

B5

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

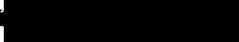
PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



File:  Office: Texas Service Center

Date: 12/15/03

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)

...ing data deleted to
prevent identity information
invasion of personal privacy

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 Citizenship and Immigration Services (CIS) 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. The Administrative Appeals Office (AAO) remanded the case back to the director on appeal. On May 20, 2003, the director issued a new decision denying the petition. The matter is now before the Administrative Appeals Office on certification. The director's decision will be affirmed.

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 or as a member of the professions holding an advanced degree. 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. In her initial decision, the director did not contest whether the petitioner was an advanced degree professional and concluded that the petitioner was not an alien of extraordinary ability, a higher standard than the classification sought. The director further denied the petition based on a determination 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 because the record did not demonstrate that it would be detrimental to the national interest if "the petitioner" were to take the time to seek labor certification.

On April 16, 2003, the AAO remanded the case back to the director. The AAO noted that the only degree in the record that had been issued prior to the date of filing was a bachelor's degree. Thus, the AAO determined that the director should consider whether the petitioner was truly an advanced degree professional or, if not, apply the correct standard in determining whether the petitioner is an alien of exceptional ability. The AAO further determined that the director's sole basis of denying the waiver request was flawed as the petitioner in this case is a self-petitioner and cannot seek labor certification on his own behalf.

In her second decision, the director determined that the petitioner did not have an advanced degree at the time of filing and was not an alien of exceptional ability. The director further determined that a waiver of the job offer requirement was not warranted because the petitioner's skills could be enumerated on an application for labor certification. The director also noted that a waiver was not warranted based on a claimed shortage of qualified workers in the U.S., as that is the problem that the labor certification process addresses. The director certified her decision to the AAO on May 20, 2003, and advised the petitioner that he could submit a brief or other written statement to the AAO within 30 days. As of this date, more than five months later, the petitioner has not submitted anything further.

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.

We concur with the director that the record does not reflect that the petitioner received an advanced degree prior to filing the petition. 8 C.F.R. § 204.5(k)(2) permits a bachelor's degree plus five years of experience instead of an advanced degree. While the petitioner claims six years of experience for P&G Corp. (China Branch), the record does not contain a letter from that company confirming this claim. Thus, the petitioner has not established that at the time of filing he was an advanced degree professional.

The petitioner also claims to be an alien of exceptional ability. The director concluded, without discussion, that the petitioner did not establish his eligibility for that classification. We concur for the following reasons.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

At the time of filing, the petitioner had a bachelor's degree. As this degree is required for his field, it is not evidence of a degree of expertise significantly above that ordinarily encountered. While the petitioner may have been "near to the completion of [his] Ph.D. degree in Chemical Engineering," he did not possess that degree at the time of filing. Thus, it cannot be considered evidence of his eligibility at that time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

In response to the director's request for additional documentation, the petitioner submitted a letter from [REDACTED] Chemical Engineering Department Chairman at Auburn University, asserting that the petitioner "had worked in the Chemical Process Industry (CPI) for six years with his bachelor's degree. He has been continuously working at Auburn University as a Research Assistant for five years." The petitioner did not submit letters from his employer(s) in the Chemical Process Industry. Moreover, [REDACTED] does not indicate that the petitioner worked full time at Auburn University while studying for his Ph.D. Thus, the petitioner has not established that he meets this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

In support of his first appeal, the petitioner submitted a job offer for a postdoctoral appointment with a salary of \$36,000. The petitioner did not submit any evidence of comparative salaries in the field. As such, we cannot determine that this salary is evidence that the petitioner enjoys a degree of expertise significantly above that ordinarily encountered.

Evidence of membership in professional associations

The petitioner submitted evidence of his membership in the American Institute of Chemical Engineering (AIChE). The petitioner did not submit the membership requirements for AIChE. Thus, the petitioner has not established that this membership is evidence of a degree of expertise significantly above that ordinarily encountered.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner relies on witness letters as evidence to meet this criterion. Letters solicited in preparation of the petition are not the type of recognition contemplated by the regulation. While the petitioner did receive a graduate research fellowship, the fellowship constituted tuition support based on the petitioner's potential to make significant contributions to the field, not in recognition of past contributions. The petitioner also received a Certificate of Achievement from his university's Office of Multicultural Affairs in recognition of his academic excellence. The certificate does not indicate that it honors the petitioner for significant contributions to his field. The petitioner has not established that he has been officially honored by his peers, a government entity, or a professional or business organization.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will briefly address this issue.

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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, chemical engineering. With little discussion, the director concluded that the proposed benefits of the petitioner's work would not be national in scope. We disagree. We find that the proposed benefits of the petitioner's work, commercially viable production of renewable energy from biomass, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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 support of his request for a waiver, the petitioner submitted reference letters, his published articles, and requests for reprints of his articles. All but one of the letters are from the petitioner's immediate circle of colleagues. While favorable, they cannot establish the petitioner's influence over the field as a whole. [REDACTED], in whose laboratory the petitioner worked, asserts that the petitioner "uncovered a new kinetic behavior of acid-hydrolysis of biomass, which led to a comprehensive kinetic model." [REDACTED] asserts that the petitioner's discovery of a reaction pathway for glucose decomposition during acid hydrolysis has stimulated the interest of scientists at National Renewable Energy Laboratory (NREL). The record, however, reflects that scientists at NREL were already collaborating with [REDACTED] laboratory and that the petitioner co-authored an article with one of NREL's senior chemical engineers.

The only letter from outside the petitioner's circle of colleagues is from [REDACTED], President of General Biomass Company. [REDACTED] asserts that he met the petitioner at a conference on biotechnology in 1999 and has followed the petitioner's work ever since. [REDACTED] praises the petitioner's research group and asserts that the petitioner has made significant contributions to that group. [REDACTED] does not assert that the petitioner's work has influenced his own work.

The petitioner's publication history is also not evidence of his influence on the field as a whole. While the requests for reprints of the petitioner's articles reflect interest in the petitioner's work, without evidence that his work has been frequently cited by independent researchers or other comparable evidence, the petitioner cannot establish that his publication history is evidence of an influence in the field.

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, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The director's decision of May 20, 2003, is affirmed.

