

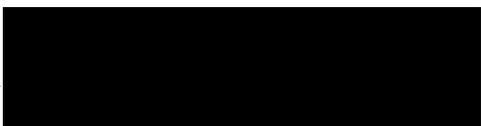


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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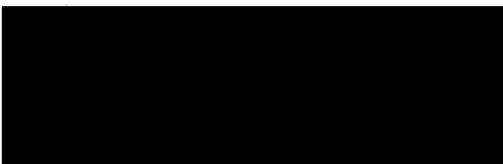


File: WAC 99 104 51515 Office: California Service Center Date: 17 SEP 2002

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, California 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 a research scientist at the Center for Solid State Electronic Research at Arizona State University ("ASU"). 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 petition was filed on February 11, 1999. At the time of filing, the petitioner was pursuing his doctorate at ASU, where he had obtained his Master of Science in Electrical Engineering in 1998. The director acknowledged that the petitioner 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 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.

We concur with the director that the petitioner works in an area of intrinsic merit, electrical engineering, 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.

The petitioner describes his current research regarding semiconductor device technology:

I am currently working on two related research projects. The first involves field emission devices, which have numerous applications, such as flat panel displays and sensors. I have recently demonstrated an application of field emission devices as magnetic sensors, a technology which will have additional applications for medical devices and aeronautical detection devices... My second project relates to the characterization of epitaxial layers in

semiconductors. This research will provide material parameters of semiconductor modeling and fabrication techniques, an area of research which is critical to the semiconductor electronics industry.

Initially, along with evidence of his co-authorship of a single non-published article, the petitioner submitted several witness letters in support of the petition. [REDACTED] Director of the Center for Solid State Electronics Research and Professor in the Department of Electrical Engineering at ASU, states:

The [petitioner's] project, supported by the Electric Power Research Institute, involved the development of a new type of integrated field emission sensor for electric power monitoring operations... Not only did he fabricate and demonstrate the properties of a working integrated field emission device, but he was also able to demonstrate its sensitivity to external magnetic fields, and all of this after only being on the project for a couple of months! To do this he had to develop a wide range of skills, from device design to semiconductor processing. It is our hope that his initial results will be presented at scientific meetings and conferences and published in archival journals.

In his first letter, [REDACTED] Product Engineer at Microelectronic Packaging, Inc., identifies himself as a former research colleague of the petitioner at ASU. [REDACTED] refers to three of the petitioner's ongoing research projects at ASU and their potential benefits. He describes the petitioner as a "talented and capable electrical engineer" and states that the petitioner is an "expert user" of the *Medici* software package. [REDACTED] notes that the petitioner's expertise on this software led to the development of two semiconductor devices for which the petitioner has applied for patents. While the granting of a U.S. patent documents that an innovation is original, not every patented invention or innovation constitutes a significant contribution to the field of endeavor. Nothing has been submitted to demonstrate that the petitioner's pending patent is more significant than the thousands of other patents granted annually by the United States Patent and Trademark Office.

[REDACTED] Assistant Professor, Information and Communications University in Taejon, Korea, received his Ph.D. in 1997 from ASU, where he also completed his postdoctoral research. He describes the petitioner as possessing a "high-level understanding of quantum mechanics." [REDACTED] credits the petitioner with "successfully fabricat[ing] a magnetic sensitive field emission device by using quantum mechanics." The significance of this fabricated field emission device to the electrical engineering field has not been established.

[REDACTED] and [REDACTED] all refer to the petitioner's skills and capabilities as a researcher of semiconductor device technology. However, in accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. Pursuant to Matter of New York State Dept. of Transportation, the benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). A petitioner seeking a national interest waiver must persuasively demonstrate that the national interest would be adversely

affected if a labor certification were required for the alien. The labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. It cannot suffice to simply state that the petitioner possesses useful skills, or a "unique background." The alien must clearly present a significant benefit to the field of endeavor.

██████████ Device Engineer for Motorola, Inc., received his Ph.D. from ASU in 1998. He describes the overall importance of the petitioner's projects, but offers little detail regarding the petitioner's specific contributions. He predicts that the petitioner's research "will provide important semiconductor material parameters for research and industry." ██████████ President of Samsung Electronics Semiconductor Business, offers a similar letter of support. ██████████ states that he "expects" the petitioner to make important contributions and that the petitioner's ideas "will" contribute to increased economic production. However, he offers no information regarding the petitioner's specific semiconductor research advances having a significant impact on the field. Yoon-Woo Lee refers mainly to the "great importance of the research that [the petitioner] is conducting."

Pursuant to published precedent, the overall importance of a given project or area of research is insufficient to demonstrate eligibility for the national interest waiver. While the Service recognizes the overall importance of improving semiconductor device technology, 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. 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 the petitioner's employment as a skilled semiconductor researcher inherently serves the national interest, the witnesses for the petitioner 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.

██████████ Senior Device Engineer at Honeywell, Inc., met the petitioner while in the Ph.D. program at ASU. He describes the petitioner's research on the simulation of Silicon Germanium Carbon Heterojunction Transistors: "The petitioner's research was critical in further understanding and interpreting the experimental results which were observed." ██████████ states that the petitioner "has been involved with the development of Field Emission Devices" and "has filed a patent describing a high gain bipolar transistor and a DRAM (Dynamic Random Memory) with high capacitance."

The petitioner's initial seven witnesses include three recent graduates of ASU's Electrical Engineering Ph.D. program, two ASU professors, a former research colleague from ASU, and

the president of Samsung Electronics Semiconductor Business. The witnesses describe the petitioner's expertise and value to his current and former research projects, but do not demonstrate that the petitioner has significantly impacted the electrical engineering/semiconductor field. Other than [REDACTED] the petitioner has not shown that his current efforts have attracted attention from independent researchers outside of ASU.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, the petitioner has submitted additional witness letters, two additional non-published research articles, and a certificate from the B.F. Goodrich Collegiate Inventors Program, dated September 17, 1999, recognizing the petitioner for "a distinguished contribution to the 1999 national collegiate invention competition." It has not been shown whether this certificate represents an actual award that places the petitioner above the other entrants, or if it simply recognizes the petitioner for having participated in the "collegiate" competition. Success in a student competition may place the petitioner among the best university students, but it offers no meaningful comparison between the petitioner and experienced professional researchers in the electrical engineering field.

The five new witnesses include the petitioner's research supervisor at ASU, a Technology Collaboration and Licensing Officer from ASU, a former Ph.D. candidate at ASU (who met the petitioner during the course of his research), a former ASU faculty research associate who collaborated with the petitioner, and a current research collaborator from Japan. We note that the certificate of recognition, publication of the research articles, and several of the events described by the additional witnesses came into existence subsequent to the petition's filing. 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. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

The petitioner submits a second letter from [REDACTED] his former research colleague at ASU. [REDACTED] notes that the petitioner holds three patent rights with ASU and that these patents "could be applied" to future products developed by Mr. Zilaro's new employer, Conexant Systems, Inc.

[REDACTED] Assistant Professor, Department of Electrical Engineering, ASU, states that the petitioner has demonstrated his ability through the development of three patents and successful collaborations with Venture Business Laboratory in Japan. He also credits the petitioner with using the AC-Signal Surface Photo-Voltage method to characterize the carrier lifetime of epitaxial wafers. [REDACTED] Senior Research Associate at Venture Business Laboratory ("VBL"), describes the collaboration between his laboratory and ASU. He states that the petitioner's [REDACTED] patent "can provide the major breakthrough" for scaling down the size of semiconductor devices. [REDACTED] further states: "Currently we are fabricating his devices as the crucial element for our research." However, while the petitioner's devices may indeed play a role in the ongoing collaborative project between ASU

and VBL, no evidence has been provided to show that any of the petitioner's work has actually resulted in a significant contribution of measurable influence within the electrical engineering/semiconductor field.

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. We note that the director's decision cited relevant statements from each and every witness provided by petitioner. The director concluded that while the petitioner was a talented researcher, the record did not establish that the petitioner's contributions measurably exceeded those of similarly qualified U.S. workers.

On appeal, counsel argues that the director erred by disregarding evidence that the petitioner will specifically benefit the national interest to a substantially greater degree than a similarly qualified U.S. worker. Counsel cites the testimonial letters as evidence of the petitioner's impact on his field. We note that the petitioner's witnesses consist almost entirely of his current and former research supervisors, educators, student acquaintances, and fellow collaborators from ASU. Such individuals, by virtue of their involvement with current and former research projects at ASU, are not in the best position to attest to the petitioner's impact beyond ASU. Research which influences the electrical engineering/semiconductor field in general serves the national interest to a greater extent than research which attracts little attention outside of the institution that produced such research.

Several of the witnesses, such as Professors [REDACTED] assert their confidence in the future significance of the petitioner's work. The witnesses' use of phrases such as "will have a beneficial effect on the progress" and "will greatly benefit the semiconductor industry" in describing the petitioner seem to suggest future results rather than a past record of demonstrable achievement.

In order to qualify for the classification sought, the petitioner must demonstrate that he has had some measure of influence on the electrical engineering/semiconductor field as a whole. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful national interest waiver claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. We note that the record reflects little formal recognition or professional awards for the petitioner's research, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence that would have existed whether or not this petition was filed is more persuasive than the subjective statements from individuals selected by the petitioner.

Counsel asserts that the director ignored evidence of the petitioner's being selected to present research at a scientific conference and his publication of two articles appearing in "peer-reviewed scientific journals." The petitioner submits additional evidence on appeal reflecting the acceptance of two articles for presentation at the 198th Meeting of the Electrochemical

Society in October 2000. However, all of this evidence came into existence subsequent to the petitioner's filing. See Matter of Katigbak, supra. Even if we were to accept the evidence, the record contains nothing showing that the presentation or publication of one's work is a rarity in the electrical engineering field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's work in their research. We further note that several of the petitioner's witnesses possess a record of publication and presentation that dwarfs the petitioner's record.

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." 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, demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner has failed to provide any evidence of independent citation of his articles appearing in "peer-reviewed scientific journals."

Without evidence reflecting independent citation of his articles, we find that the petitioner has not significantly distinguished his results from those of other researchers in the field. It can be expected that if the petitioner's published research was truly significant, it would be widely cited. The petitioner's authorship of a mere four articles, three of which were published subsequent to the petition's filing, may demonstrate that his research efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's work has garnered significant attention in the scientific community beyond his professional and academic acquaintances.

Clearly, the petitioner's professors and collaborators have a high opinion of the petitioner and his work, as do other researchers who met the petitioner while working at ASU. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of the petitioner's patents, there is no indication that these applications have been commercialized or acknowledged as significant breakthroughs by independent researchers throughout the semiconductor industry. 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 persuasively distinguish the petitioner from other competent researchers.

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. Without evidence that the petitioner has been responsible for significant achievements in the electrical engineering/semiconductor field, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations of the petitioner's witnesses may yet come to fruition, at this time the waiver application appears premature.

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.

ORDER: The appeal is dismissed.