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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: Nebraska Service Center Date: APR 11 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Elizabeth Hayward

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 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 in the Department of Geological Engineering and Sciences at Michigan Technological University ("MTU"). 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. --
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> > (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.
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> > (B) Waiver of job offer.
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> > > (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 petitioner holds a M.S. degree in Environmental Engineering Science from MTU. 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 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 copies of his published work and proof of his organizational memberships, the petitioner submitted several witness letters. Dr. William Rose, Professor of Petrology in the Department of Geological and Engineering Services at MTU, is one of the petitioner's Ph.D. research advisors. Dr. Rose states:

> In the last ten years one focus of my research and educational effort has been directed toward the mitigation of the hazards of volcanic clouds to aircraft. In this work we have used satellite remote sensors to detect and map volcanic clouds and the techniques we have developed are now used by Volcanic Ash Aviation Centers around the world to warn aircraft. [The petitioner's] research

is part of this effort at mitigating aircraft hazards, and it is also an important insight into the interaction of volcanic eruptions and the atmosphere. In particular we are interested in how eruptions influence the health of people, weather and climate.

* * *

The direct results of our efforts are expected to clarify issues related to the mechanisms of fallout and hazards of fine ash, the conversion of SO_2 to sulfate, and the role of ice in various reactions and processes. The results are important in understanding a wide range of local and global scale environmental effects of eruptions... They are also significant to the mitigation of hazards to aircraft. We focus on four eruptions, all for which we have amassed considerable observational data and experience, and which span a range of volcanic and atmospheric environments: (1) The February 26, 2000 Hekla fissure eruption, which represents an ash-poor example and which fortuitously has important validation information associated with it; (2) The December 26, 1997 eruption at Soufriere Hills Volcano, Montserrat, which is marked by significant interaction with the ocean; (3) The three 1992 Subplinian Spurr eruptions which have unusually extensive and complete observational constraints; and (4) The climactic June 15, 1991 Pinatubo event, the largest well-documented eruption of the past century.

* * *

[The petitioner] occupies a critical position in our research effort concerning the Pinatubo event, its impact on the atmosphere and the processes that led to its removal. He has a direct, leading role in the remote sensing study of the Pinatubo volcanic clouds. He is using the latest remote sensing retrieval methods, some of them developed by himself, for tracing and mapping the evolution of the cloud during its first week of dispersal. He will also use meteorological numerical simulation methods first developed at Max Planck Institute for Meteorology, in Hamburg, Germany for further understanding of the volcanic cloud processes. In the past three years his training has been directed toward developing his ability to accomplish these challenging research goals, which require an exceptionally broad background and combination of skills. If [the petitioner] were unable to continue in our research effort, we would lose several man-years of invested time and expense and would be forced to find another exceptionally well qualified specialist and train him/her again. Besides the waste in resources, such a delay is significant as the research is in the national and international interest, because if its importance to atmospheric science, climate change and aviation hazards.

We generally do not accept the argument that a given project is so important that any alien qualified to work on that project must also qualify for a national interest waiver. Information concerning the overall importance of the petitioner's ongoing studies may establish the intrinsic merit of the petitioner's work, but such general arguments would not suffice to show that the petitioner's individual accomplishments are of such an unusual significance that he qualifies for a waiver of the job offer requirement. 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). Congress plainly intends the national interest waiver to be the exception rather than the rule. Thus, Dr. Rose's statements pertaining to the undoubted importance of volcanic cloud research fail to distinguish the petitioner from other competent researchers involved in that same field.

Similarly, assertions as to the petitioner's potential to make future contributions would fall short of demonstrating his eligibility for a national interest waiver. Dr. Rose's letter addresses the petitioner's ongoing studies rather than his prior research achievements and their influence on the greater field. For example, Dr. Rose notes that the petitioner's efforts "are expected to clarify issues related to the mechanisms of fallout and hazards of fine ash, the conversion of SO_2 to sulfate, and the role of ice in various reactions and processes." The petitioner, however, must demonstrate that his work has already significantly influenced the research 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. Rose states: "If [the petitioner] were unable to continue in our research effort, we would lose several man-years of invested time and expense and would be forced to find another exceptionally well qualified specialist and train him/her again." It cannot suffice, however, to state that the petitioner is "well qualified" or that he possesses a unique educational background. In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. 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 demonstrate that he has already significantly influenced his field of endeavor.

Dr. Rose's letter describes several of the petitioner's objective qualifications that are amenable to the labor certification process:

> [The petitioner] has 10 years of research experience in atmospheric chemistry and remote sensing before his graduate education in the U.S. began. He wrote 10 papers in Chinese journals (in English and Chinese), he was given a scientific award for the development of a solar and skylight spectrophotometer and he became an associate research professor in China in 1997. After coming to Michigan Tech, [the petitioner] obtained a M.S. in Environmental Engineering (1999), with important work in atmospheric chemistry. This background in atmospheric studies, together with his strength in computational methods, as exemplified by his doctoral degree program in computational science and engineering is combined with volcanology in his current project. It is very hard to find people with this combination of skills, which are all necessary in his dissertation research, and which are also applicable to many important problems in environmental science and engineering.

Dr. Greg Bluth, Associate Professor, Department of Geological Engineering and Sciences, MTU, is the petitioner's other Ph.D. advisor. Dr. Bluth states:

> [The petitioner] fills a research position which requires an individual with knowledge of atmospheric physics and chemistry, satellite remote sensing, digital image processing, as well as extensive background in computational theory. This work also includes a high degree of programming skills to revise and modify the image processing and data analysis software for both NASA's satellite data and the ATHAM atmospheric process model.

We note here that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification. 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.

Dr. Bluth further states:

> [The petitioner's] background and training make him an ideal candidate to play a leading role in our research efforts. His responsibilities include image processing and data analysis of the TOMS satellite data. He is also a key link between our research group at Michigan Tech and the scientists at the Max-Planck Institute for Meteorology in Germany. This collaboration involves model simulation of the microphysical processes of ash and gas erupted from the 1991 eruption of Mt. Pinatubo, Philippines... [The petitioner] is the primary person responsible for the Pinatubo study's overall success under my guidance.
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> * * *
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> I believe that it is in the interest of the United States to confer permanent resident status to [the petitioner] because his research work is important to the environment protection and natural hazard mitigation, and his work will also be helpful to scientific work sponsored by NASA and NSF. For example, if [the petitioner] can be granted the permanent residency in the U.S., he would become eligible for NASA internship and fellowship programs, which will benefit both our ongoing research as well as the scientific work in NASA.

As noted previously, statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for the national interest waiver. Further, nothing in the legislative history suggests that the national interest waiver was conceived as a means to facilitate the ongoing training of alien researchers. Dr. Bluth has not explained why the petitioner requires permanent immigration benefits to secure his participation in short-term training programs (such as those at NASA), for which nonimmigrant visas exist. We reject the implied claim that, for the very reason that the petitioner has yet to complete his training, he is entitled to an exemption from the job offer requirement which, by law, attaches to the visa classification he seeks.

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Dr. David Schneider, Research Geophysicist, U.S. Geological Survey, Alaska Volcano Observatory, states that he received his M.S. and Ph.D. degrees "from the same volcanic and cloud eruption research group at MTU where [the petitioner] now studies." Dr. Schneider further notes that he collaborates with the petitioner on a variety of issues.

> Work such as that being conducted by [the petitioner] has direct application to the mitigation of the hazard posed by volcanic clouds, and shows great promise in benefiting me personally in my position with the Alaska Volcano Observatory.
>
> [The petitioner] is conducting cutting-edge research in an important field of study and has been shown a strong commitment to this area as his career path. In my opinion, [the petitioner's] services will be in great demand once he completes his Ph.D. work. I realize that if [the petitioner] can be granted permanent resident status in the United States, it will be possible for him to gain employment in a research institute or government agency. I submit that this would be a benefit to our nation. My experience on hiring committees within the U.S. Geological Survey has shown me that there are very few applicants with strong interdisciplinary backgrounds in atmospheric science, volcanology, and remote sensing. A recent job opportunity at the Alaska Volcano Observatory in this field has gone unfilled due to a lack of qualified applicants.

A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *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.

Dr. Christiane Textor, Research Scientist at the Max-Planck Institute for Meteorology in Germany, collaborated with the petitioner in 1991 and worked as a visiting scientist at MTU in 2000. Dr. Textor indicates that the petitioner "already has more than ten research papers published in peer-reviewed scientific journals... and in half of these he is first author."

Dr. Arlin Krueger, now a Research Professor in the Department of Physics at the University of Maryland, Baltimore County, formerly worked as an astrophysicist at NASA. Dr. Krueger notes that he previously collaborated with Dr. Bluth and also "led the project that funded the work at MTU." Dr. Krueger also indicates that the petitioner had "at least ten research papers published in peer-reviewed journals."

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 scientific community 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.

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 stated that the witness letters had failed to establish that the petitioner's "work is known and considered unique outside his immediate circle of colleagues." The director also noted that the "[p]ublication and presentation of one's work is inherent to the field of research in any endeavor."

On appeal, the petitioner submits a "Certificate of Excellence" from the MTU Graduate Student Council stating that the petitioner won first place for "Best Poster" in the graduate school's fall poster session. Also provided was a "research paper written after the submission of the original petition." This evidence came into existence subsequent to the petition's filing. *See Matter of Katigbak, supra*, in which the Bureau held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

A student award may place the petitioner among the top students at his particular university, but it offers no meaningful comparison between the petitioner and experienced researchers in the field who have long since completed their educational training.

The petitioner cites the letters from Drs. Textor, Krueger, and Schneider as evidence that his "work is known and considered unique outside his immediate circle of colleagues." We note, however, that all three of these witnesses have direct ties to the petitioner, his research supervisor (Dr. Bluth), or MTU. Their letters describe the petitioner's expertise and value to his current research projects, but they do not demonstrate the petitioner's impact on the greater field. 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 researchers throughout the field have viewed the petitioner's findings as particularly significant.

The petitioner argues that the director did not fully consider his articles that were published in "peer-reviewed scientific journals." 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.

The petitioner states that his "leading role in... NASA funded research projects" shows that his work is of greater significance than that of others in the research field. The record, however, contains no evidence showing that the petitioner was named on a NASA grant. Furthermore, even if that were the case, the very existence of documentation indicating that the petitioner was the direct recipient of a NASA research grant would carry little weight in this matter. The argument that contributing to a project which was awarded funding by NASA elevates the petitioner above other competent researchers is flawed in that it applies equally to all researchers who receive governmental funding for their studies. We note here that the U.S. Government routinely provides 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 prior research findings are viewed as particularly important when compared to the results of other researchers in the petitioner's field. Grants from NASA generally support future research rather than recognize prior achievement and therefore we reject the argument that the receipt of grant funding significantly distinguishes the petitioner from other competent researchers.

Clearly, the petitioner's educators and research collaborators have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While numerous witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such

research; the assertion that the petitioner's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent researchers.

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.