

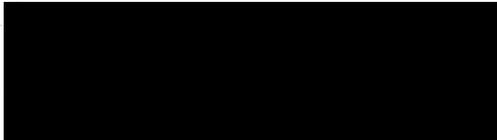


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U.S. Department of Justice  
Immigration and Naturalization Service

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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: 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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

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 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.

On appeal, counsel asserts that the director should have issued a request for additional documentation prior to denial. Even if we considered the director's failure to issue a request for additional documentation an error, the remedy would be to consider any new documentation on appeal. As such, we will consider the new documentation submitted below.

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's degree in opto-electronics from Shandong University. 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, 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.

We concur with the director that the petitioner works in an area of intrinsic merit, semiconductor research, and that the proposed benefits of his work, improved technology, 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 he seeks. 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.

Jingyu Lin, an associate professor at Kansas State University (KSU), asserts:

[Professor [REDACTED] and I have] established a highly prolific semiconductor research group in the Department of Physics at Kansas State University for the experimental investigations in materials growth and optical and electrical properties of III-nitride wide band gap semiconductor materials and devices.

Professor [REDACTED] discusses the importance of this area of research as it relates to more efficient light bulbs and optical storage. He continues that his research group was the first "to employ transport measurement techniques on the persistent photoconductivity (PPC) state to study the impurity properties of III-nitrides" and "picosecond time-resolved photoluminescence (PL) measurement technique to study the mechanisms of optical transitions, LED emission, and lasing in III-nitride epilayers, multiple quantum wells, LEDs, and laser structures." Professor Lin then asserts that the petitioner has gained a strong background in several areas of III-nitride material characterization and property measurement.

[REDACTED] a full professor at KSU, provides very similar information, noting that some of the research group's accomplishments have been published in leading physics journals with the petitioner as the lead author.

[REDACTED] a senior professor in the Department of Electrical and Computer Engineering at KSU, indicates that he has collaborated with the petitioner's research group. Professor Rys asserts that the semiconductor group at KSU is highly regarded and that the petitioner's research is funded by the National Science Foundation. Professor Rys continues:

As some major issues relating to device performance are still not well resolved, it is expected that this research will have a direct impact on the practical applications and industrial commercialization of III-nitride electronic devices in the United States.

[The petitioner] has an exceptional background in semiconductor research, especially in semiconductor transport properties. For example, working with Dr. [REDACTED] and Dr. [REDACTED] at Kansas State University, he first observed the PPC in p-type GaN epilayers and AlGaN/GaN heterostructures. These findings have stimulated worldwide theoretical and experimental studies on impurity properties, as well as on the origin of PPC in III-nitrides. [The petitioner's] research on the switching behavior of GaInNAs solar cells is in the forefront of the field. As a result of his extensive training and experience, [the petitioner] also has an in-depth knowledge of instrumentation and electronic techniques. This is critically important since almost all of the research projects involve multiple device interfaces and instrumentation.

Dr. [REDACTED] another professor at KSU, indicates that he has had close contact with the petitioner's research group and that the petitioner's research is considered groundbreaking within the semiconductor industry.

Dr. [REDACTED] a research associate in the petitioner's laboratory at KSU, reiterates some of the information discussed above and asserts that the petitioner has been a vital and essential member of the research group.

Dr. [REDACTED] research scientist at Columbia University, discusses the petitioner's collaboration with his research group at Columbia.

Based on my research experience, [the petitioner] is one of the best-qualified researchers in the USA in the field of transport properties of GaN based materials and devices. His work is important for understanding of fundamental properties of not only of [sic] III-nitride materials but also other wide band-gap semiconductors. Specifically[,] his achievements in understanding of the origin of PPC in p-type GaN and AlGaIn/GaN heterostructures are crucial to the field of wide bank-gap semiconductors as a whole. Furthermore, his research in the electronic device applications AlGaIn/GaN photo-detectors for UV light detecting, AlGaIn/GaN HEMPTs for high speed and high power microwave device fabrication, and GaInNAs solar cells for energy conservation, etc. - is essential for future technological progress in this country. Since III-nitrides is the [sic] one of the most promising classes of optoelectronic materials, the practical application of this new technology will cause significant impact to the US industry in the near future. Thus a number of highly qualified young scientists are certainly required to keep the United State[s] in the leading positions in this field. To my knowledge, [the petitioner] is an exceptionally qualified candidate. I believe that it would be impractical and costly to find or train a scientist of the same qualifications to replace him in the crucial role he is playing.

[REDACTED] another research scientist at Columbia University, indicates that she has collaborated with the petitioner's group. She discusses the importance of the semiconductor group at KSU and asserts that the petitioner is a key member of that group. She also provides similar information to that quoted above. The petitioner did not provide a letter from the professor or other high level scientist overseeing the research group at Columbia with which the petitioner collaborated.

As noted by the director, all of the above letters are from the petitioner's immediate circle of colleagues and collaborators. On appeal, counsel criticizes the director for implying that the petitioner's colleagues might be biased and asserts that the petitioner's colleagues are highly esteemed and impartial. The petitioner submits new letters from Professor Jiang and Lin asserting that the best recommendation letters must come from individuals who know the petitioner's work and that no professor "worth his salt" would risk his reputation by providing a biased reference. While we acknowledge the importance of references from those who have witnessed the petitioner's work, counsel and the professors misread the directors concerns. The director stated that the record was not "persuasive without corroboration from disinterested parties." We do not read this statement as accusing the petitioner's references of unethical

conduct or improper bias. Rather, the director was stating that an influence over the field as a whole is simply not demonstrated by the honest accolades of one's colleagues. It would be unusual for a scientist to work on a project that he or she did not personally view as important and having great potential. We concur that the accolades of one's advisors, colleagues, and collaborators is not evidence that one has influenced the field beyond those colleagues.

Despite counsel's claim that the petitioner would have provided any additional evidence felt necessary by the director had the director issued a request for such evidence prior to the denial, the petitioner has not addressed the director's concern on this matter by submitting new letters from disinterested parties.

That said, the record includes additional evidence beyond the petitioner's reference letters. The petitioner also submitted a 1990 certificate for a gold medal awarded at the 18<sup>th</sup> Salon International Des Inventions Et Des Techniques Nouvelles in Geneva. The petitioner's name does not appear on the legible portion of the certificate. The petitioner also submits several awards issued in China. While these awards reflect recognition of one's peers, an element for demonstrating exceptional ability, that classification normally requires a labor certification unless a waiver is warranted in the national interest. We cannot conclude that meeting one, or even the necessary three criteria for exceptional ability warrants a waiver of the labor certification in the national interest.

In addition, the petitioner submits a letter from the American Physical Society verifying his membership since 1998. The letter states, "APS membership consists of outstanding scientists who have the very top-level expertise and remarkable achievements in their field, as judged by recognized national and international experts." The letter does not specify the membership requirements. Simply because an organization's membership includes famous individuals in the field does not mean that the organization requires such accomplishments for membership.<sup>1</sup>

The petitioner submitted evidence that he entered the U.S. as a J-1 nonimmigrant exchange visitor, subject to a two-year foreign residency requirement upon completion of his medical training, and that this foreign residency requirement has been waived. Counsel argues that this waiver demonstrates that the U.S. government deems the beneficiary's services to be in the national interest. While section 212(e) of the Act does indicate that the two-year foreign residency requirement can be waived when it serves the public interest to do so, there is no indication that the terms "public interest" in one section of the Act and "national interest" in another section are interchangeable, or that the approval of one waiver mandates the approval of the other. Nevertheless, we will consider the letter from the National Science Foundation (NSF)

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<sup>1</sup> According to APS's bylaws as published on their website, the APS accepts members who are graduate students, teachers, other persons professionally trained in physics, persons engaged in lines of work related to physics, and persons who are not professionally engaged in either physics or related lines but whose interest and activity in the science would made them desirable Members. While Fellows must demonstrate a contribution to the advancement of physics, the petitioner is not a Fellow.

requesting a waiver of the foreign residency requirement, a copy of which is included in the record.

on behalf of writes that the petitioner's foreign residence requirement should be waived because a two-year absence would cause a setback to the projects on which he is working at KSU. Ms. Bantz continues that his skill excelled faster than expected, and thus, there was no planning for a replacement. In addition, she states that the projects at KSU are supported by NSF, the Department of Energy, the Office of Naval Research, and the Ballistic Missile Defense Organization of the Department of Defense. Finally, she states that the petitioner has the experience and training necessary to continue to make a significant contribution to his important projects "both now and in the future."

Most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow, however, that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. Moreover, the two-year foreign residency requirement is an absolute requirement unless waived. Even if the Department of Labor certified that there were no similarly experienced U.S. workers available, the petitioner would still have to leave for two years unless the foreign residency requirement was waived. The letter from the NSF, in and of itself, is not persuasive that the labor certification process should also be waived in the national interest.

While none of the above evidence is particularly persuasive on its own, when considered with the petitioner's publications and citation history, the record does suggest that the petitioner has influenced his field. Initially, prior counsel (same firm as present counsel) asserted that the petitioner had authored 42 articles. While the petitioner listed 42 articles on his resume, one was in processing and three were merely submitted. The petitioner submitted copies of 34 published articles. Prior counsel further stated:

[The petitioner's] scholarly publications are highly regarded by his peers. His works have been cited as authoritative thirty two times since 1996 by other researchers, which is a very high rate of citation.

The petitioner submitted citation indexes containing 1995, 1996, 1997, 1998, and 1999 citations for several articles authored by the petitioner or another scientist with his name. None of the 1995, 1996 and only one of the 1997 citations relate to the petitioner's articles. After a careful comparison of the indexes with the petitioner's resume and the articles in the record, we can only find 28 citations of the petitioner's articles, two of which are self-citations and two of which are citations by collaborators. Twenty-three of these citations are for a single article.

When considering these publications and the citations of them, the director stated that "original contributions, publications, and presentation of research work are inherent to the position of a researcher." The director concluded that the above evidence did not demonstrate that the

petitioner had influenced his field to a greater extent than those of other qualified researchers also contributing to the field.

While we agree that publication of original articles is inherent to the field of research, we find that the number of times the petitioner has been cited is significant in this case. The petitioner's 1996 article has been cited 23 times by many independent researchers, a strong suggestion that this article has been influential. While letters from disinterested scientists in the field would certainly have bolstered the petitioner's case, we find that all of the evidence considered together sufficiently establishes that he has influenced his field as a whole.

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 field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained and the petition is approved.