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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

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Washington, D.C. 20536

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File: [Redacted] Office: Nebraska Service Center

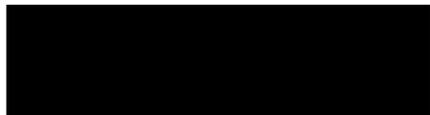
Date: AUG 25 2003

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.

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 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. At the time of filing, the petitioner was working as a postdoctoral research associate in the Department of Physics at the University of Washington. 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 petitioner holds a Ph.D. in Physics from the University of Maryland at College Park. 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 documentation pertaining to his field of research, the petitioner submitted several witness letters.

Dr. [REDACTED] Professor of Physics, University of Washington, states:

[The petitioner] came to the United States after studying at the University of Science and Technology in China. He studied at Texas A & M, and then went to the University of Maryland where he received his Ph.D. under Professor Michael Fisher, one of the most eminent theorists in Condensed Matter Physics.... The petitioner's dissertation was on the statistical mechanics of interacting charged systems. He then took a postdoctoral position

with Professor [REDACTED] at Lehigh University.... I felt that [the petitioner] would be an excellent post-doctoral fellow for me to work with.

* * *

Up until quite recently, the method used to alter genes employed viruses, which have evolved precisely to invade cells and to alter genes to their liking. The problem has been to control matters so that the viruses alter the genes to our liking. The many problems involved have led to attempts to accomplish the same result without using viruses; hence non-viral gene therapy. One method which appears promising is to enclose the negatively charged DNA fragment, which is to be delivered, in a casing consisting of positively charged lipids. The technique is under a great deal of investigation with rather widely varying results. A major difficulty is that one is not sure of the various steps that must be accomplished for this method to work. It is this problem which [the petitioner] is addressing. He has formulated a model lipid system which describes the actual lipids extremely well, as measured by the accuracy with which the experimentally measured phase diagram of the lipid can be reproduced.... I am optimistic that use of this model will permit us to investigate the necessary steps required for non-viral drug delivery.

Dr. [REDACTED] Distinguished University Professor and Regents Professor at the University of Maryland, and member of the U.S. National Academy of Sciences, states:

The petitioner's thesis work was devoted to understanding the behavior of ionic fluids or electrolytes – a topic of both fundamental scientific significance and practical application. At the one end, the subject impinges on plasma science, with the ultimate hope of cheap fusion energy. At the other end, which [the petitioner] is now pursuing, all our bodily fluids are ionic in character and the interaction of individual ions in an electrolyte (the specific aspect of some of [the petitioner's] work) is of major biophysical significance. [The petitioner] also developed a sophisticated theory that describes phase transitions in ionic fluids, both in bulk and in thin films. These contributions, published in prestigious U.S. and European journals attracted international attention and have been well cited in subsequent literature. In my own lectures and published reviews of the field, [the petitioner's] research has especially figured in because of the specific questions it both answered and raised.

* * *

Most recently, with Professor [REDACTED] [the petitioner] has presented a basic theoretical study of so-called "lipid polymorphism"...

Professor [REDACTED] of the University of Maryland, states:

[The petitioner] produced a general theory that can describe all dimensions, and showed explicitly how physical properties change in different dimensions. As a result, his theory unifies earlier theories on ionic behaviors in both two-dimensional and three-dimensional

space. Furthermore, his theory naturally demonstrates how different ionic behaviors emerge by varying the dimensionality of space. This is a very widely cited and conceptually important advance.

Dr. [REDACTED] Professor of Physics, Lehigh University, also indicates that the petitioner's work is widely cited. He states: "[The petitioner] has authored over ten professional papers in prestigious journals including *Physical Review Letters*. All of them bear the mark of excellence and originality and have been cited numerous times in the international community."

In support of the above statements, the petitioner has presented numerous examples of research articles, authored by independent scientists in the United States and from around the world, citing his published findings. When judging the influence and impact that the petitioner's published 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. In this case, the substantial number of citations of the petitioner's published articles demonstrates widespread interest in, and reliance on, the petitioner's work. While some of the citations presented are self-citations, the overwhelming majority of the citations demonstrate the favorable response of independent researchers. These citations show that many other scientists have acknowledged the petitioner's influence and found his work to be significant.

Not all of the witness letters were from individuals with whom the petitioner had previously collaborated.

Dr. [REDACTED] Leading Professor, Department of Chemistry, State University of New York, states:

One of [the petitioner's] original contributions in the field was to develop a theory for the screened interactions between two ions inside ionic fluids... I found his work very interesting since I was studying the same interactions using a different method. I was glad to know that our results agreed and I cited his work in my own papers.

* * *

A particularly important contribution from [the petitioner] comes from his thesis work in which he formulated a theory to demonstrate the phase behavior of ionic fluids in arbitrary dimension. His work is thus especially important to films and interfacial phenomena that are two-dimensional... His papers have helped us to understand some of the most important issues in ionic fluids.

[REDACTED] Professor of Chemistry, The Hebrew University of Jerusalem, states:

In a recent paper, [the petitioner] made an important contribution to the field by developing a theory for both cationic and neural lipids. His paper is based on a solid microscopic model and

an elegant statistical thermodynamic theory. The agreement between his theoretical results and earlier experimental ones is impressive. In summary, [the petitioner] has made significant contributions relating to research in gene therapy.

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.

On appeal, counsel calls attention to the following statement that appeared in the director's decision: "It appears that the alien petitioner has made an important advance in the theoretical understanding of the nature of ionic fluids. As a result, his groundbreaking theory unifies other theories on ionic behavior in both two and three-dimensional space." Counsel disputes the director's contradictory findings, stating that the director's decision "on the one hand, admits that the petitioner has made an important advance and groundbreaking theory, but, on the other hand, claims that the petitioner does not make a contribution that is substantially greater than that of his peers."

The petitioner submits further evidence of his published work, numerous reprint requests from scientists throughout the world, and an additional witness letter.

Dr. [REDACTED] Chief, Laboratory of Physical and Structural Biology, National Institutes of Health, indicates that he does not know the petitioner personally and that his support for the petitioner is based on the petitioner's reputation in the field. Dr. [REDACTED] states:

[The petitioner's] recent work in lipid polymorphism has made a significant contribution to the field of gene therapy.

* * *

[The petitioner] successfully developed a microscopic theory that provides insightful and detailed descriptions of the behavior of lipids. This is the first theory that I know that requires very little input from experiments but reproduces experimental data very well. More important, his theory also provides information that cannot be obtained either by experiments or by other theories, such as how different lipids distribute their mixtures and how they arrange themselves on their pathway to new structures.

It is no exaggeration to say that information gained as a result of [the petitioner's] work provides crucial guidance in designing an effective vesicle for gene therapy.

The heavy independent citation of the petitioner's published work, along with the numerous reprint requests, bolsters the witnesses' claims that the petitioner's biophysical theories have garnered the attention of researchers throughout the scientific community and significantly influenced his field. It is further noted that the petitioner's witnesses are not limited to his



immediate colleagues.

Upon careful consideration of the documentation presented, we find that the petitioner has shown that independent researchers from throughout his field have viewed his theories as significant breakthroughs. The witness letters point toward a consensus throughout the biophysical research community that the petitioner has developed plausible theories both for predicting the behavior of lipids and for predicting ionic behaviors in two-dimensional and three-dimensional space. Distinguished experts from throughout the country and from around the world regard the petitioner's achievements as being unusually significant.

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 evidence in the record, establishes that the scientific 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, 8 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.