, former professors, etc.) carry greater weight because such evaluations demonstrate that the work is seen as important outside of the group that has devoted its time and resources to it.

In this instance, the witnesses are predominantly the beneficiary's professors and collaborators, and as noted above, several witnesses signed what appear to be variations of a single letter of unknown authorship. These letters do not provide a clear or coherent picture to show how the beneficiary's work is of greater significance than that of others in the field. General assertions to the effect that improved motors are more efficient do not demonstrate that the beneficiary has made especially great strides in this area; improved efficiency would appear to be a fairly widespread goal among design engineers.

The documentation of record places much stress on the importance of electric power steering. Some witnesses imply that the technology is still under initial development, by referring to "future" EPS systems, but the record shows that EPS has already been in use since at least 1990, when it appeared in the Honda NSX. Thus, the beneficiary is clearly not the inventor of EPS, or the originator of the concept. The beneficiary's work with EPS, therefore, amounts to improvements on existing technology rather than pioneering work on as-yet-unused technology. While Mr.

McHenry states that the beneficiary is leading the projects on which he works, his affidavit does not establish that those projects stand out from others in the automobile industry. Statements from officials of the petitioning company indicate that the U.S. will benefit from “cleaner” technology, and that U.S. companies should strive to keep their competitive edge, but these are generalities regarding the intrinsic merit of the beneficiary’s occupation. Witnesses have credited the beneficiary with “pioneering” work in other fields outside of the automotive industry, but there is no indication as to the extent to which this work has already been implemented. The assertion that, for instance, the beneficiary’s past work has promising potential for the aircraft industry, does not show that this potential has since been realized, or that it will be realized, or that the aircraft industry itself has responded enthusiastically to the beneficiary’s work. Statements regarding the future potential of the beneficiary’s past work – particularly when that work is in an area where the beneficiary is no longer working – are more akin to speculation than to evidence of past impact.

The petitioner submits a copy of a scholarly paper, written solely by the beneficiary, submitted for publication in June 1999 and scheduled for publication in mid-2000. This paper can have no positive effect on the question of whether the petition was approvable at the time it was filed in April 1999. See 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. Even then, the existence of a publication does not demonstrate the importance or influence of that publication.

Counsel also argues that, because labor certification would restrict the beneficiary’s employment to one specific geographic area, the beneficiary would be unable to travel to the petitioner’s other sites throughout the United States while an application for labor certification is pending. While this may represent an inconvenience for the petitioning company, it is not an onerous burden nor one that is unique to that company. The petitioner has not shown that this inconvenience would have significant effects outside of the petitioning company, nor has the petitioner shown that the beneficiary would have to be outside of the Dayton area to perform the computer programming tasks within the compass of his job description.

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.