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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:

30 SEP 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, 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 an alien of exceptional ability and a member of the professions holding an advanced degree. At the time of filing, the petitioner was a doctoral student at the Ohio State University ("OSU") while also working on the technical staff at Lucent Technologies. 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 a member of the professions holding an advanced degree. The petitioner's additional claim of exceptional ability is moot because he readily qualifies as an advanced-degree professional, and an additional finding of exceptional ability would be of no further benefit to the petitioner in this matter. 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, 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.

The petitioner describes his work:

In February 1998, I joined Lucent Technologies as part of my Ph.D. Academic Training. I started working in the Wireless Standards Department in the Platform Technology Standards group based in Naperville, IL. My research work is related to the cdma2000 standard . . . for the 3rd generation Cellular Wireless Technology. My primary focus is on the standardization of the Medium Access Control (MAC) Layer and the Radio Link Protocol (RLP) in the Telecommunications Industry Association (TIA). I am part of the Lucent delegation that participates in Standards body meetings in National and International forums. . . .

The importance of cdma2000 wireless standard is crucial for US cellular industry. . . . Lucent Technologies represents one of the major US companies that is advocating the US based technology as a candidate for the IMT2000 global standard for wireless systems. . . . I have been appointed as part of the IMT2000 coordination ADHOC under TIA, to engage in technical negotiations with Association of Radio Industries and Businesses (ARIB) of Japan. . . .

I feel that my application qualifies to be considered under the "National Interest Waiver" program due to the following key factors:

- cdma2000 is being developed at a very aggressive pace in standards bodies. This limits the professionals that understand the history and technology behind the standard.

- Lucent Technologies along with Qualcomm Inc. is a key player in the development of cdma2000 standard. . . .
- In order to make cdma2000 a serious candidate for the IMT2000 global standard, TIA requires the services of professionals to lobby for the US based cdma technology in the international wireless market. This effort is also crucial to protect the investments made by US companies in the international market.
- I am a permanent and active member of the Lucent delegation to TIA subcommittee TR45.5 (Spread Spectrum Digital Technology – Mobile and Personal Communication Standards). I have already represented TIA in negotiations relating to cdma2000 with ARIB of Japan.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. Lynne Sinclair, technical manager of the Platform Technology Standards Development Group at Lucent, states:

[The petitioner's] work is not only important to Lucent Technologies, but it is also important to the Wireless Industry in the U.S. for both the equipment vendors and the service providers. This work is critical to the success of the 2nd generation and 3rd generation wireless systems based on U.S. standards, especially in relation to the systems based on standards generated in the European Telecommunications Standards Institute (ETSI). The European policies of protectionism have resulted in much greater deployments of 2nd generation system manufactured by European vendors around the world in comparison with U.S. manufacturer systems. The current advantage that the European manufacturers have is being played out in 3rd generation standards, and has been the subject of hearings in the U.S. Senate. It is critical to the success of the U.S. wireless system vendors that U.S. based standards are technically competitive to the ETSI standards.

The ITU (International Telecommunications Union) is currently working towards a global standard for wireless telecommunication systems. It is known as International Mobile Telecommunication-2000 (IMT2000) standard. It would succeed the various cellular-phone formats that exist today and is scheduled to be launched by the year 2000 (also referred to as 3G wireless technologies). The ITU has called for candidate proposals for inclusion in the IMT2000 standard. There are a number of candidate proposals from the North American standards bodies. The proposal that is the main contender for deployment in the U.S. is called cdma2000. The TIA (Telecommunications Industry Association) is working very aggressively to meet the ITU deadlines for submission of this proposal. The other main contender is out of ETSI . . . and is known as the W-CDMA standard.

Ms. Sinclair explains that U.S. businesses would benefit from the inclusion of cdma2000, rather than the European W-CDMA, into the IMT2000 standard, and that the promotion of cdma2000 requires "skilled professionals who have worked on the cdma2000 standards development. . . . In the near future, we believe that [the petitioner] will be one of the key representatives of TIA in explaining the cdma2000 standard in general and the MAC sublayer in particular. Ms. Sinclair

specifically states that the petitioner seeks the national interest waiver in order to expedite his adjustment to permanent resident status because "normal INS procedures for work authorization for J-1 visas are not fast enough." Other witnesses offer similar assertions to the effect that the adoption of the cdma2000 standard is in the national interest because it would allow U.S. communications companies to remain competitive in the global market.

Officials of several TIA subcommittees assert that the petitioner's contribution is essential. For instance, Robert J. Marks, chair of the TR-45.5.1.5 Data Service Task Group, states:

[The petitioner] has been a key contributor in the Data Services Task Group's effort to define both the architecture and protocols necessary for third generation wireless industry standards. His expertise and technical acumen have proved invaluable in developing a Medium Access Control (MAC) standard that enables high speed data services.

His continuing participation is critical to the future successful creation of competitive national standards.

The petitioner submits background materials illustrating the controversy surrounding the competing standards. An article from the *New York Times* indicates that the chief players in the debate were Qualcomm (promoting cdma2000) and Ericsson (behind W-CDMA), whereas Lucent Technologies is identified as "a relatively neutral party in the dispute" rather than as a key innovator of the cdma2000 standards.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted additional evidence and arguments. The petitioner states that Lucent will announce job openings in China to assist in establishing a market foothold in that country, and he will be unable to take a medium-term position in China until he is a permanent resident of the United States. The petitioner does not clarify why he needs to be a U.S. resident in order to work in China, nor does he discuss the fact that an alien can forfeit his permanent resident status through long absences from the United States. The petitioner states that Lucent "is already looking for cdma experts to accept assignments in China. Unless I receive permanent residency status at an expedited pace, I will not be in a position to offer my services for these expatriate assignments." The petitioner states that the usual labor certification process is too time-consuming, and he would emigrate to Canada (where he already has an approved immigrant petition) rather than face long delays in becoming a permanent resident of the United States.¹

The petitioner cites background evidence showing that, in the petitioner's words, "strong industry standards are vital for a technology's success in the international marketplace." We do not dispute this general argument, but it does not follow that every alien who is involved in the creation of such standards merits a national interest waiver.

¹ Leaving aside the fact that a significant appellate backlog has created a significant waiting period for national interest waiver cases, the national interest waiver does not in any way expedite the processing of an application to adjust status. An alien does not immediately or automatically become a permanent resident through the approval of an immigrant petition with a national interest waiver.

The petitioner submits a partial copy of a technical document that he had edited, as well as copies of job offer letters demonstrating that a number of employers seek his services. The petitioner emphasizes that he has not accepted, and does not intend to accept, these offers.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification the petitioner chose to seek.

On appeal, the petitioner asserts that the director's decision includes an acknowledgement of the importance of the dispute over global wireless standards, and the petitioner repeats his assertion that time is a critical factor because of the goal of selecting a global standard by 2000. While the standards, as a whole, do represent an important issue for the U.S. wireless industry, the record is not persuasive that the petitioner has been a major force in shaping the cdma2000 standards. The aforementioned *New York Times* article indicates that the cdma2000 standards did not originate with Lucent. Lucent appears to have entered at a later point, introducing refinements to an existing blueprint. While the petitioner has performed work that is important to one working group of one subcommittee engaged in preparing the standards, the petitioner has not shown that his work in the context of the standards as a whole (rather than in one of numerous compartments) has been of such unusual significance that it warrants a national interest waiver.

The petitioner has argued repeatedly that a principal argument for obtaining the waiver has been to expedite his obtaining permanent resident status. We cannot ignore that, owing to the very large number of waiver-based petitions on appeal, the target year of 2000 has come and gone and thus the selection of the global standard has presumably been made. The argument that time is of the essence has, in effect, been rendered moot.

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.