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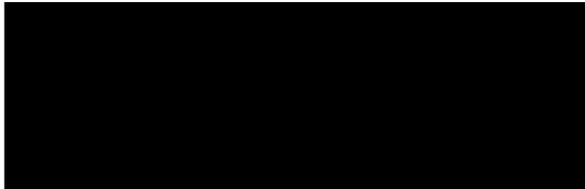
U.S. Department of Justice

Immigration and Naturalization Service

135

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 00 160 51686 Office: Vermont Service Center

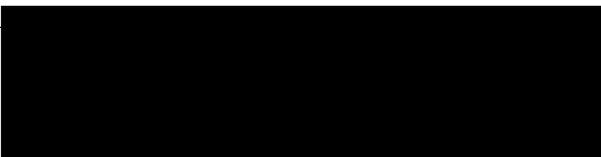
Date: FEB 27 2003

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:



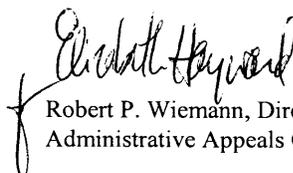
INSTRUCTIONS:

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 Service 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, Vermont 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. The petitioner seeks employment as a technology expert/Chief Executive Officer for Lupsor Systems, Inc., a start-up company personally financed by the petitioner that “provide[s] safety features to the automotive industry.” 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.

(ii) Physicians working in shortage areas or veterans facilities.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree or an alien of exceptional ability. 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 Service 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 Service 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.

Counsel describes the petitioner's company: "Lupsor is a U.S. corporation organized to provide safety features to the automobile industry. The initial product is the Reducing Frontal Glare Safety Visor ("RFGS Visor"). Lupsor has the exclusive rights to produce and sell it."

The petitioner submitted documentation verifying his work experience and educational background. Also submitted was evidence of the petitioner's receipt of a "Sciences Award" in 1989 from the

Academy of Metz.¹ The record contains no first-hand information from the Academy of Metz indicating the selection criteria for the award or the number of recipients. Nor has the petitioner provided evidence showing that this award enjoys significant recognition beyond the institution where it was presented.

The petitioner also provided evidence of an approved patent for a glare reducing visor for vehicles from the United States Patent and Trademark Office (1997), European Patent Office (1999), and France's National Institute of Industrial Property (1995). The granting of a U.S. or foreign patent documents that an invention or innovation is original, but not every patented invention or innovation constitutes a significant contribution in one's field. The petitioner offered no evidence showing that automotive industry experts have hailed his patent as a significant safety innovation or that his glare reducing visor was installed as an option in cars mass produced by automobile manufacturers such as Ford Motor Company, Renault or Nissan.

The petitioner also provided two of his published articles appearing in *Fuel* and *Fuel Processing Technology*. Publication, by itself, is not a strong indication of impact in one's field, 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 can have, if that research does not influence the direction of future research. In this case, the petitioner has offered no evidence demonstrating independent citation of his published articles. The record does not show that independent experts throughout the industry view the petitioner's published findings as particularly significant.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Department of Transportation*. In response, on November 27, 2000, the petitioner submitted letters verifying his prior employment experience; a letter from his Ph.D. research supervisor dated September 14, 1988; evidence that the petitioner is currently attempting to market his automobile visor to various automobile manufacturers; evidence of a second U.S. patent filing dated May 25, 2000; and copies of documentation previously submitted.

¹ We note that the petitioner received his Ph.D. from the University of Metz in 1988. The record is not clear as to whether the University of Metz and the National Academy of Metz are separate institutions. An academic award may place the petitioner among the top students at his particular university, but it offers no meaningful comparison between the petitioner and experienced professionals in the petitioner's field.

In a letter dated September 14, 1988, [REDACTED] Professor of Organic Chemistry, University of Metz (France), stated:

[The petitioner] was a researcher in my laboratory during the academic years 1985 to 1988, during which he obtained his advanced degree in Chemistry and Molecular Physics...

* * *

[The petitioner] developed the analytical study of pyrolysis's coal tar and petroleum pitches, followed by a study of their thermal treatment. These studies constituted his doctoral thesis subject.

It is important to underline that the complexity of the carbonated materials which constitute the pitches, conduct [the petitioner] to use a multitude of analytical methods allying chromatographic methods to other different spectroscopic methods [sic].... [The petitioner] has therefore [had] the occasion to setup and practice a number of analytical techniques in a domain of particular difficulty.

[REDACTED] concluded her letter by stating that the petitioner's efforts resulted in him receiving his doctorate from the university with high academic honors. University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's academic achievement may have placed him among the top students at his educational institution, but it offers no meaningful comparison between the petitioner and experienced professionals who already completed their educational training.

[REDACTED] letter describes the petitioner's educational training and experience in applying chromatographic and spectroscopic methods to analyze carbonated materials. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education which could be articulated on an application for a labor certification. Dr. Cagniant's letter does not address how the petitioner's findings have influenced the greater field. While the petitioner's findings may have added to the general pool of knowledge, it has not been shown that researchers throughout the field viewed the petitioner's findings as particularly significant.

The petitioner's evidence may demonstrate his exceptional ability, but it does not satisfy the threshold for granting a national interest waiver. 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). The petitioner must establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. It cannot suffice to state that the alien possesses useful skills, or a unique background. Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background

will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The petitioner must show that he has already significantly influenced his field of endeavor.

The petitioner's response included correspondence from three automobile manufacturers indicating that the petitioner is attempting to market his safety visor to their companies. The companies included Renault, Ford Motor, and Nissan.

The petitioner submitted a handwritten fax from Y. Leglaunec, Advanced Study Interiors Department, Renault, dated June 13, 1994. We note here that the petitioner served as a consulting engineer for Renault during the 1990s. Y. Leglaunec states:

Renault confirms its interest concerning your project of adapting sunglasses to the automobile sun visor. That said, therefore, in the current state of your study, your product couldn't be envisaged in [an automobile] series. Indeed this product asks a best integration to the sun visor function and a competitive cost price [sic]. A complementary work going in this sense remains therefore necessary.

A subsequent letter from Renault is dated October 19, 2000. Jean-Pierre Fromont, Transversal Product Manager, Product Planning Department, Renault, states:

We have received information pertaining to your sun visor. After visiting your website, we wish to deepen the technical knowledge of your product, so as to better surround the benefit that it can bring. We would wish to organize a presentation meeting with our technicians of the sun-visor team and those of the glass section.

The petitioner offered no evidence to indicate that any of his innovations were actually implemented by Renault from 1994 to 2000. Therefore, it is reasonable to conclude that the petitioner has not established a proven track record of significant accomplishment as a technology expert in the automotive safety industry.

The petitioner submitted two letters from Ford Motor Company, dated August 3 and September 6, 2000, indicating that the company had received his "suggestion" and stating that if the petitioner's suggestion meets certain requirements, Ford specialists would contact him for further information and analysis.

The petitioner also submitted several e-mails between himself and officials at Nissan North America, ultimately resulting in a meeting being scheduled for December 6, 2000. According to an e-mail dated September 13, 2000, the petitioner had not yet obtained a judgement from Nissan's product planning team nor had they agreed to purchase prototypes of the petitioner's RFGS visor for product testing.

Other than the fax from Renault in 1994, the correspondence from Ford, Nissan, and Renault was all dated subsequent to the petition's filing on April 27, 2000. The majority of this evidence is

devoted to the petitioner's attempt at marketing his safety visor, and does not establish a past record of successfully implemented innovations. Documentation pertaining to the expectation of future results rather than a past record of demonstrable achievement fails to demonstrate the petitioner's eligibility for a national interest waiver. 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. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. Simply showing that he is attempting to market his automobile visor to automobile manufacturers cannot suffice to demonstrate the petitioner's eligibility for a national interest waiver.

The petitioner provided evidence that he applied for a second U.S. patent on May 25, 2000. *See Matter of Katigbak, supra*. We note here that anyone may file a patent application with the United States Patent and Trademark Office, regardless of whether the invention constitutes a significant innovation in one's field or industry. In this case, the petitioner must show that his automobile visor has been successfully utilized by the automotive industry, indicating that the visor is regarded as a significant safety breakthrough by independent experts throughout the industry. The petitioner, however, has only shown that his innovation is being considered for implementation. For example, the petitioner has offered no evidence of any contracts executed with the automobile manufacturers mentioned above or venture capital companies such as The Interchange Group. We note here that a letter from The Interchange Group, dated October 26, 2000, reflects that the petitioner has not yet secured any funding from that company. Nor has the petitioner provided any evidence indicating that his safety visor was approved for production by automotive design engineers or that the visor was successfully test marketed.

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 research and innovations, but found that the record lacked evidence demonstrating the petitioner's past record of significant accomplishment.

On appeal, counsel for the petitioner requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, counsel has not offered sufficient justification as to why the issues to be presented on appeal cannot be addressed in writing; counsel simply expresses a desire to argue the case in person. Consequently, the request for oral argument is denied.

Counsel states that "the INS falsely assumed that if Lupsor made the position of Chief Executive Officer available to U.S. Workers, it would not require the services of [the petitioner]." The director's decision, however, contains no such statement. The issue in this case is not whether the petitioner's service is important to the company he is personally financing, but, rather, whether a waiver of an approved labor certification would be in the national interest. In order to

qualify for the national interest waiver, the petitioner must show a past history of significant impact on his field of endeavor or industry.

The petitioner submits evidence that he advertised his position at Lupsor in the employment section of the *Washington Post*. Counsel states: "Three responses were received, none of which satisfies the requirements needed and advertised." This evidence only supports the conclusion that the petitioner's position is amenable to the labor certification process. Pursuant to *Matter of New York State Dept. of Transportation*, 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.

Counsel states: "The RFGS Visor is expected to be installed in luxury cars by the year 2003, the culmination of several months of negotiations between Lupsor and principals in the auto industry." In support of this assertion, the petitioner submits a new letter from Jean-Pierre Fromont, Transversal Product Manager at Renault, outlining the results of a meeting that took place on January 5, 2001. This evidence came into existence subsequent to the petition's filing. See *Matter of Katigbak, supra*. Even if we were to consider the letter, we disagree that it shows that Renault has agreed to install the petitioner's RFGS visor. At the beginning of the letter, Jean-Pierre Fromont specifically states:

In case of an interest from Renault for the RFGS Visor concept, this scheme would need to be discussed with our Purchasing Division. Please note that, before entering into any development with Renault, a complete supplier nomination process involving mainly Purchasing, Engineering, and Product Planning functions will have to take place; the pilot of this process is purchasing.

These statements show that the petitioner has no contractual agreement with Renault for installation of the RFGS visor.

The petitioner also submitted an e-mail from Robert Sump of Nissan, dated March 21, 2001, expressing indecision in regards to purchasing the petitioner's RFGS visor prototypes. Robert Sump states: "I will try to get clarification from Pete about his interest level. I would like to close this issue one way or another, i.e.- proceed with the order of some prototypes or say we have not decided to pursue this idea."

Counsel's brief describes several objective qualifications necessary for performing as Chief Executive Officer of Lupsor. We note here that any objective qualifications that are necessary for the performance of a position, such as the petitioner's fluency in French or educational level, can be articulated in an application for alien labor certification.

Counsel states that the petitioner's approved patents for the RFGS visor and a recent patent application (filed on May 25, 2000) reflect the petitioner's significant accomplishments. We disagree. According to statistics released by the U.S. Patent and Trademark Office, which are

available on its website at *www.uspto.gov*, the U.S.P.T.O. has approved over one hundred thousand patents per year since 1991. In 2001, for example, the office received 345,732 applications and granted 183,975 patents. The petitioner has offered no convincing evidence to show that the automotive industry views the petitioner's patents as significant safety innovations.

Counsel argues that the petitioner's published article in *Fuel* and the presentation of his findings at a seminar in Japan in 1988 shows that his contributions have been recognized internationally. The record, however, contains no evidence that the presentation or publication 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. It can be expected that if the petitioner's published research were truly significant, it would be widely cited. The petitioner's co-authorship of two articles during his doctoral studies may demonstrate that his research efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's work has garnered significant attention from the greater scientific community.

While the Service recognizes the overall importance of improving automotive safety and the efficiency of energy resources, eligibility for the waiver must rest with the petitioner's own qualifications rather than with the position sought. 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).

The assertion that the petitioner's RFGS visor may eventually "be installed in luxury cars by the year 2003" does not persuasively distinguish the petitioner from other competent technology experts or inventors. Without evidence that the petitioner has been responsible for significant achievements in science and industry, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations regarding the petitioner's safety visor may yet come to fruition, at this time the waiver application appears premature.

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.