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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 01 243 59240 Office: California Service Center Date: **APR 11 2003**

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:

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 Bureau of Citizenship and Immigration Services (Bureau) 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 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 Administrative Appeals Office 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 of filing, the petitioner was pursuing his Ph.D. degree and working as a research assistant in the Department of Electrical and Computer Engineering at the University of California, Irvine ("UCI"). 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.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 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 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 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.

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.

Along with documentation pertaining to his field of research, the petitioner initially submitted four witness letters.

Dr. Keyue Smedley, Associate Professor of Electrical and Computer Engineering at UCI, states:

[The petitioner] has been working on his Ph.D. degree in the field of power electronics in my research laboratory since September 1997. As his academic and research advisor for the Ph.D. degree, and as his mentor and co-author of articles in several scientific publications, I am uniquely qualified to evaluate his technical background and scientific achievements.

[The petitioner] has made outstanding contributions in both circuit theory and engineering

practice. The circuit he developed eliminated the need of a fast DSP, multipliers, and complicated detection and calculation circuits as required by other approaches. Laboratory prototypes were built and have demonstrated elegant, simple, and robust circuits with order of magnitude reduction in the component count compared to those reported in literatures. Using these circuits, the current draw becomes sinusoidal; therefore, the transmission efficiency as well as the power quality is significantly improved. These pertinent research results are patented and are currently being transferred to our industrial partners.

[The petitioner's] other contribution is in the area of lower voltage DC regulators for CUP processors and wireless communication. [The petitioner] has developed a high efficiency circuit that has very tight regulation against fast load transient and input perturbations.

Furthermore, [the petitioner] has developed soft switching techniques that can effectively improve the efficiency of a single-phase stage power factor correction circuit.

The fact that the petitioner's work has resulted in a patent carries little weight. Of far greater value in this proceeding is the importance to the field of the petitioner's creations. The granting of a U.S. patent documents that the innovation is original, but not every patented invention or innovation constitutes a significant contribution in one's field. The petitioner must show not only that his findings are important to his own research laboratory and the companies that fund his work, but throughout the greater electrical engineering field.

The letter from Dr. Smedley notes several of the petitioner's academic accomplishments at UCI. University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's scholastic achievement may place him among the top students at a particular educational institution, but it offers no meaningful comparison between the petitioner and experienced professionals in the electrical engineering field who have long since completed their educational training.

Dr. Roland Schinzinger, Professor Emeritus of Electrical Engineering at UCI, states: "Given the present conditions of [California's] as well as the nation's electricity supplies, the proliferation of noise producing switching devices, and the practices of power users, inventive engineers such as [the petitioner] are badly needed." This argument, however, fails to single out the petitioner for the special benefit of a national interest waiver. By law, advance degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. With regard to Congressional intent, 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). Congress plainly intends the national interest waiver to be the exception rather than the rule. We generally do not accept the argument that a given field of endeavor is so important that any alien qualified to work in that field must also qualify for a national interest waiver. Witness statements and documentation pertaining to the undoubted importance of power electronic research fail to distinguish the petitioner from other competent researchers in that same field.

The letters from Drs. Schinzinger and Smedley cite the petitioner's publication record as evidence of his "outstanding contributions." For example, Dr. Smedley states: "[The petitioner's] work has resulted in more than ten technical articles that were published in the most prestigious conferences and journals in the field of power electronics." The record, however, contains no evidence that the publication or presentation of one's work is a rarity in petitioner's field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's findings in their research.

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, would demonstrate more widespread interest in, and reliance on, the petitioner's work.

The record, however, does not contain citation records or other evidence to establish that independent researchers throughout the electrical engineering field regard the petitioner's published work as especially significant. While heavy citation of the petitioner's published articles would carry considerable weight, the petitioner has not presented such citations here.

Tom Brooks, Vice-President of Design and Development at Taiyo Yuden, Inc., states that he met the petitioner when his company decided to enter into a research partnership with the UCI Power Electronics laboratory headed by Dr. Smedley. Tom Brooks further states:

[The petitioner] had been assigned to do research and development on several advanced projects that we have funded to advance the art of harmonic correction as applied to commercial power supplies and systems.... Ultimately this work may result in building fewer power plants to provide for the ever-growing needs of users.... [The petitioner] has demonstrated a complete understanding of the problems involved with the reduction of harmonics. His insights on current technologies have enabled him to simplify through equivalency rules the current state of the art as well as invent new and more efficient topologies. Several of his ideas are now being developed by us and will be very instrumental in reducing harmonics in our products... [The petitioner] is now working on methods to improve the efficiency of power converters through the use of soft switching and other techniques to further reduce the energy wasted by existing technologies.

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for a national interest waiver. The petitioner must demonstrate that his work has already significantly influenced the electrical engineering field. 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.

Dr. Franco Maddaleno, Professor in the Department of Electronics at the Polytechnic of Turin, Italy, states that he was invited to conduct research and supervise graduate students at UCI. Dr. Maddaleno's letter is devoted mostly to the overall importance of electrical power engineering rather than the petitioner's individual research accomplishments. Dr. Maddaleno asserts that the petitioner is at a "promising point in his professional career" and that he possesses a "unique and exceptional background in power electronic engineering." It cannot suffice, however, to simply state that the petitioner possesses useful skills, or a "unique and exceptional background." In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. The petitioner must demonstrate that he has already significantly influenced his field of endeavor. *See Matter of New York State Dept. of Transportation, supra*. Similarly, arguments about the overall importance of a given occupation may establish the intrinsic merit of that occupation, but such general arguments cannot suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement.

All four of the witness letters emphasize the petitioner's educational background and technical expertise. Such qualifications, however, are amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation, supra*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a statement from counsel, his Ph.D. degree, evidence of three recent job offer letters, a letter addressed to Dr. Smedley dated July 20, 2001 showing that one of his proposals to the California Energy Commission was selected for funding, evidence of an approved patent dated October 31, 2001 which names the petitioner and Dr. Smedley, and three additional witness letters.

Given that three job offers exist, the question necessarily arises as to why the petitioner seeks a waiver of the job offer requirement. The petitioner's Ph.D. degree, the letter from the California Energy Commission, and the patent approval were all issued subsequent to the petition's filing. *See Matter of Katigbak, supra*. New circumstances that did not exist at the time of filing cannot retroactively establish the petitioner's eligibility as of that date.

Dr. Jie Chang, Principal Scientist, Rockwell Scientific Company, states that the petitioner's work "contributes to the technology development of modern AC-DC and DC-DC power conversion that benefit our national interest in energy conservation and energy efficiency utilization." Dr. Chang's

letter does not mention any of the petitioner's specific achievements that have been particularly influential in the electrical engineering field.

Dr. Enrico Santi, Assistant Professor in the Electrical Engineering Department at the University of South Carolina, met the petitioner at UCI in 1998. Dr. Santi describes the petitioner's research experience regarding advanced control methods for active power filters, general control methods for power factor correction of single-phase and three phase power converters, power converter interfaces for alternative energy sources, and the use of soft switching to improve power efficiency. We note, however, that any objective qualifications that are necessary for the performance of a research position can easily be articulated in an application for alien labor certification.

A second letter from Dr. Smedley describes a research grant awarded to UCI based on the petitioner's work. The record, however, contains no evidence that the petitioner was named on this grant. Furthermore, even if that were the case, the very existence of documentation indicating that the petitioner's findings resulted in a research grant would carry little weight in this matter. The argument that contributing to a project that was awarded state or federal funding elevates the petitioner above other competent engineering researchers is flawed in that it applies equally to all researchers who receive governmental funding for their work. We note here that the federal government and states routinely provide millions of dollars in research grants to many thousands of scientists and research institutions on an annual basis. The record contains no statement from any official governmental source indicating that petitioner's individual results were viewed as particularly important to the electrical engineering field. Governmental grants generally support future research rather than recognize prior achievements and therefore we disagree with counsel that the receipt of grant funding significantly distinguishes the petitioner from other competent researchers.

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 acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director indicated that general arguments about the importance of retaining qualified power electronics engineering researchers fail to distinguish the petitioner's accomplishments from those of other competent researchers in his field.

On appeal, counsel argues that the director considered the evidence under the standard for aliens of extraordinary ability and therefore applied an incorrect standard in determining the petitioner's eligibility. We agree with counsel that the director's decision contains several erroneous references to the criteria for aliens of extraordinary ability under section 203(b)(1)(A) of the Act. For example, page three includes a discussion of the lack of national or international prizes and participation as a judge. Prizes and judging experience, however, are not required for the classification sought by the petitioner. At the bottom of page four the director asserts that citations of one's work is not evidence of national or international acclaim, a standard not

required for the instant classification. Erroneous references to the “regulatory criteria” and national or international acclaim appear several times in the first five pages of the director’s decision. By discussing the lack of evidence regarding national or international acclaim, the director erred in the initial portion of her analysis. Therefore, we withdraw the director’s initial findings pertaining to the regulatory criteria for the extraordinary ability classification.

The director’s decision subsequently goes on to discuss the evidence under the correct standard and even states that national acclaim is not required for the classification sought. While we concur with counsel that the director’s decision contains flawed statements, we find that the decision is not so flawed as to undermine the grounds for denial. The Bureau notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the power of the Service to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm’n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926 (1961).

Counsel cites the witness letters attesting to the petitioner’s impact on his field. We note, however, that the petitioner’s witnesses consist entirely of individuals with direct ties to the petitioner or Dr. Smedley. Their letters describe the petitioner’s expertise and value to his research projects, but they do not demonstrate the petitioner’s influence on the field beyond the institutions where he has studied or worked. While letters from those close to the petitioner certainly have value, the letters 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. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of one’s published findings, would be more persuasive than the subjective statements from individuals selected by the petitioner. In this case, the petitioner’s findings may have added to the general pool of knowledge, but it has not been shown that engineering scholars throughout the field have viewed the petitioner’s findings as particularly significant.

Counsel states that the petitioner’s publication record demonstrates evidence of his significant impact on the electrical engineering 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 National Academy of Sciences 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. Numerous independent 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. If, on the other hand, there are few or no citations of an alien’s work, suggesting that that work has gone largely unnoticed by the larger research community, then 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 would have, if that research does not influence the direction of future research. In this case, the petitioner has offered no evidence demonstrating heavy independent citation of his research articles.

Counsel cites two of the petitioner's patents as further evidence of his research contributions. We note here that the issuance of a patent by the United States Patent and Trademark Office ("USPTO") demonstrates only that an invention is original. According to statistics released by the USPTO, which are available on its website at *www.uspto.gov*, the USPTO has approved over one hundred thousand patents per year since 1991. In 2001, for example, it received 345,732 applications and granted 183,975 patents. The petitioner has offered little evidence showing that his innovations have captured significant attention from independent experts throughout the electrical engineering field.

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 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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.