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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 99 208 52616 Office: Vermont Service Center

Date: MAY 06 2002

IN RE: Petitioner:
Beneficiary:



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: Self-represented

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.

Although the petitioner had legal representation when she filed the petition, she has filed the appeal on her own behalf and has indicated that her prior attorney no longer represents her. Therefore, we shall consider the petitioner to be self-represented for the purposes of this appeal.

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 a mechanical engineer employed, through a contractor, at Caterpillar, Inc. 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 director did not dispute that the petitioner qualifies as 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 describes her work:

I am considered an outstanding researcher by my peers and supervisor, and also by distinguished scientists and engineers with whom I have had the opportunity of working at one time or the other. My research is vital to the design of the next generation of gas turbines in order to solve some very significant environmental and energy conservation problems for the United States Government. . . .

My research work involves in-depth understanding of the use of Computational Fluid Dynamics (CFD) software called FLUENT/UNS to simulate the flow field and the thermal field in the disk cavity of a gas turbine. . . .

The problem begins with the fact that for the next-generation of ground-based and aircraft gas turbines, significantly higher gas temperatures at the first-stage rotor inlet are anticipated to occur, as compared to the present design gas turbines. Thus, an accurate prediction of the temperature distribution in critical components of the turbine engine becomes very important. The first-stage rotor disk is one such component. A major concern in the gas turbine industry and to the U.S. Government’s DOE [Department of Energy] is that ingestion of hot mainstream gas into the rotor-stator cavity may occur, compounding the already ferocious thermo-mechanical condition of the rotor disks. If this happens, it will adversely affect the

durability of the gas turbines. . . . A turbine failure can result in fatal consequences for our fighter pilots and be detrimental to the national defense.

The petitioner then argues in detail that she has earned sustained acclaim pursuant to 8 C.F.R. 204.5(h)(3). That regulation, however, pertains to a different visa classification. While we will consider the evidence submitted by the petitioner, her specific references to particular provisions of the cited regulation are without weight in this proceeding.

According to her resume, the petitioner's work with FLUENT/UNS was in the context of her graduate studies at Arizona State University ("ASU"), and a related internship at AlliedSignal, Inc. The resume also indicates that the petitioner's work at Caterpillar (where she has worked since late 1997) involves "hydraulic analysis for the diesel fuel injector." The petitioner cannot establish eligibility based entirely or predominantly on the importance of a research project with which she is no longer involved.

Along with background documentation regarding her occupation, and copies of her published work, the petitioner submits several witness letters in support of her petition. [REDACTED] offers technical information about the petitioner's work at ASU and states that the petitioner offers "a clear-cut benefit to the U.S. national defense, U.S. environment, and the U.S. energy utilization." [REDACTED] states that the petitioner "carried out numerical simulations to better understand the turbulent flow field and heat transfer in a model rotor-stator disk cavity" but does not explain how the petitioner's work is more significant than that of other graduate students studying in the same field. [REDACTED] does not address the petitioner's current work or explain how that work is relevant to her previous project.

[REDACTED] a senior project engineer at Caterpillar, states:

[The petitioner's] primary job duties include hydraulic and structural models of fuel systems, as well as multi-dimensional computational field dynamics (CFD) modeling for the fuel injector components. Within my group, [the petitioner's] main task is to analyze the performance and structural feasibility of our next generation diesel engine fuel injectors. . . .

[W]e need analysts who have very strong backgrounds in fluid dynamics, solid mechanics and finite element analysis. Caterpillar is using [the petitioner's] expertise to analyze new fuel system designs to determine their ability to achieve the intended targets of lower fuel consumption and reduced emissions. Only after simulation and analysis show positive results, will further research be done on a new design.

[The petitioner] has been applying her expertise in hydraulic analysis to model fuel injector performance for existing designs, simulating the performance of flexible systems and calculating the power consumption needed to drive the fuel injector. She then makes design recommendations if improvements are needed. . . .

By performing structural analysis, [the petitioner] is able to identify potential reliability and durability problem areas and provide input for changes to critical

components in the fuel injector. This type of analysis is a very important aspect of our ability to develop and manufacture highly reliable and durable diesel fuel systems. . . .

The diesel engines manufactured by Caterpillar are sold all over the world. . . . The environmental impact of lower emissions and reduced fuel consumption is global. The benefits served by [the petitioner's] work at Caterpillar are consequently global in scope.

The above letter and others like it explain the nature and purpose of the petitioner's work at Caterpillar. The letters establish the intrinsic merit of the petitioner's work, and Caterpillar's stature as a major national corporation arguably give national scope to her efforts. Still, there is no explanation as to why it is in the national interest to ensure that this particular petitioner is the engineer who performs the listed functions. The importance of her occupation does not establish a blanket waiver for every alien in that occupation.

Dr. Misbahul Azam,¹ a staff engineer at Motorola, Inc., studied at ASU while the petitioner was also a graduate student there. [REDACTED] discusses the petitioner's work with hot gas in turbine engines, and her computer modeling using FLUENT/UNS [REDACTED] states "I most certainly consider her to be a remarkable researcher of international repute." As someone who studied alongside the petitioner, [REDACTED] personal knowledge of the petitioner is clearly not dependent on any wider reputation, and [REDACTED] cites no other direct evidence to establish that the petitioner is internationally known for her graduate work. [REDACTED] asserts that the petitioner's "work is absolutely critical to the development of high efficiency gas turbines in the future" but does not address the documented fact that the petitioner has stopped working on high efficiency gas turbines, instead working with diesel engines at Caterpillar. [REDACTED] another ASU alumnus who collaborated with the petitioner, offers similar comments about the petitioner's turbine research.²

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director specifically noted the absence of "independent opinions from national experts who are aware of [the petitioner's] work." In response, the petitioner has submitted two further witness letters and documentation to show that patents are pending on some of the petitioner's inventions.

One letter is from [REDACTED] Institute of Technology, who indicates that he has been a consultant for Caterpillar for "over 20 years." Dr. Shirely states:

I *do not* know [the petitioner] professionally or personally. . . . I do understand the qualifications needed by any one who would work in a position like hers. . . .

¹ In recent correspondence, the petitioner has stated that her married name is now [REDACTED]. Because the petitioner does not state her new spouse's full name, it is not clear whether this is merely a coincidence.

² We note that, in the signature block at the bottom of the letter, the name was originally printed as [REDACTED]. The "W." was then obscured with correction fluid. [REDACTED] signature reads [REDACTED]" suggesting that [REDACTED] rather than [REDACTED] hence the correction. The possibility that the letter was written by an unidentified third party and then signed by [REDACTED] seems at least as likely as [REDACTED] making a mistake in typing his own name.

Fuel systems on modern diesel engines are complex devices. The discipline required to design and develop new fuel systems concepts is similarly complex. A successful design . . . calls on professional expertise from many individuals each having a rich pallet of knowledge and skills.

(Emphasis in original.) The director did not dispute that the development of modern machinery is often the result of collaboration between many skilled specialists. It does not follow, however, that U.S. experts in those specialties do not deserve the protection of the labor certification process, or that professional competence in one such specialty is *prima facie* grounds for a waiver.

While the director had requested letters from individuals “who know [the petitioner’s] work, [redacted] does not claim familiarity with the petitioner’s work. Rather, he prefaces his comments with “I gather from the supporting documentation for the petition that [the petitioner] has certainly established herself in this community at Caterpillar Fuel Systems.”

[redacted] notes that the petitioner works with “an in-house computational product” which “is proprietary and is protected as a trade secret.” [redacted] states that “no one outside of Caterpillar could possibly have these skills” relating to the computer code. By the same logic, the petitioner herself obviously could not have known the code before she started working for Caterpillar, yet clearly the company was able to train her. [redacted] does not seem to regard the petitioner as an expert in this code, instead stating that the petitioner “has a workable set of the skills necessary to use the code and her skills in this respect grow daily” and “will improve with time.”

The other letter is from [redacted] program manager at FEV Engine Technology, Inc. Like [redacted] [redacted] claims no prior knowledge of the petitioner’s work in the field, instead stating that his opinions are “[b]ased on the supplied documents” that the petitioner’s attorney at the time had sent to him. [redacted] limits his comments, for the most part, to an overall description of diesel engine design. He states that computer simulation tools can increase the speed and efficiency of new engine design, but does not indicate that the petitioner’s contributions in this area are more significant or important than those of others in the same specialty. He asserts only that “[b]ased upon the information letters of support provided in the petition, [the petitioner] has developed the professional respect of those working in her immediate area of this field.”

We note that the petitioner has submitted an Invention Notification Form (“INF”) to Caterpillar, which is an initial step towards seeking a patent. As we noted in Matter of New York State Dept. of Transportation, however, “an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis.” Securing a patent is a routine step in the innovation process, as demonstrated by the U.S. Patent Office’s issuance of literally millions of patents. In just one year (1999) Caterpillar alone processed 617 INFs – on average, nearly twelve per week.

The director denied the petition, stating that the petitioner has failed to demonstrate that she, individually, has had a significant impact on her field. The director noted that [redacted] with his long-standing ties to Caterpillar, cannot be considered a truly independent witness.

On appeal, the petitioner asserts that [REDACTED] and [REDACTED] are independent witnesses, because whatever their connection to Caterpillar, they do not know the petitioner personally. It remains, however, that their statements focus primarily on the overall importance of the petitioner's occupation. Certainly the petitioner's position requires a qualified professional, but the witnesses have not demonstrated why it is a matter of national interest to ensure that this petitioner, rather than another qualified worker, be the one in that position. Also, both of those witnesses indicated that their knowledge of the petitioner's work derives from information that the petitioner provided to them through her attorney, and therefore the director was correct in finding that they are not independent experts who know the petitioner's work.

The petitioner submits further witness letters and other documentation. The new documentation concerns the petitioner's activities that took place well after the filing date. While this material confirms that the petitioner continues to work (on a contract basis) at [REDACTED] it cannot retroactively establish that the petitioner was eligible for a waiver before any of the described events (such as conferences) took place.

The witnesses offering new letters on appeal discuss the overall importance of the petitioner's occupation, and some state that the petitioner's "area of expertise is in the national interest of the United States," which the Service has not disputed. Some also indicate that "there is currently a shortage in this field," which is precisely the circumstance for which labor certification exists in the first place. None of the witness letters indicate that the petitioner's contributions are especially important to her field, nor do the letters even devote much space to the petitioner's specific activities. The message of the letters instead seems to be that because the industry requires trained professionals to do a certain kind of work, the petitioner serves the national interest by virtue of possessing the required training and skills.

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.