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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: 03 MAY 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 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 engineer at Symetrix Corporation. 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 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 petitioner holds a Ph.D. from the University of Colorado, and his 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.

The petitioner's initial submission consists almost entirely of witness letters and arguments from counsel. Counsel argues "[t]he notion of requiring a researcher to pursue a labor certification . . . is counter-productive to the scientific process itself," because researchers frequently change jobs. Counsel argues, in effect, that scientists as a class should not be subject to the labor certification requirement. Nevertheless, the plain wording of the statute indicates that members of the professions holding advanced degrees (including scientists) as well as aliens of exceptional ability in the sciences are, generally, subject to the job offer/labor certification process. The Service is not in a position to "second guess" Congress by ruling that legislative error subjected scientists to the labor certification requirement. As long as the statute's plain wording places a job offer requirement on scientists, this office lacks the authority to exempt scientists wholesale from that requirement. While some occupations may be more amenable to the national interest waiver than others, final decisions must remain at a case-by-case level.

The most detailed letter submitted with the petition is from [REDACTED] chairman and co-CEO of Symetrix Corporation [REDACTED]

[The petitioner] is highly distinguished in his field and has already made many breakthroughs in ferroelectric memories. [The petitioner's] continued work in the United States is critical to our ability to maintain our position as the technological leader of the world. . . .

As a doctoral student in microelectronics at the University of Colorado at Colorado Springs, [the petitioner] conducted some of the most pioneering research to date in ferroelectric memory. Specifically, [the petitioner] was the first individual to succeed in making a practical ferroelectric single transistor memory cell device. Since the middle of the 1950's, many researchers have tried to achieve a practical realization of such a device but have failed miserably. In contrast, [the petitioner] was able to quickly identify the obstacles in developing such a device and develop solutions to such obstacles. . . .

Lest you think that [the petitioner's] talents are limited to the ferroelectric memory cell, I would like to briefly comment on another project which he is leading: the rechargeable battery project. Specifically, [the petitioner] is developing a novel thin-film rechargeable battery. His idea is to develop a small copper-plated battery with an application of thin film. This design would allow for a very small battery, small enough to fit on a computer chip. This is a newer project, but [the petitioner] has already made great headway on it. Batteries consist of three kinds of materials: electrolytes, anode materials and cathode materials. The existing materials used for batteries will not function for thin-film batteries, and [the petitioner] has already developed the new materials, which he will incorporate into the new thin-film battery. He is currently in the process of building the battery, and he then will of course conduct extensive testing to determine how well it functions and what further refinements are necessary. . . .

The reason that the ferroelectric memory cell has captivated researchers for so many years is because it is an important technological breakthrough – a revolution, if you will – in the memory industry. . . . Its benefits will parlay into our ability to develop faster and more efficient computers with greatly enhanced stability. . . .

While [the petitioner's] work on the FET memory cell is a revolutionary technological development, his work on the battery project also has important benefits for our country. . . . By developing a battery, which can be an integral part of a computer chip, [the petitioner] is developing yet another breakthrough in the electronics industry. His work will allow for computer manufacturing companies to usher in the next generation of small computers and other high-technological devices because the size obstacle required for battery space will be completely eliminated. Additionally, his battery will last about four times [as long as] existing rechargeable batteries, which will make smaller computers much more functional.

With regard to labor certification [REDACTED] states that “competition in high-tech industries is fierce. . . . The competitive nature of this business has given rise to a situation in which companies are constantly changing, and moving their scientists into new positions and

locations frequently,” but a researcher tied to the labor certification process is less mobile, which “could surely be the downfall of many corporations.”

Professor [REDACTED] who was the petitioner’s Ph.D. advisor at the University of Colorado, states that the petitioner has already established an “impressive track record” in “one of the most exciting, progressive, and complex areas of computer engineering.” Prof. Kalkur describes the petitioner’s work:

A ferroelectric single transistor memory mechanism is a product that scientists have sought, unsuccessfully, to perfect for decades. [The petitioner] has successfully designed just such a cell. In so doing, [the petitioner] has broken new ground, and has paved the way for further advancements in what may be the next revolution in electronic storage technology. . . .

Success of this kind is, needless to say, extremely rare. It comes as little surprise, however, that [the petitioner] is the one responsible for this breakthrough. [The petitioner] has distinguished himself from other leading researchers since early on in his career. . . .

The technology that he is advancing is on the very cutting edge, and its eventual arrival on the commercial market will bring great economic rewards to the company responsible for its development.

[REDACTED] an associate professor who served on the petitioner’s dissertation committee at the University of Colorado, repeats the assertion that the petitioner ended the decades-long effort to develop a ferroelectric single transistor memory cell, which “will benefit a host of U.S. companies . . . because it will significantly reduce the risk of data loss and improve computational efficiency.”

Dr. Shawn Cunningham of Ford Microelectronics, Inc., was the petitioner’s manager at that company before the petitioner moved to Symetrix. [REDACTED] states:

While working at Ford Microelectronics, Inc., [the petitioner] experimented with technologies associated with the pressure sensor. Because the pressure sensor for automobile and printing injector is one of the applications of ferroelectric FET, [the petitioner’s] experience with sensor and ferroelectric FET may be applied to other devices. The possibilities are practically endless.

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 noted the absence of letters from independent sources, to establish that the

technology that the petitioner developed is being implemented and used outside of companies where the petitioner has worked.

On appeal, counsel observes that the director issued no request for further evidence before denying the petition. While this omission is a procedural flaw, we note that the petitioner has not submitted any new evidence on appeal, and counsel has not specified what evidence, if any, the petitioner would have submitted in response to such a notice. Because it does not appear that the petitioner would have had any substantive response to offer (unless he is withholding such a response on appeal), the director's error does not appear to have seriously prejudiced the outcome of the decision.

Counsel devotes much of the subsequent appellate brief to general observations regarding the national interest waiver and Matter of New York State Dept. of Transportation. Some of these arguments and assertions simply do not apply to the matter at hand. For instance, counsel states "[p]etitioners need not demonstrate why a labor certification would be detrimental to the national interest, particularly when the national interest waiver option is the only one available," but the petitioner has not shown that the waiver is the only option available to him. Rather, counsel has offered only general assertions to the effect that labor certification is time-consuming and inconvenient, and that (despite the plain wording of the law) the labor certification requirement ought not apply to scientific researchers. Also, counsel asserts that "substantial experience" should be a favorable consideration in granting a national interest waiver, although the petitioner had completed his graduate studies only a year and a half before filing the petition at hand.

Most of counsel's comments that pertain specifically to the facts of this particular proceeding derive from the four letters submitted with the initial filing, discussed above. Counsel states that the director did not give these letters sufficient weight because "the individuals who wrote in support of the petition are . . . nationally known individuals in [the petitioner's] field of expertise. It is to be expected that an individual who is distinguished in his field will be associated with other prominent experts." This argument appears to presume that the University of Colorado accepts, as doctoral students, only those individuals who are already distinguished in their field. Because the petitioner has submitted almost no evidence along with the four letters, there is no documentary evidence to support counsel's claim that the petitioner's witnesses are all "nationally known individuals" as claimed.

Counsel asserts that [REDACTED] has, contrary to the director's finding, "specifically describe[d] how [the petitioner's] work has been applied in a practical sense." Counsel appears to refer to [REDACTED] statement that the petitioner "experimented with technologies associated with the pressure sensor," and that "the pressure sensor for automobile and printing injector is one of the applications of ferroelectric FET." [REDACTED] does not specify any specific application for which the petitioner's innovation is already in use; he states that the petitioner "experimented with" the technology, and lists some hypothetical applications for the innovation. Given the statements by witnesses that several major national computer companies would be deeply interested in the petitioner's work, it does not appear unreasonable for the



director to have noted the absence of testimony from any of these major corporations (which witnesses had identified by name).

Furthermore, while the witnesses have asserted that the petitioner's creation of a practical ferroelectric single transistor memory cell device was the result of a half century of effort, the record does not show whether this was a fringe pursuit or a principal research focus during those decades. Also, the record does not indicate that the petitioner's innovation has attracted any attention in trade publications, for instance, as might reasonably be expected if the industry as a whole had been devoting substantial energy to the ferroelectric single transistor memory cell. In short, the record contains no first-hand evidence to establish directly that anyone outside of the petitioner's circle of collaborators, supervisors, and professors have taken a deep and sustained interest in the petitioner's work. By no means do we mean to impugn the sincerity or competence of the petitioner's witnesses, but their letters, by their very nature, cannot constitute primary evidence to show independent interest in the petitioner's work.

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.