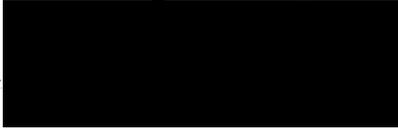




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U.S. Department of Justice
Immigration and Naturalization Service

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

OCT 29 2002

File: [Redacted] Office: Nebraska Service Center

Date:

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:



FUBLIC 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. At the time he filed the petition on August 11, 2000, the petitioner was pursuing his Ph.D. as a graduate research assistant in the Department of Atmospheric and Oceanic Sciences, University of Wisconsin-Madison ("UWM"). 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 Master of Science in Atmospheric Sciences from UWM. 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, 22 I&N Dec. 215 (Comm. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, cloud and atmospheric physics, and that the proposed benefits of his research would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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 sought. 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.

The petitioner submits four witness letters in support of the petition. [REDACTED] Professor, Department of Atmospheric and Oceanic Sciences, UWM, served as the petitioner's academic advisor for almost ten years [REDACTED] states:

[The petitioner] started out in my research group in performing experimental studies of the adsorption of organic vapors by dry aerosol particles. This was a research contract I had with the Argonne National Laboratory (administered by the Department of Energy). The set

up of this experiment was very difficult because we had to simulate the real atmospheric conditions, yet had to scale it down so it is manageable in a laboratory setting. [The petitioner] had done a great job in this and wrote an excellent M.S. thesis on this subject. For this, he received a fellowship sponsored by the [REDACTED]

After he earned his M.S. degree, [the petitioner] began to study the cloud dynamical and microphysical behavior using the state-of-art cloud model developed by our research group. This eventually becomes his Ph.D. thesis topic, which is on the comparison between the cloud dynamical and microphysical structures of thunderstorms in U.S. High Plains and subtropical areas. [The petitioner] again worked methodically and performed very thorough investigations on detailed dynamical/physical processes to an unprecedented degree. Many important results have already been obtained and I have no doubt that they will attract the attention of world meteorologists once these are published. In fact, we are developing a new research proposal based on many of these new findings. I have been using his results extensively in my lectures given in this country and in Europe, and have drawn enthusiastic response.

* * *

[The petitioner] is currently involved in a project that is funded on an annual basis, therefore its is impossible to make an offer of full-time, permanent employment in accordance of the Department of Labor guidelines.

The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. Congress plainly intended that, as a matter of course, advanced degree professionals should be subject to the job offer/labor certification requirement.

Participation in research projects in pursuit of one's doctorate is, by nature, temporary. One does not expect to spend one's career working on the same research project; these positions represent training for a future professional career. The national interest waiver does not appear to have been conceived as a means to facilitate the ongoing training of alien researchers. It should be noted that the petitioner was still a student at the time he filed this petition; his continued participation in [REDACTED] project is already covered by his nonimmigrant student visa, and H-1B nonimmigrant visas are available to postdoctoral researchers. Therefore, his continued participation in on [REDACTED] current project is obviously not contingent upon his obtaining permanent resident status.

[REDACTED] notes that the petitioner "possesses expertise in both experimental and theoretical (especially modeling) methods." [REDACTED] further states that most researchers "can only become specialized in one of these areas" and that the petitioner has demonstrated ability in both. We note, however, that any objective qualifications necessary for the performance of a research position can be articulated in an application for alien labor certification. [REDACTED] adds: "This double-

expertise, especially in the area of cloud physics and dynamics, is in short supply these days.” Pursuant to Matter of New York State Dept. of Transportation, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

██████████ Senior Research Scientist at the Mesoscale Atmospheric Processes Branch, NASA Goddard Space Flight Center, first met the petitioner while pursuing his master’s degree at UWM in 1990. ██████████ states:

The Wisconsin Dynamical/Microphysical Model (WISCDYMM), a three-dimensional time-dependent cloud model, which incorporates detailed ice microphysics, and provides a complete four-dimensional data set of the simulated storm dynamics and microphysics, was used by both [the petitioner] and myself as a research tool in order to simulate the observed characteristics of storms. The results from these studies will not only increase the reliability of future numerical simulations, but will also be beneficial in severe storm forecasting, hail and rainfall prediction, and experiments involving cloud seeding and hail suppression. This is not only an important scientific objective, but also an operational need. [The petitioner’s] continued research in the area of cloud physics will prove beneficial for a better understanding of the partitioning of hydrometeors in the atmosphere. These results will greatly assist the understanding of cloud formations, and will thus influence the global radiation budget in studies of climate change.

The differences in dynamics, thermodynamics, and microphysical structures of mid-latitude and subtropical thunderstorms has motivated [the petitioner’s] present study of severe weather over Subtropical and High Plains regions. Better understanding of their workings can illuminate the mechanisms that influence the storms’ precipitation efficiency in general, as well as the feedback between precipitation formation and storm dynamics. The model results can be analyzed to obtain an understanding of the physical and dynamical processes that are hard to be observed. [The petitioner] successfully extended the WISCDYMM simulations from my study of a Northern High Plains supercell thunderstorm to more case studies... His study focuses on higher spatial resolutions, better initial conditions, a more accurate parameterization, and improved microphysical formulations related to the autoconversion processes and to the interactions of hydrometeors with other hydrometeors.

██████████ indicates that the petitioner’s continued research in the area of cloud physics “will prove beneficial” and “will thus influence the global radiation budget.” Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for the national interest waiver. ██████████ assertion that the petitioner’s articles “will attract the attention of world meteorologists once [they] are published” is entirely speculative and does not persuasively distinguish the petitioner from other competent atmospheric researchers. The above witnesses offer no specific information as to how the petitioner’s research findings have already influenced the greater field. Their letters fail to demonstrate a past history of

significant research accomplishment on the part of the petitioner. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Staff Research Engineer at

[The petitioner] was one of my colleagues in the cloud physics group in the Department of Atmospheric Sciences at the from 1990-1992. It was through his presentations at our weekly group meetings that I became aware of [the petitioner's] exceptional work. In order to achieve his experimental study of the adsorption of alcohol vapors at different concentrations by sodium chloride aerosol particles (NaCl), he designed, constructed and operated two experimental systems. A series of experiments were conducted in which various kinds of alcohol vapors at different concentrations were introduced into the sodium chloride aerosol and the amount of vapor adsorbed by aerosol particles were determined. The results from this experiment can be used for comparison and verification of various adsorption theories. The results may help to better understand the aerosol budget, the formation of clouds, and the global radiation budget in the study of climate change.

Natural Resources, also describes the above experiment that was conducted by the petitioner at indicates that results from the petitioner's experiment "can be used for comparison and verification of various theories leading to improvements of the aerosol scavenging process, which plays a crucial role in ambient air quality and global climate change" also refers to the petitioner's "numerous publications."

The petitioner has provided several of his research articles in support of the petition. The 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The petitioner has failed to provide any evidence of independent citation of his published works. Thus, it has not been shown that the petitioner's

articles have had a significant influence in the field of atmospheric physics.

The petitioner's witnesses consist entirely of individuals with direct ties to the petitioner. They describe the petitioner's expertise and value to his current and former research projects, but do not demonstrate the petitioner's influence on the field beyond his projects at [REDACTED]. The petitioner has not shown that his work has attracted significant attention from independent researchers in the greater scientific community.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director noted:

Because the petitioner's impact on the national interest is better measured by his demonstrated achievements than by his as yet unrealized goals, discussion of what the petitioner may accomplish at some future date is not dispositive here. The witnesses indicate that the petitioner is highly trained, and is conducting valuable research in his field. The witnesses have not, however, clearly stated what especially valuable talents the petitioner brings to his position beyond the minimum requirements. The record does not show that the petitioner has demonstrated a track record of achievement that would justify projections of future benefits.

On appeal, counsel notes that the director issued the denial "without the benefit of a request for additional evidence or information." At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request.

The petitioner submits a second letter from [REDACTED] on appeal. The majority of the passages in the new letter are identical to those from his initial letter. [REDACTED] adds:

What [the petitioner] is working on for us now is of great national and international importance. We are studying the influence of clouds on global climate changes. In the last few years, we have witnessed catastrophic climatic events such as intense tornadoes and severe floods associated with strong El Nino signals. There is an acute need of understanding the process of climatic change so that effective forecasts can be made and preventive measures can be planned. Yet, the scientific community is increasing aware of the greatest uncertainty in the global climate process- the clouds. [The petitioner] is already a highly trained scientist in cloud physics and dynamics as well as in modeling the cloud influence on climate, and he is already contributing significantly to this field. It takes many years of dedicated work and a large amount of federal funding support to train a college graduate to reach [the petitioner's] level.

On appeal, counsel argues that the petitioner is entitled to a national interest waiver because the petitioner "is conducting [REDACTED] funded research at [REDACTED]. In essence, counsel and [REDACTED] contend that the petitioner is eligible for a national interest waiver simply by virtue of conducting

government-funded climatic research. While the Service recognizes the overall importance of understanding the process of climatic change, eligibility for the waiver must rest with the petitioner'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. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that the petitioner's employment as a "highly trained scientist in cloud physics" inherently serves the national interest, counsel for the petitioner and [REDACTED] essentially contend that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect. Congress plainly intends the national interest waiver to be the exception rather than the rule.

We note Congress' recent creation of a blanket national interest waiver for certain physicians. The creation of Section 203(b)(2)(B)(ii) of the Act demonstrates Congress' willingness to grant such blanket waivers. We cannot ignore the absence, to date, of such a blanket waiver for climatic/atmospheric researchers. Furthermore, the creation of the blanket waiver for certain physicians demonstrates that no such blanket waiver for any given occupation is implied in the statute. Otherwise, the blanket waiver for certain physicians would be superfluous.

The remainder of [REDACTED] letter addresses the petitioner's proficiency in Chinese. [REDACTED] states:

In addition, because [the petitioner] is a native Chinese speaker, he can search and study scientific publications in Chinese language effectively. This is important in the field of climate studies because climate is a global process and there is a need to gather information about climatic changes in other regions. Many important historical documentary sources and scientific publications in climate are in Chinese. One of my current research projects, which is funded by [REDACTED] is dedicated to the review of Chinese literature in sun-climate relations. [The petitioner] is now an important part of this project, and his proficiency in both the language and the science of climate is making a great contribution. It is clearly very difficult to find people of the same talent as he is.

[REDACTED] indicates that part of the petitioner's value as a climatic researcher lies in the petitioner's knowledge of the Chinese language. The implication, which we cannot accept, is that the petitioner qualifies for a national interest waiver simply by virtue of being a Chinese-speaking atmospheric researcher. If being multilingual is a requirement for the petitioner's research position, then a shortage of workers with those traits would facilitate the approval of labor certification.

Counsel argues that the petitioner has "displayed a significant amount of expertise above his colleagues." The record, however, does not support counsel's conclusion. Clearly, the petitioner's

collaborators and research supervisor have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While the petitioner's witnesses discuss the potential applications of his findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not distinguish the petitioner from other competent researchers.

Counsel cites the testimonial letters as evidence of the petitioner's impact on his field. We note, however, that all of the petitioner's witnesses are individuals with direct ties to the petitioner or his projects at [REDACTED]. Letters from those close to the petitioner certainly have value, for it is those individuals who have the most direct knowledge of the petitioner's specific contributions to a given research project. It remains, however, that very often, the petitioner's projects are also the projects of the witnesses, and no researcher is likely to view his or her own work as unimportant. The observation that all of the witnesses have close ties to the petitioner is not intended to cast aspersions on the integrity of the witnesses; the director specifically indicated that the letters accompanying the petition were "credible." Still, these individuals became aware of the petitioner's research efforts because of their collaborations with the petitioner; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are especially significant.

A number of the petitioner's witnesses have referred to his research articles as evidence of his impact on the field. Publication, by itself, is not a strong indication of impact, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the [REDACTED] of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner himself has cited sources in his own articles. Outside citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. In this case, the petitioner has offered no evidence demonstrating independent citation of his research articles. Thus, the petitioner has not shown that his work has garnered the attention of researchers beyond those with direct ties to [REDACTED]. Few or no citations of an alien's work suggests that that work has gone largely unnoticed by the larger research community and therefore it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work can have, if that research does not influence the direction of future research.

In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches itself to the visa classification sought by the petitioner.

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 the 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.

ORDER: The appeal is dismissed.