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

**PUBLIC COPY**

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536



**APR 16 2003**

File:  Office: Texas Service Center

Date:

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. § 153(b)(2)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

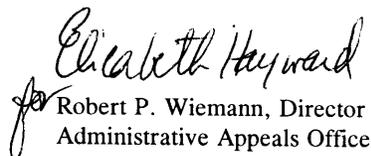
**INSTRUCTIONS:**

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, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 but also argued that he was an alien of exceptional ability. 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 did not contest that the petitioner qualifies for the classification, either as a member of the professions holding an advanced degree or as an alien of exceptional ability, but concluded 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) . . . the Attorney General may, when the Attorney General 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 was a Ph.D. candidate at Auburn University at the time of filing. His only degree of record at the time of filing was a bachelor's degree in chemical engineering from Tsinghua University in 1991. The director failed to consider whether this documentation establishes the petitioner as an advanced degree professional as claimed in the cover letter.

The petitioner, however, also claims to be an alien of exceptional ability. The only discussion of the petitioner's ability in the director's decision, however, is as follows:

The alien is claiming extraordinary ability in the field of chemistry. The evidence submitted suggest the beneficiary is well educated and trained in the field, however, it cannot be established the beneficiary has reached a level of expertise indicating that the individual is part of that small percentage that has risen to the very top of the field. . . .

Extraordinary ability means a level of expertise indicating that the individual is part of that small percentage that has risen to the very top of the field of endeavor. Aliens of extraordinary ability in the arts, sciences, business, athletics, etc., are those who have demonstrated sustained national or international acclaim and whose achievements have been recognized in the field.

This language, however, relates to aliens seeking classification as aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. As stated above, the petitioner is seeking classification as an advanced degree professional or alien of exceptional ability pursuant to section 203(b)(2) of the Act. The regulation at 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." This standard is not as exclusive as the standard imposed by the director. Therefore, we cannot uphold the director's decision. The matter must be remanded to the director for a determination of whether the petitioner was an advanced degree alien at the time of filing as claimed. If not, the director must consider whether the petitioner is an alien of exceptional ability using the proper standard quoted above. While the petitioner submitted evidence relating to several of the regulatory criteria for exceptional ability set forth at 8 C.F.R. § 204.5(k)(3), when considering this evidence, the director should evaluate whether such evidence places the alien above others in the field in order to fulfill the criteria. We note that qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered."

By statute, aliens with exceptional ability are generally subjected to the labor certification requirement unless it is in the national interest to waive that requirement. Thus, even if the director concludes that the petitioner is an alien of exceptional ability, the director must still determine whether the labor certification requirement should be waived in the national interest.

In her decision, the director concluded that the petitioner had not established that a waiver of the labor certification requirement would be in the national interest. Neither the statute nor pertinent 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 the 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.

The director did not contest that the petitioner's area of work, development of biomass fuels, has intrinsic merit or that the proposed environmental benefits would be national in scope. The director simply stated, without discussion, that the Service (now the Bureau) "is not convinced that the beneficiary would merit a national interest waiver as it has not been established that the national interest would be adversely affected if the petitioner were to take the time to obtain a labor certification for the alien." This statement is perplexing in light of the fact that the petitioner self-petitioned in this case, and would not be able to file a labor certification application on his own behalf. Nevertheless, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

In light of the above, the matter must also be remanded for an appropriate analysis of whether the petitioner has established that he will benefit the national interest to a greater degree than an available worker with the same minimum qualifications. In making such a determination, we offer the following guidance. 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.

Further, 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 219, n. 6.

In light of the above, this matter will be remanded for consideration of whether the petitioner qualifies for the classification and, if so, whether a waiver of the labor certification requirement is warranted in the national interest. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.



**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.